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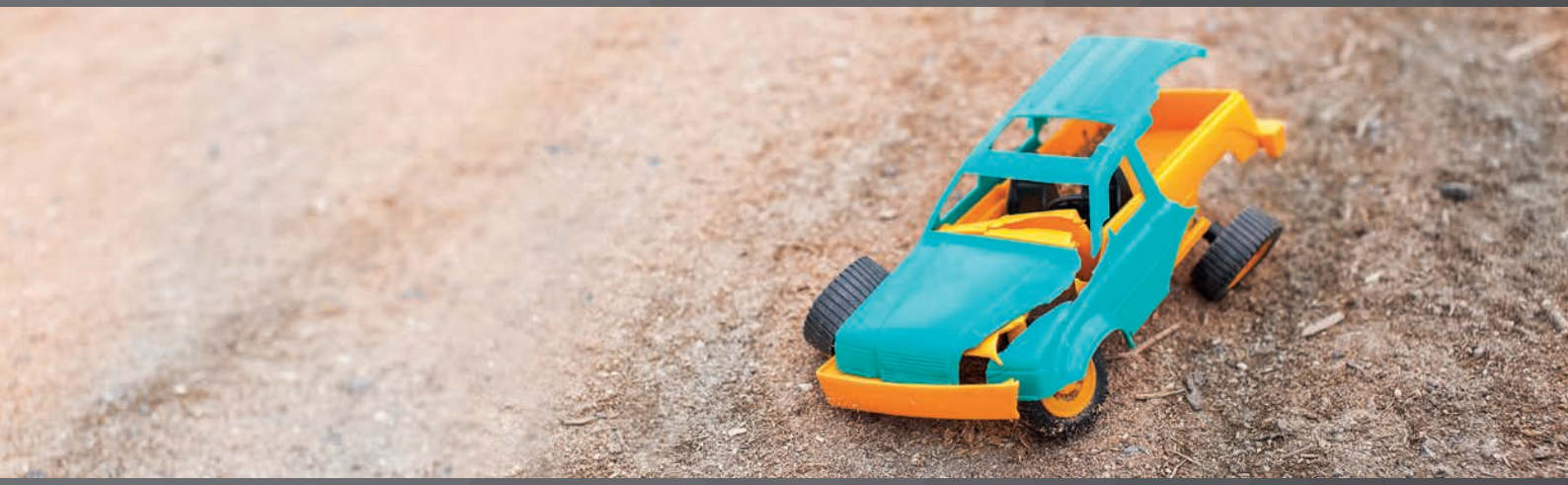

Insurance & Reinsurance 2020

A practical cross-border insight into insurance and reinsurance law

Ninth Edition

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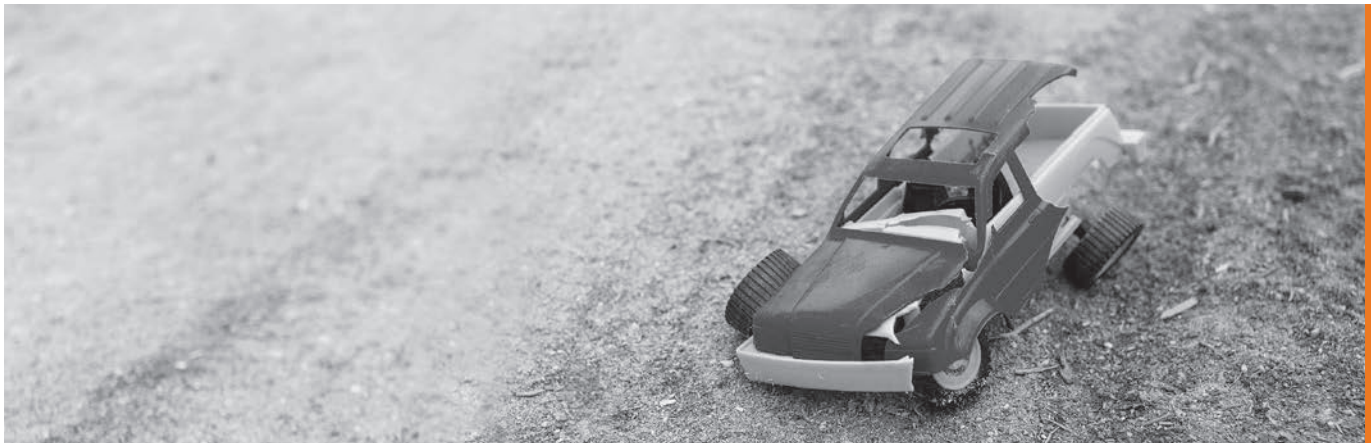

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From the Publisher

Dear Reader,

Welcome to the ninth edition of *The International Comparative Legal Guide to: Insurance & Reinsurance*, published by Global Legal Group.

This publication provides corporate counsel and international practitioners with comprehensive jurisdiction-by-jurisdiction guidance to insurance and reinsurance laws and regulations around the world, and is also available at www.iclg.com.

This year, the industry chapter from Lloyd's Market Association examines the impact of cyber events on directors' and officers' insurance. Six expert chapters cover topics such as insurance and climate change, and regional updates.

The question and answer chapters, which in this edition cover 39 jurisdictions, provide detailed answers to common questions raised by professionals dealing with insurance and reinsurance laws and regulations.

As always, this publication has been written by leading insurance and reinsurance lawyers and industry specialists, for whose invaluable contributions the editors and publishers are extremely grateful.

Global Legal Group would also like to extend special thanks to contributing editor Jon Turnbull of Clyde & Co LLP for his leadership, support and expertise in bringing this project to fruition.

Rory Smith
Group Publisher
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Busting the Myth – Are Cyber Events Responsible for Claims Inflation and Recent Increases in Directors' and Officers' Pricing?

Tony Ellwood

Lloyd's Market Association

Introduction

Somewhat perplexingly, the answer to the question posed in the title may be a little like Schrödinger's cat – both yes and no at the same time. This chapter explores the factors behind recent premium increases in commercial directors' and officers' (D&O) insurance, including the impact of cyber events, securities class actions, claims inflation and derivative law suits, as well as reserve deterioration.

Aon has just announced a near 30% annual increase in their US Clients' D&O index. Lexington[1] has similarly reported a 30% increase across commercial D&O policies in the third quarter of 2019, with Public D&O business achieving rate rises of more than 35%. Further, the hardening of the D&O market has also brought reductions in aggregate limits, with Lexington reporting primary commercial D&O aggregate limits reduced by over 40% in the third quarter (compared to a 30% reduction in the second quarter), and primary commercial D&O policies with limits greater than $10 million in lead layers were reduced by over 40%. These rate increases and aggregate deductions seem to be representative of wider market conditions.

So, what is the story behind the hardening of the D&O market? Is it just the impact of "cyber events"? Or "social inflation"? Or perhaps simple "dislocation" as a result of insurers reprofiling their accounts away from casualty volatility? Or something else? These are issues which the LMA's D&O committee, representing US and International D&O underwriters at Lloyd's, has been reviewing carefully.

Interestingly, as "far back" as 2013, law firm Bailey Cavalieri LLC commented that:[2] "Cyber risks have become a major potential loss exposure for most corporations. Although non-existent just a few years ago, most companies today are vulnerable to a growing list of threats relating to technology misuse." This is, of course, not surprising given the embedding of technology and the resultant cyber (operational) risk in almost all aspects of business, commerce and industry.

Like any other major risk exposure, directors should monitor their company's cyber risks and confirm that reasonable steps are being taken to identify, prevent, mitigate and respond to cyber-related problems when they arise. Because these risks can damage not only the company but its customers, suppliers, other constituents and even the public, extra caution is necessary. Plus, new federal and state statutes and regulations are being adopted with increasing frequency, which mandate appropriate company risk-management practices in this area. Indeed, given the reputational and regulatory requirements around reporting, any shortcomings in this area can in themselves give rise to securities or shareholder class actions.

Directors are not expected to fully understand all of the risks, and all of the company's risk management responses, in this highly technical area. However, directors should at a minimum comply with laws expressly applicable to them, should ask informed questions to gauge the company's focus and preparedness in this area, and should generally understand the extent to which the company is insured – or not insured – for these exposures. And there are various questions a reasonably diligent director could ask to assure the company's cyber risks are being properly addressed (in terms of both measurement and mitigation).

For many companies, cyber risks represent one of the most volatile and potentially damaging areas of exposure. However, because these risks are evolving and complex, many boards have given insufficient attention and resource to these risks. Each company faces unique cyber risks, and therefore each company's response to these risks should be unique; and thereby hangs the challenge, and risk, that all companies and directors face. The steady increase in cyber-related lawsuits suggests that many insureds are failing to manage the risks adequately. Whilst pure data breaches may have declined globally, there has been a corresponding increase in the number of other cyber intrusions such as distributed denial of service (DDoS) attacks (in 2018, DDoS attacks increased by 40% as large organisations faced an average of eight attacks per day).[3]

But "cyber" is not the only risk which needs managing; company boards also have to keep track of another emerging type of claim, known as event-driven litigation. These can stem from a variety of sources. For example, there has been a spike in claims resulting from the *#metoo* movement, where it is alleged that directors and officers allowed a toxic culture to take hold and endure within their companies. Elsewhere, the wildfires in California were blamed on downed power lines and this has resulted in D&O claims being brought against utility companies. Other areas which may see event-driven litigation include the energy sector for "climate change"-related issues, and pharmaceutical companies in the wake of the opioid crisis.

Securities Class Actions and Event-Driven Litigation

To understand the recent hardening of the insurance market, we need to understand recent D&O insurance history. Over the last 10 to 15 years, a sizeable percentage of D&O claims have stemmed from a company's restatement of its past financial results. There are numerous cases where it is alleged that the company engaged in various unauthorised accounting practices for the purpose of inflating reported revenue and cash flow. Ultimately, these companies have been forced to restate financial results to remedy the falsities. Stock market values have plunged in the face of these restatements and shareholders have sued, alleging restatements were admissions that the prior financial filings were materially misstated.[4] Shareholder suits have

increased rapidly; a recent report from Cornerstone Research Inc. and Stanford Law School notes that plaintiffs filed 428 new class action securities cases in federal and state courts in 2019, which was the most on record and nearly double the 1997–2018 average.

There is also the potential for both cyber event-driven litigation as well as a securities class action. In November 2018, Marriott International, Inc. announced that hackers had breached its Starwood guest reservation system and stolen the personal data of as many as 500 million guests. The subsequent investigation of the incident revealed that there had been unauthorised access to the Starwood network since 2014. (Marriott had acquired the Starwood hotel chain in 2016 for $13.6 billion.)

Plaintiffs' lawyers did not waste any time in launching lawsuits based on the company's disclosures. On December 1, 2018, plaintiffs' lawyers filed what may prove to be only the first of many D&O lawsuits filed in connection with the breach.

Significantly, however, also on December 1, 2018, plaintiffs' lawyers filed a securities class action lawsuit in the Eastern District of New York against Marriott, its CEO, its CFO, and its Chief Accounting Officer and Controller. The complaint alleges that statements in the company's SEC filings were false and misleading because: "(1) Marriott's and Starwood's systems storing their customers' personal data were not secure; (2) there had been unauthorized access on Starwood's network since 2014; (3) consequently the personal data of approximately 500 million Starwood guests and sensitive personal information of approximately 327 million of those guests may have been exposed to unauthorized parties; and (4) as a result Marriott's public statements were materially false and/or misleading at all relevant times." It is alleged that on the news of the breach of the guest information systems, the company's share price declined 5.5%. Companies and directors may be more expectant of securities (and derivatives) class actions, but may not appreciate that they too can stem indirectly from a cyber event.

As noted by Kevin La Croix (D&O Diary),[5] one of the most watched and commented upon corporate and securities litigation trends over the last several years has been the rise of management liability lawsuits arising from cybersecurity-related incidents. While there has not been the volume of cases that some commentators expected, there have been a number of cases filed. One of the most recent of these lawsuits is the securities class action lawsuit filed in New York in June 2019 against FedEx, in which the plaintiff shareholder alleges the company did not fully disclose the extent of the disruption at its European operation after it was hit with the NotPetya malware virus in June 2017. A number of the allegations in the FedEx complaint are similar to those raised in prior cybersecurity-related securities suits, suggesting some of the factors that might lead to a proliferation of this type of cybersecurity follow-on lawsuit.

Claims Inflation

Much has been made recently of claims inflation, particularly in the US where the D&O market performance has remained below a level of technical profitability for the past five or six years. Carriers have been battling a toxic combination of rising shareholder derivative lawsuit awards, increasingly punitive jury awards and the high costs of electronic discovery in lawsuits (the electronic aspect of identifying, collecting and producing electronically stored information in response to a request for production in a law suit or investigation).[6] As part of "e-discovery", plaintiffs can request the personal communications of senior management in a bid to bolster litigation strategies. This recent development is time-consuming and therefore expensive for insurers covering defence costs.

Unlike conventional D&O actions, derivative lawsuits are brought by shareholders of a company against management with the intention of returning funds to a company.

Shareholder derivative actions have risen exponentially in recent years, with multiple sources describing the chilling effect of recent cases, including a $240 million cash settlement from a claim brought against US bank Wells Fargo in 2019. The initial agreement, which was announced in February 2019, will be paid largely by the bank's D&O insurers.[7]

Social Inflation

Underwriters have also cited "social inflation" as a driver of increasingly generous jury awards, which have heightened loss costs and driven carriers to assess their approach to pricing D&O business – many existing claims may be subject to inflationary costs pressures before they reach settlement, and thus may be under-reserved at present. The increasing number of millennials on juries and the rise of litigation finance were pushing up claims costs.[8]

The insurance trade press has cited various insurers commenting on event-driven securities lawsuits.[9] In June 2019, Chubb condemned the substantial rise in the cost of D&O claims emanating from the continued uptick in the number of securities class actions against public companies year-on-year, with the number of filings hitting 198 in the first half of 2019. This compares with a semi-annual average of 106 for data collected between 1997 and 2018. Chubb's executive vice president and COO John Keogh issued a stark warning over the increase of "meritless" actions, and said that around half the estimated $23 billion spent on the type of litigation over the past five years had gone to lawyers.

The effect of the above inflationary factors is cumulative, and ultimately insurers are now seeing the market move to redress years of under-pricing. Indeed, in Australia, there are reports of increases of as much as 400%. Prior to 2017, the Australian D&O market experienced prolonged soft market conditions due to overcapacity. Given the long-tail nature of D&O and the history of under-pricing, insurers are now struggling to meet the costs of claims as they materialise from prior years.

Another area on the horizon that may have an impact globally in 2020 is that of climate change litigation. Yet this issue rarely figures in underwriters' ratings at present. It is an area to be monitored carefully, especially in the realms of energy supply companies, with Exxon Mobil Corp having already successfully defended a lawsuit by the office of New York State Attorney General in December 2019. All casualty underwriters will also be monitoring developments in *Lliuya v RWE*,[10] the first European litigation that is alleging that known emitters of greenhouse gases should be held liable for specific contributions to the effects of climate change.

Conclusions

At the outset of this chapter, I posed the question "are cyber events responsible for the recent increase in D&O pricing?" The answer seems to be that by themselves, cyber events are not responsible, even though the term "cyber-attack" has already entered the corporate psyche and the risks are not showing any signs of diminishing; recent events surrounding Travelex provide yet another example of the risks presented by malicious cyber-attacks using ransomware. However, our research indicates that cyber risks are only one of a myriad of factors leading to a significant hardening of the D&O insurance market.

The Lloyd's market is leading the insurance world in moving towards clarification of coverage regarding cyber events. However,

it is inevitable that as that clarity improves, risk ratings will reflect the realisation of cyber exposures. As capacity shortens and prior-year litigation comes to the fore, we expect that D&O pricing will remain subject to correction, especially if securities and derivatives class-action ligation continues at historic high levels – whether or not triggered by event-driven causes, cyber or otherwise.

Endnotes

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Tony Ellwood joined the LMA's underwriting team in September 2011, having worked previously as a Professional Indemnity Class Underwriter with Catlin. He has particular responsibility as Secretary to the Financial Institutions, Directors' and Officers', US and International Errors and Omissions, International and US Casualty and Cyber Risks Business Panels.
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Climate Change: Liability for the Sins of the Past and the Road Ahead

Clyde & Co LLP

Neil Beresford

Introduction

2020: A Critical Year

Climate change is the greatest single threat to the future of humanity. According to a survey of Global Risk Perception, taken ahead of the World Economic Forum in Davos,[1] the environmental, social and political consequences of climate inaction have become a more likely threat than cyber fraud, data theft or water shortage. The impact of the threat is also at the top of the scale, more serious even than nuclear war.

Politically, the pressure is building. Speaking in Madrid in December 2019, UN Secretary-General António Guterres warned: "*a point of no-return is in sight and hurtling toward us.*" Most commentators agree that 2020 will be a critical year for delivering meaningful statements of public policy and making tangible progress towards the Paris Agreement goal of limiting warming to a maximum of 2°C above pre-industrial levels.

2020 will see the first movement in the 'ratchet mechanism', by which the Parties to the Paris Agreement complete a stocktake of their progress towards the fulfilment of their treaty obligations. As part of that exercise, the Parties will assess their collective efforts to reduce emissions, build resilience to climate change and align financial support with the action that is needed. Credible statements of policy and regulation are expected to follow.

In November 2020, 30,000 delegates will attend the 26th session of the Conference of the Parties (COP26) in Glasgow. Following the relatively disappointing outcome of COP25 in Madrid, levels of rhetoric and expectation will be high.

Also in 2020, the European Commission will begin the implementation of the European Green Deal. The Commission's goal is to put Europe on a new path of sustainable and inclusive growth, with an overall target of being the first continent to reach net zero by 2050. At the heart of the Green Deal is a proposal to mobilise €1 trillion of investment and a just transition mechanism, with direct funding of €7.5 billion directed towards regions which have the greatest reliance upon carbon-intensive industries.[2] In the coming years, the Commission will formulate wide-reaching policy and regulation in the areas of energy, industry, transportation, building, agriculture and biodiversity.

Economically, too, the landscape is changing as the private sector begins pressing for change. Investor initiatives such as Climate Action 100+, whose members manage a combined $41 trillion of assets, are using their economic weight to influence the world's largest corporate greenhouse gas emitters to take action. Blackrock, the world's largest asset manager, has recently announced a new strategic focus on climate change.[3] It proposes to exit investments which have a high sustainability-related risk, press corporate managers on their environmental goals and introduce more funds which avoid fossil fuel investments.

The Rise of Climate Liability Litigation

With activity taking place on so many fronts, litigation lawyers are also keen to play their part. Worldwide, more than 1,500 cases have been commenced involving aspects of climate change.[4]

Among the most high-profile cases are those brought by NGOs against governments to compel them to take more effective action. A leading example is *Urgenda v The Netherlands*,[5] in which an environmental group and 900 citizens argued that the Dutch government's failure to reduce greenhouse gas emissions to at least 25% below 1990 levels before the end of 2020 contravened Articles 2 (the right to life) and 8 (the right to family life) of the European Convention on Human Rights. On 20 December 2019 the Supreme Court handed down judgment in the applicants' favour, confirming that the Dutch government has a legal obligation to take action in response to the real threat of climate change. The Court found that neither adaptation measures, nor the global scale of the problem, nor the Court's constitutional inability to formulate its own policy solution, would excuse the government from a failure to act. The government's existing pledge of a 17% reduction below 1990 levels was inadequate to meet the Paris goals.

Urgenda is the first decision by any court in the world ordering states to limit greenhouse gas emissions for reasons other than statutory mandates. The court did not prescribe the precise measures that the government should be required to take, but it did confirm that the government owed a legal duty to act and could be held to account in law for its failure to comply.

A similar action in the United States has, to date, been less successful. In *Juliana v United States*,[6] a group of NGOs has united to represent current and future generations against the United States government and named public representatives. The lawsuit's central assertion is that the government has failed to exercise responsible control over the use and depletion of natural resources and thereby violated the plaintiffs' rights to life and liberty. In 2016, a District Court in Oregon ruled that access to a clean environment was indeed a fundamental right and allowed the case to proceed.[7] Subsequent progress has been slowed by procedural argument and, in January 2020, the Ninth Circuit Court of Appeals dismissed the case for the plaintiffs' lack of standing.[8] The case is now set to continue on appeal, although it is ultimately unlikely that the Supreme Court will countenance the declaration of new environmental rights.

The risk of litigation is by no means confined to governments. The cases brought in public law are now accompanied

by an extensive body of civil litigation against private entities. In the United States and Europe, a number of influential climate liability cases have been started with the intention of defining new duties and standards of care for carbon-emitting businesses and, eventually, their investors, financiers, insurers, advisors, customers and clients.

Climate liability is the first truly global litigation subject and each jurisdiction will have its own response. Certain jurisdictions will prove to be welcoming environments for climate liability litigation, thanks to their developed bodies of environmental regulation or generous rules of causation in the laws of tort. Other jurisdictions have particularly well-developed litigation environments, active NGOs promoting litigation and access to deep-pocketed litigation funding.

For obvious reasons, climate liability litigation is closely attended by the insurance industry. Liability insurers may be impacted in several classes, most obviously under general liability, product liability and environmental liability policies.

In the sections below, we consider: first, existing climate liability litigation in the US and elsewhere; second, the future of climate liability litigation in the medium- to long-term; and third, the likely impact of such litigation on insurers.

Existing Climate Liability Litigation

United States

In the United States, a number of lawsuits have been filed by several municipalities and one state against the oil industry, seeking damages under common law tort theories for the financial consequences of climate change. Suits have been filed in the State Courts of California, Colorado and New York.[9]

The complaints tell impressively documented, well-researched and virtually identical stories of the contributions of the energy industry to climate change. They explain the past and projected effects of global warming, particularly on coastal communities. The plaintiffs advance detailed allegations of the past and future costs associated with the measures they have taken and will be forced to take to deal with climate change, both as part of efforts to mitigate anticipated damage and also to deal with the direct losses associated with rising sea levels, flooding, and other alleged impacts.

The thrust of the allegations is that, from 1965, the oil industry defendants: extracted a substantial percentage of the world's raw fossil fuel; caused a quantifiable percentage of global fossil fuel-related carbon dioxide emissions; wrongfully promoted their fossil fuel products; concealed known hazards associated with the use of those products; championed anti-regulation and anti-science campaigns; and failed to pursue the less hazardous alternatives which were or might, with further investment, have been available.

The complaints are not made under federal environmental law but under the common law and, in some cases, codified state law, including public nuisance, private nuisance, product liability, negligence and trespass.

The municipalities seek various categories of damages including the past and future costs of planning for, predicting and responding to future sea level rise, dealing with flooding, infrastructure repair and reinforcement and enhanced emergency and other public services.

The substantive issues at stake in the cases break new ground. The plaintiffs' central allegation is that oil is a defective product which has caused greenhouse gas emissions and contributed to man-made climate change. The central theme of the defence will be that the comparisons between oil and tobacco are misplaced: unlike tobacco, oil fulfils an important social and economic function. Indeed, it is no exaggeration to say that oil is an essential ingredient of the global economy. It is a product which has been extracted, refined and used for decades subject to the controls of federal environmental law. It would rewrite history for a court now to define oil as a defective product. Furthermore, even if the plaintiffs succeeded in establishing that oil is a defective product, it would be impossible to prove to the satisfaction of the court that man-made climate change has caused the specific losses which are alleged.

The cases are now mired in procedural argument as to whether the lawsuits should be adjudicated in the State or Federal Courts. Those arguments are set to continue for years to come before the complex issues of liability and causation might become the subject of detailed argument.

Other Jurisdictions

Climate liability litigation is not uniquely an American phenomenon. One of the leading climate liability cases has been brought in Germany by a Peruvian farmer against the energy company RWE.[10] RWE is among Europe's largest emitters of greenhouse gases, emitting 118 million metric tonnes of carbon dioxide in 2018. The claimant alleges that a lake threatens to overflow as the result of glacial retreat, creating a risk of flooding to his home. He seeks to hold RWE responsible for its part in man-made global warming and claims a contribution towards the €3.5m cost of draining the lake.

The claim is similar to the US litigation in that it seeks to establish a causal relationship between RWE's emissions and the risk of physical damage. The claimant relies upon the theory of 'cumulative causation', whereby damage is caused by the combined conduct of multiple polluters and the material contribution of each polluter is sufficient to fix it with a share of its liability. As the claimant asserts that RWE was responsible for 0.47% of global greenhouse gas emissions over the last 250 years, he seeks damages of €17,000 to represent a contribution of 0.47% towards the cost of draining the lake.

In February 2018, the Higher Regional Court of Hamm made an order that the claim should proceed to the evidence stage.

Other European courts are beginning to see early-stage climate liability litigation. In the Netherlands,[11] a group of claimants including Friends of the Earth has issued proceedings, seeking a ruling that, in line with the Paris Agreement, Shell must reduce its carbon dioxide emissions by 45% by 2030 and to zero by 2050.

The case is founded on the proposition that Shell owes a duty of care arising from the Dutch Civil Code and the same articles of the European Convention on Human Rights upon which the successful *Urgenda* case was based. In the civil litigation, the claimants seek to extend those duties to Shell as a private company, alleging that its long knowledge of climate change, misleading public statements and inadequate action to reduce climate change would support a finding that Shell has unlawfully endangered Dutch citizens.

In France,[12] a civil case has been commenced against Total, seeking to prevent a planned 900-mile, $3.5 billion export pipeline from its oil fields in Uganda to Tanga in Tanzania. Similar to the litigation in the Netherlands, the case involves the extension of public law principles to private organisations, alleging that the company's vigilance plan was inadequate in that it failed to properly account for the life cycle greenhouse gas emissions of the project.

In Poland,[13] the NGO law firm ClientEarth has commenced proceedings against an energy company, seeking to block the operators of the Belchatow power plant from burning highly-polluting lignite coal. Belchatow is the largest and most

controversial coal plant in the EU. ClientEarth is targeting not only the coal plant but also the proposal to dig new open-pit coal mines in the surrounding area. The case is put under the Polish Environmental Protection Law on the grounds that the operator has not presented any official plan to reduce its climate impacts and is failing to take preventative measures for the protection of the environment and the common good.

The Future of Climate Liability Litigation

Climate liability litigation is at the early stage of the cycle, with lawyers actively engaged in testing theories of liability, causation, loss and damage. It will be several years before any of those theories becomes established in law.

There are already some clear trends, however.

Firstly, claimants are predominantly public entities and NGOs. The interest of public entities is to offset some of the costs which they will face in the coming decades. Those costs will be enormous: they extend to the building of sea defences, the loss of lucrative real estate revenues to rising sea levels and the provision of improved emergency services. The interest of NGOs is to bring about change through reliance on existing laws and by holding polluters to account.

Individual claimants, whether or not backed by NGOs and other sources of philanthropic funding, are presently in the minority. A possible explanation may be the scarcity of commercial funding for such large and complex cases. Another explanation might be the complexity of proving each link in the causal chain which lies between the defendant's activity and damage to the claimant's property and/or injury to the claimant's person.

The causal chain is the subject of extensive research. A growing body of science around the attribution of extreme weather events may encourage a greater number of cases brought by individual claimants. Attribution science has two objectives: to establish a quantifiable connection between human activity and specific events such as hurricanes or wildfires; and to address the question of what scientists knew about climate change and how that knowledge developed over time.

Currently attribution science is in its infancy: the complex statistical calculations are understood only by experts in the field.[14] As attribution science develops into the mainstream, the likely consequence will be a greater volume of climate liability litigation brought by individual claimants seeking redress for specific events affecting their property and/or person.

Secondly, the liability theories are constructed on pre-existing foundations. In the United States, they are taken directly from the tobacco litigation textbook. The plaintiffs allege that all the oil majors knew of the harmful side effects of their product but stifled science and continued making sales. Those theories may face challenges in the context of a product, such as oil, which for the foreseeable future will continue to serve a universal need. In Europe, the liability theories are taken from public law. They build upon the successful cases, such as *Urgenda*, where the courts have made orders against governments.

The same is true of causation theories. The US plaintiffs rely on collective liability theories (chiefly market share and commingled market share theories) which have been tried and tested in other environmental lawsuits such as the MTBE litigation. The theory of contribution-based causation put forward on behalf of Mr. Lliuya is not dissimilar to the approach taken by the English appellate courts in employers' liability asbestos claims.

Thirdly, the claims are on a global scale. Mr. Lliuya's claim is brought in Germany, under German law, almost 7,000 miles from his home in Peru. The claimants against Total sought, under French law, to prevent a project almost 4,000 miles away in Uganda. Climate liability litigation will not, therefore, be limited to the courts of the jurisdiction in which the alleged damage occurred. Companies are at risk of litigation in the courts of any country where they conduct business and subject to that country's laws.

Fourthly, the claims are unashamedly politicised. They are open invitations to the judicial system to fill the void which the claimants perceive to have been left by the executive and legislative branches of government. While the overtly political nature of the claims is attractive for NGOs, and possibly American juries, it is discouraging for judges who fear opening the floodgates to unending future litigation.

Those trends give us some idea of how climate liability litigation will evolve in the medium- to long-term.

It is reasonably clear that the total number of claims, particularly those brought by individual claimants, will increase. The rate of development of attribution science, the interest of litigation funders and the enthusiasm of insurers to pursue subrogated recoveries will be the main drivers of the rate of growth.

It is highly probable that the prospect of successful claims will improve with time. That is partly a statistical truism: the greater the number of cases, the higher the probability that one will succeed. The pattern of United States class actions is that, following the first success, others quickly follow. It is also a product of zero carbon growth policies and related technological improvement: once society is less dependent on fossil fuels, it will be a less daunting prospect for a judge or jury to hold that oil is a defective product or that its consumption amounts to a violation of fundamental rights. Hindsight rarely looks kindly on product manufacturers or their insurers. The prospects of success will be further influenced by changes in the social and political values of the public and judiciary. The standard of care in relation to climate liability will not stand still.

It is also highly probable that climate liability litigation will extend to other commercial sectors. The claims described above focus exclusively on the oil and gas and energy sectors, because companies in those sectors have arguably the greatest level of scientific knowledge and make arguably the greatest quantifiable contributions towards greenhouse gas emissions. They are the easiest targets for the first round of claims. If the legal theories against those companies begin to gain acceptance, plaintiff lawyers could extend their interest to manufacturing, transportation, construction, agriculture and even those who finance, advise and support those sectors.

Consequences for Insurers

Climate liability litigation will affect the insurance industry across most areas of operation.

Underwriters will need to keep abreast of the changing risk profiles of particular sectors and jurisdictions. The oil and gas and energy sectors are most obviously exposed, but a weather eye should also be kept on those sectors which might be caught up in later litigation waves. Jurisdictional variation is equally important, for the reasons set out above.

Wordings teams should reflect on the adequacy of existing wordings and the boundaries of existing products. 'Silent environmental' exposure is already a concern in the general liability market, with high-profile environmental litigation involving products such as MTBE, PFOS and PCBs being notified under product pollution extensions and, in some cases, the main product liability insuring clause. There is a growing body of US case law which calls into question the applicability of pollution exclusions to product liability claims.

One possible future development (following the trend in cyber insurance) is that all environmental exposures, including product pollution claims and EIL risks, could be brought together into an enhanced environmental product, with environmental exposures being excluded entirely from general liability covers.

Claims teams will face a number of challenges. We consider below some of the principal areas of investigation which are likely to arise in response to the notification of a climate liability claim.

Governing Law and Jurisdiction

The first issue is governing law. Being of an international nature, climate liability claims will be notified under a very broad range of liability policies, with a very broad chronological range and an equally broad range of governing laws and jurisdictions. Law and jurisdiction clauses are often incorporated obliquely into excess liability and reinsurance policies. Different legal systems will approach insuring agreements in different ways, such that defining a single standard of interpretation will be very difficult to achieve.

Occurrence Wordings

Under some policies, it may be difficult to determine whether an 'occurrence' has taken place. Historic damage to the atmosphere, as alleged by the plaintiffs in the US climate litigation, does not satisfy the ordinary definition of 'damage'. The policy definition of 'damage' usually requires a physical change to tangible property. The atmosphere is neither 'tangible', nor is it 'property' because it cannot be owned.

The only damage event which would reliably amount to an insured occurrence would be physical damage to land or structures, such as a wildfire or flood occurring during the policy period. Although the US lawsuits make some generalised allegations concerning existing damage, those allegations are not specific and the thrust of the complaints is to seek the recovery of anticipated future loss.

The same will be true for claims involving personal injury. As described above, the recent developments in European litigation are focused on Articles 2 and 8 of the European Convention on Human Rights. It may in due course be argued that a failure to take climate action causes injury or an actionable invasion of personal privacy, such as to trigger coverage under certain liability policies.

For that reason, insurers should be alert to the growth of attribution science. If claimants, who may themselves be subrogating insurers, are able to argue that a defendant's conduct is a specific cause of damage to property, such claims are more likely to engage the occurrence wordings of mainstream liability covers. Future claims could include extreme weather events such as hurricanes or wildfires which have affected large physical areas.

Aggregation

Climate liability will awaken old arguments on aggregation. The temporal and physical scope of claims is vast and there will be fascinating questions concerning the application of aggregation language. Do the melting of a Peruvian glacier in Peru and the outbreak of an Australian wildfire have the same original cause?

Retroactive Date

Some climate liability cases involve conduct which goes back 50 years or more. In the US climate litigation, the allegations of tortious conduct go back to 1965; the *Lliuya* claim relies upon emissions figures going back 250 years. The retroactive dates of insurance policies and the wording of retroactivity exclusions could prove to be material in the assessment of claims.

Deliberate Conduct/Awareness of Risk

Insurers will wish to keep a close eye on the policy provisions which limit coverage by reference to the insured's knowledge, intent and expectation. In particular, the definition of 'occurrence' sometimes requires the damage to be "*neither intended nor expected*" from the standpoint of the insured, and most claims-made policies contain an express exclusion for claims where the insured was "*aware of the circumstance or event which gave rise to the claim prior to inception*".

Those are important provisions because the claims in the US allege that climate change was a known or foreseeable consequence of the energy companies' conduct, going back to the 1960s. It is likely to be a central allegation of climate liability litigation that the fossil fuel industry knew of the risks of climate change and deliberately suppressed the science.

Pollution

Most liability policies contain some form of pollution exclusion, but they differ widely in scope and effect. Some standards require pollution to be the proximate cause of the loss; others respond to losses for which pollution was a 'but-for' cause. The application of pollution exclusions to climate liability claims will require assessment on a case-by-case basis.

Fines and Penalties

Most policies exclude liability for "*fines, penalties, punitive or exemplary damages*". Such exclusions may become relevant in circumstances where the current US plaintiffs seek punitive and exemplary damages and the disgorgement of profits on the grounds of the defendants' alleged deceitful conduct.

Financial Loss

Liability policies written in the common law world usually exclude liability for 'financial loss'. Those are important exclusions in respect of claims which include the costs of remodelling urban environments and laying on additional emergency service provision to combat the anticipated effects of climate change.

Conclusion

Climate liability litigation has become an established weapon in the global fight against man-made climate change. Public entities and NGOs have commenced a deliberately wide variety of claims, in various jurisdictions, seeking to establish new duties of care on carbon-intensive industries. In the coming years, those claims will bring about significant developments in the theories of liability and causation by which climate liability is alleged. Litigators will develop new causation theories, supported by attribution science, asserting the existence of specific causal connections between the defendant's conduct and their clients' loss. The development of such theories will attract ever-greater numbers of private litigants and litigation funders. One day, we might even witness the commencement of mass-subrogated recovery claims following extreme weather events.

Climate liability is not a liability which a court is likely to impose overnight. Oil is, and will for years remain, essential to the world economy. It would, however, be naïve to assume that the standard of care around the sale and consumption of oil will remain static. As the world accelerates its progress towards

renewable energy and a sustainable economy, the practices of the past and present may be viewed differently from the manner in which they are seen today. The effect of the shift in public opinion towards concern for man-made climate change should not be underestimated.

The future can already be seen in the public law cases. The *Urgenda* decision is a powerful illustration of the role of the courts, not in the direct formulation of policy but in the exercise of effective legal controls over those who fail in their duties.

Liability insurers should keep informed of developments in climate liability litigation, wherever they write business and in whichever sectors they operate. Notifications have already been made of lawsuits all over the world. For the reasons explained above, climate liability litigation impacts multiple classes of business and requires attention at every level. Insurers will wish to consider, as they have done with cyber, whether climate risk should be identified and specifically insured.

Insurers will also wish to take advantage of the immense opportunities to develop new products. The financial risks of climate change can be transferred through new product lines and extensions to existing policies covering climate-related exposures. Appetite for risk transfer in some sectors may be limited, but for directors and officers, fiduciaries, professionals and new technologies, the market may be more vibrant.

Weather insurance is increasingly in demand, underwritten either conventionally or on a parametric basis, involving predetermined payments being made on the occurrence of a defined trigger event. Climate change goes wider than an increased incidence of catastrophic loss events. Climate change-driven weather insurance has an increasing role for the agricultural sector, renewable energy businesses, transportation and logistics companies, construction firms and even retailers which are particularly sensitive to meteorological events.

There is a growing market for product and performance guarantee insurance in the renewable energy sector, where policies are issued to give lenders the confidence that the technology will perform in the medium- to long-term.

Climate-related infrastructure projects are being supported by new financial products such as Resilience Bonds. These combine catastrophe bonds with traditional project finance to support the implementation of large-scale resilient infrastructure projects that would otherwise be unaffordable.

Finally, risk modelling and mapping will create a role and revenue stream for insurers. Not only are well-prepared insurers better placed to understand and reduce their own underwriting risks, they are also uniquely placed to assist their clients by providing risk management advice as others in the financial system seek to understand climate risk.

In conclusion, the changing climate brings both risk and opportunity for insurers. Looking to the future, it is clear that insurers have an essential role in helping their clients – and the world – to avoid the point of no return.

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Neil is a market leader in environmental liability claims, particularly those which arise from the sale of products. His current caseload includes: an oil pollution claim in Canada valued in excess of USD $1 billion; multiple claims arising from the sale of PFOA and PFOS firefighting products; and existential claims against the oil industry seeking damages for the remediation of climate change.

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Cyber Warfare and the Act of War Exclusion

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Introduction

A recent cybersecurity breach of the Canadian laboratory testing company LifeLabs has underscored the rising threat of cyber-attacks and the significant losses attributable to them. On December 17, 2019, Canada's largest private provider of diagnostic testing for health care disclosed that it had suffered a cyber-attack that may have compromised the personal information of some 15 million customers, primarily in the provinces of British Columbia and Ontario.[1] The company is facing a putative class action lawsuit claiming for more than $1.13 billion in compensation for Lifelabs' clients, who they say experienced repercussions, including damage to their credit reputation, wasted time, inconvenience and mental distress.[2]

This was, of course, far from the first cyber-attack on a Canadian company. According to the Canadian Centre for Cyber Security, 71 per cent of Canadian organisations reported experiencing at least one cyber-attack last year, with the average cost of investigating and remediating the attack averaging at $9.25 million.[3] To protect against this kind of significant financial risk, many businesses have turned to cyber insurance.

The cyber insurance market remains relatively new and misunderstood in comparison to other lines of business. However, there is a growing acceptance by businesses across Canada of cyber insurance as an effective risk transfer solution.[4] However, the application of one common, but rarely used, provision in insurance policies has been a topic of debate in the cyber insurance context. That is the war exclusion and whether a cyber-attack could be considered an act of war.

Although the attack on LifeLabs can be characterised as an act of cyber-crime as opposed to cyber-war, renewed turmoil in the Middle East has again made the threat of war a possibility and has given the war exclusion renewed importance to the insurance industry in an age of digital warfare. This issue came to light most prominently in 2018 when one of the world's largest confectionery, food and beverage companies, Mondelez International ("Mondelez"), sued its insurer Zurich American Insurance Company ("Zurich") for denying coverage to Mondelez following the NotPetya global cyber-attacks that caused billions of dollars in damage around the world.

NotPetya Cyber-Attacks

On June 27, 2017, a major global cyber-attack began utilising a variation of Petya malware. On that day, Kaspersky Lab reported attacks in France, Germany, Italy, Poland, the United Kingdom, and the United States, as well as Russia and Ukraine, where more than 80 companies were initially attacked, including the National Bank of Ukraine. It was dubbed the "NotPetya" virus.[5]

The NotPetya virus was part of a series of attacks making use of hacking tools that were stolen from the National Security Agency of the United States. This hacking took control of computers and initially demanded ransom from their owners to regain access. It wreaked havoc around the world and was an assault that was intended to coincide with the Ukrainian public holiday of Constitution Day, hitting just on its eve.[6]

While Ukraine's government and businesses may have been the primary target, the cyber-attacks affected the computer systems of private companies throughout the world. In the United States, a multinational law firm reported being hit, while computers in a Cadbury chocolate factory in Hobart, Tasmania, owned by Mondelez, displayed ransomware messages that demanded USD $300 in bitcoins.[7] By the time the attacks were over, multiple multinational companies were severely impacted, including Maersk, pharmaceutical giant Merck, FedEx's European subsidiary TNT Express, French construction company Saint-Gobain, food producer Mondelez, and manufacturer Reckitt Benckiser.[8]

This was not, however, the work of regular criminal hackers. The CIA believed the attacks to have been a Russian state-sponsored attack on Ukraine. It concluded with a high degree of confidence that the Russian GRU military spy agency created NotPetya with the goal of disrupting Ukraine's financial system. The military hackers used malware that appeared to be ransomware, which encrypts data and decrypts it only if a ransom is paid, to make it appear as though criminal hackers were responsible rather than a nation state. Because of this deception, it took days to understand that NotPetya was permanently deleting data.[9]

The result was more than $10 billion in damage, according to Tom Bossert, a United States Homeland Security adviser at the time of the attacks. While there was no loss of life, Bossert characterised the attacks as being "the equivalent of using a nuclear bomb to achieve a small tactical victory".[10] Other reported approximate damages to specific companies included USD $870 million to Merck, USD $400 million to FedEx, USD $384 million to Saint-Gobain, USD $300 million to Maersk, and USD $188 million to Mondelez.[11] If there was ever a hacking event that could be characterised as an act of cyberwarfare on a global scale, the NotPetya virus arguably was it.

Mondelez v Zurich

Mondelez, one of the world's largest snack companies, was one of the major victims of the NotPetya cyber-attacks. The malware spread throughout its servers, stole credentials of numerous users, propagated across the Mondelez network and rendered approximately 1,700 servers and 24,000 laptops permanently dysfunctional. As a result of this damage caused to both its hardware and software systems, Mondelez alleged that it

incurred property damage, commercial supply and distribution disruptions, unfulfilled customer orders, reduced margins, and other losses well in excess of USD $100 million.[12]

Zurich provided property insurance to Mondelez at the time of the cyber-attacks. According to Mondelez's complaint against Zurich,[13] Zurich's insurance policy provided coverage at the date of loss for "all risks of physical loss or damage" to Mondelez property, including instances of "physical loss or damage to electronic data, programs, or software including physical loss or damage caused by the malicious introduction of a machine code or instruction".

The policy also provided other types of coverage including, but not limited to, time element coverage, including for "actual loss sustained and extra expense incurred by the insured during the period of interruption directly resulting from the failure of the insured's electronic data processing equipment or media to operate" resulting from malicious cyber damage.[14] This coverage was offered under a general all-risk property insurance policy and not a cyber-specific one.

Following the cyber-attack, Mondelez alleged that it gave prompt notice to Zurich and worked with Zurich to adjust the insurance claim. However, on June 1, 2018, Zurich informed Mondelez that it was denying coverage under the Policy based on a single policy exclusion for hostile or warlike action, which provided the following:[15]

> "This Policy excludes loss or damage directly or indirectly caused by or resulting from any of the following regardless of any other cause or event, whether or not insured under this Policy, contributing concurrently or in any other sequence to the loss:
>
> 2) (a) hostile or warlike action in time of peace or war, including action in hindering, combating or defending against an actual, impending or expected attack by any: (i) government or sovereign power (de jure or de facto); (ii) military, naval, or air force; or (iii) agent or authority of any party specified in I or ii above."

According to Mondelez, Zurich relied on no other ground for denying coverage under the general all-risk property insurance policy other than the act of war exclusion. It claimed that Zurich then later rescinded its coverage denial on July 18, 2018 and promised to adjust the claim, even committing to advance a USD $10 million partial payment towards Mondelez. However, on October 9, 2018, Zurich allegedly reasserted its June declination of coverage based on the act of war exclusion.[16]

Mondelez therefore promptly sued Zurich for breach of contract.[17] Mondelez asserted that the invocation of the act of war exclusion to deny coverage for the NotPetya virus was unfounded and unprecedented and that such a clause has never applied to anything other than conventional armed conflict or hostilities. Further, Mondelez also asserted that the cyber-attack losses did not result from a cause or event excluded under the act of war exclusion and that the attack did not constitute a "hostile or warlike action" as required by it. Additionally, it argued that the exclusion itself was vague and ambiguous, particularly given Zurich's failure to modify the historical language to specifically address the extent to which it would apply to cyber incidents. Because of that, it claims that the exclusion must be interpreted in favour of coverage.[18]

As of today, Mondelez's litigation remains ongoing. After a series of motions, Zurich filed its reply in October 2019 and a continued case management date is currently set for March 2020.

Act of war exclusions such as the one invoked by Zurich, of course, have been common clauses in insurance policies for decades. However, the Mondelez case is the first time that an insurance company has invoked the exclusion to decline coverage for a cyber-attack.

The Act of War Exclusion

For the better part of a century, many insurance policies have contained terms that exclude from coverage "war risks", being losses of property or life due to acts of actual warfare. There are two important considerations on the part of insurance companies that necessitate such exclusions: the inability of insurance companies to properly gauge premiums to cover those risks; and the companies' need to protect against financial disaster which could result from wholesale death or destruction occurring from actual warfare. The rationale behind these exclusions is that if private insurers were to assume the normal risks accompanying military service in a time of war under ordinary premium rates, they could become insolvent. Instead of penalising the country by causing the bankruptcy of such insurance corporations, the courts choose to penalise the individual insureds.[19]

Courts in the United States have frequently been called on to define "acts of war" over the past century. In *Vanderbilt v. Travelers' Insurance Company*, one of the earlier cases to interpret the war exclusion and a traditional example of the clause's usage, the insured was traveling as a passenger and was on board the British steamer Lusitania, then bound from New York to Liverpool on May 7, 1915 with a life insurance policy in effect. The Lusitania was engaged as a passenger and freight ship, carrying both merchantman and non-combatants alike, when it was sunk off the coast of Ireland by a German submarine. The sinking resulted in the unfortunate death of the insured and was done at a time when a formal state of war existed and was being waged between Great Britain and Germany. However, the insured's life insurance policy contained an exclusion clause stating that the insurance would not cover death resulting from war or riot. Even though the United States was not involved in World War I at the time, the Court found that a formal war was certainly in existence and the torpedoing of a ship was considered an act of war. It further determined that the ship was sunk in accordance with the instructions of a sovereign government and came about in a contest conducted by armed public forces in a state of war. As such, a New York court held that the death of the insured was not covered by the policy excluding acts of war.[20]

In a similar case dealing with an exclusion interpreted under more traditional physical warfare, *Stankus v. New York Life Insurance Co.,* the insured was a manager on the S.S. Altalena, a vessel which was transporting munitions to Israel during an armistice between Israel and neighbouring states and which contained members of a military organisation, the Irgun, at odds with the Israeli government. On June 22, 1948, the insured was killed during an attack by artillery and machine-gun fire in the harbour of Tel Aviv by the Israeli army. Under those circumstances, the insurer invoked the act of war exclusion. Despite the armistice in place, the Court viewed this activity as an act of war by Israel and held the insured's death to be within the contemplation of a clause exempting the company from liability for death "directly or indirectly from a state of war".[21] On this basis, it was established that acts of war can take place for the purpose of insurance coverage even if a "state of war" may not currently exist.

In cases arising out of the Pearl Harbor attack, courts more comprehensively considered the distinction between acts of war and states of war. In *Gladys Ching Pang v. Sun Life Assurance Co. of Canada*, the insured, an employee of the Honolulu Fire Department, died as a result of the Japanese attack on Oahu on December 7, 1941. The insured's life insurance policy carried a double-indemnity clause, giving double the face of the policy for death caused solely by external, violent, and accidental means, but this clause expressly excluded death resulting from

riot, insurrection, or war, or any act incident thereto. While the insurer maintained that on the date of loss the United States was at war with Japan, the plaintiff beneficiary argued that there must be some recognition of the existence of war by the government before courts can take judicial notice of its existence, which the plaintiff argued only happened the next day when the United States congress passed a resolution declaring war on Japan. The Hawaii court found that "war" does not exist merely because of an armed attack by the military forces of another nation. It was held that it needed to be a condition recognised or accepted by the political authority of the government which is attacked, either through an actual declaration of war or other acts which recognise the existence of a state of war. As such, the insured's death was found to have not resulted from an act of war and coverage was granted.[22]

However, in a leading case of United States Court of Appeals, *New York Life Insurance Company v. Bennion*, the Court held that a state of war existed at the time of the Pearl Harbor bombing even though war had not yet been declared. In this case, the insured was the captain of a battleship and was killed in the attack at Pearl Harbor. The Court found nothing in the subject matter, the context, or the purpose of the insurance policy to indicate that the parties intended to use the word "war" in the technical sense of a formally declared war. The parties did not specify any particular type or kind of war, rather they used the all-inclusive term, and the Court thought it fair to assume that they had in mind any type or kind of war in which the hazard of human life was involved.[23] This decision opened the door for coverage denials involving many types of physical conflicts between countries in which war was never formally declared.

Through such American case law, two categories of war exclusion clauses arose over time: result clauses and status clauses. Typical result clauses generally excluded the insurance company from coverage obligations when the insured's death resulted from military activity in a time of war. Status clauses generally excluded the insurance company from liability from all causes while the insured was in military service in a time of war. Accordingly, in result clause cases, courts decided whether the death of the insured was the result of military activity. Status clause cases usually involved two issues, whether the insured was actually in military service and whether the death indeed happened in wartime.[24]

As more exclusion clauses exempted the insurer from liability only for death from acts of war rather than from any kind of engagement in military service, the issue before courts has routinely become whether the loss resulted from "war" itself. In these early cases on the interpretation of the term "war", courts sometimes construed the term in its legal, technical sense, requiring a "state" of war (i.e., a formally declared war), while at other times courts recognised "acts" of war (i.e., warlike hostilities) as sufficient to exclude the insurer from liability. Because of lessons learned involving the question of whether the Korean War was legally a war involving the United States, many insurance companies in their exclusion clauses now refer to a war "whether declared or undeclared".[25] In the aforementioned Mondelez case, the Zurich policy followed this approach, with its exclusion applying to warlike actions in both "a time of peace or war".

Courts have also since recognised that the interpretation of insurance policies does not turn on how political leaders describe the events giving rise to a loss, but on how the policy describes the event. If the terms in the policy are clear and unambiguous, the Court will give them their plain and ordinary meaning. Conversely, if they are considered ambiguous, as Mondelez is claiming in its suit, the rule of *contra proferentem* may apply in favour of coverage.[26]

One of the most recent cases in this area that reaffirmed the special meaning of "war" in the insurance context is *Universal Cable Productions, LLC v. Atlantic Specialty Insurance Company*[27] ("Universal"). In Universal, the insured submitted a claim for loss related to the need to relocate the production of a television series due to rocket attacks conducted by Hamas, which is affiliated with the Palestinian Authority, located in the Gaza Strip adjacent to Israel. The insured carried its burden to show that "war" had special meaning in the insurance industry that required hostilities between *de jure* and *de facto* governments. Based on the customary usage in the insurance industry of the terms "war", and "warlike action by a military force", the United States Court of Appeals, Ninth Circuit, held that the meaning of such terms related to the existence of hostilities between *de jure* or *de facto* governments. Hamas was not *de jure* or a *de facto* sovereign, and therefore actions by that organisation could not be defined as "war" for purposes of interpreting war exclusion. As such, the "war" and "warlike actions" exclusions in policy were not triggered.[28]

Cyber Warfare: A Changing Coverage Landscape

With regard to the application of insurance policy exclusions, the general rule is that the insurer bears the burden of showing that a claim falls within a policy exclusion. Therefore, in order to invoke the war exclusion in the cyber context, insurers such as Zurich have the difficult task of proving that a cyber-attack was a warlike action by a government or sovereign power (or by an agent or authority of such a power) rather than a criminal or terrorist action.

It has been challenging for insurers to establish that "regular" hostilities had significant attributes of sovereignty in the past. For example, in the seminal case *Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co*, despite arguments from the insurer that the Popular Front for the Liberation of Palestine (PFLP) was a quasi-government body that received financial support and arms from China and North Korea, a court held that its hijacking of a plane in 1970 was the act of a radical political group rather than a sovereign government and that the loss of the plane was in no sense caused by any "war" being waged by or between recognised states. The PFLP had not been accorded by Middle Eastern states the rights of a government, nor could the PFLP's own exaggerated rhetoric, proclaiming itself to be "at war with the entire Western World", change the practical realities that the hijackers were not the agents of a sovereign government.[29] In subsequent cases, courts have generally followed the *Pan Am* court's reasoning when deciding whether war exclusions apply to acts of terrorism.[30]

In the context of cyber-attacks from groups with unofficial links to a state and whose origin can be disguised by the professional hackers who commit them, establishing the sovereign nature of such actions will become even more difficult. While the aforementioned Mondelez cyber-attack was widely believed to have been a Russian state-sponsored attack, Russia denied responsibility for the attack.[31] For the policy exclusion to apply to cyber-warfare, insurers such as Zurich will have to establish sufficient evidence of a connection between cyber-attacks and a government or sovereign power. Without official documentation in support and given the shrouded nature of cyber-attacks and the motives behind them, that will probably not prove easy for insurers.

Beyond the issue of attribution, insurers will also have to show that any cyber-attack constitutes a "warlike action" rather than a traditional criminal or terrorist action for the policy exclusion to apply. One obstacle facing insurers in this regard is that a court must determine what the intent of the parties was at the time of

the contract and, as noted, that any ambiguity in a policy exclusion is generally construed against the insurer and in favour of the insured.[32] Courts need to construe the exclusions as parties would reasonably have expected them to be construed.[33] As the wording of these war clauses has been found in most insurance policies for nearly a century, long before cyber-attacks become a mode of conflict, cyber warfare is likely not something that would have been anticipated by either party as being a "warlike action" under an insurance policy.

In this regard, a leading insurance treatise notes that "warlike operations" are normally part of an armed conflict between combatants and usually do not include intentional violence against civilians by political groups.[34] Past coverage case law has also distinguished between warlike operations and terrorist activity, with courts historically viewing "warlike operations" as not including attacks upon civilian citizens of non-belligerent powers and their property.[35]

Cyber-attacks, however, regularly involve attempts to alter, disable, steal, and destroy property of civilians and private corporations such as Mondelez. While such attacks target computer systems, networks, and infrastructures that can cause millions of dollars in losses, they do not easily fall into the traditional definition of "warlike operations". To have a chance at success, insurers such as Zurich will have to contend that the nature of warfare has changed, that attacks on the private sector are a tactic now used in modern global warfare, and consequently that courts reading clauses such as "war" and "warlike operation" as narrowly as in the past is no longer appropriate.

This will be likely be problematic for insurers given that war exclusions were developed with physical conflicts between states in mind. They were originally designed and applied to limit insurer risk for loss and damage sustained physically by individuals during a formal state of war. They were certainly not intended to be invoked in cases of pure economic loss by third-party corporations. But given that cyber-attacks have suddenly become a legitimate tactic between governments in modern warfare, there is certainly a possibility that such exclusion clauses could begin to be interpreted much more broadly.

A potential argument in insurers' favour might be that cyber warfare is already causing nations to strike back with traditional physical combat. On May 5, 2019, the Israel Defence Forces reported that it stopped an attempted cyberattack by Hamas and retaliated with an airstrike against the building from where it said the attack originated.[36] While this direct meeting of a cyber-attack with a real-world response during an ongoing battle may have been a potential first for cyberwarfare, physical retaliation of this kind will no doubt become more common. As cyber-attacks get more severe and hackers inflict real-world harm through critical infrastructure hacking, escalating physical warfare in response by government and sovereign powers appears inevitable.

In determining the Mondelez case and future cyber warfare coverage cases that will likely follow it, courts will have to decide whether the consequences of such cyber-attacks need to go beyond economic losses to the point of casualties or wreckage seen in previous interpretations of the war exclusion for the act of war exclusion to apply. As war evolves in the digital age, however, it is reasonable to anticipate that the interpretation of the war exclusion will evolve with it.

Conclusion

With more and more nations developing advanced cyber warfare operations to weaken enemies and strengthen their own global positions, cyber-attacks such as the NotPetya virus will only become more frequent in number and wide in scope. Cyber warfare may even be the way that future conflicts between nation states are both predominantly fought and won. As that happens, cases such as *Mondelez v. Zurich* will become all the more common.

Given these developments in modern warfare, it would be wise for insurers to reconsider their all-risk property and cyber insurance policies and clearly define what the exclusions and limits of those policies are. For now, although change may be on the horizon, this issue has not yet been judicially analysed and is far from being conclusively resolved.

Acknowledgment

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US Insurance Company Acquisitions – Navigating the Regulatory Waters

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Acquisitions of insurance companies in the United States present regulatory and execution complexities that warrant thoughtful attention by deal parties, legal counsel and other advisers. In this chapter, we will cover the principal regulatory requirements associated with acquiring a US insurance company, particularly a stock acquisition. Other forms of acquisition transactions such as asset sales, bulk reinsurance, assumption and novation and renewal rights, and acquisitions of insurance-related entities such as producers or administrators, will not necessarily have the same characteristics as a stock sale of a carrier for purposes of these regulatory requirements. Although this chapter will not cover these specifically, some of the guidance herein may be incidentally relevant in such contexts.

I. The NAIC Model Insurance Holding Company Act

The starting point for understanding the regulatory requirements associated with acquiring an insurance company in the US is the Insurance Holding Company System Regulatory Act,[1] a model statute (the "Model Holding Company Act", with accompanying regulations,[2] the "Model Holding Company Regulation"), published by the National Association of Insurance Commissioners ("NAIC"). Insurance is regulated at the state, and not the federal, level in the US. The NAIC is the umbrella organisation for the insurance regulatory officials of each of the 50 states (and certain other US entities such as the District of Columbia and territories). The Model Holding Company Act has been adopted in some form in each state, but variations do arise across the states in both the actual text and the interpretation of the statute. It is critical in any given transaction to refer to the state-specific version of the Model Holding Company Act, including state-specific insurance department customs or requirements (such as so-called "desk drawer" rules). This chapter will refer to the Model Holding Company Act as a general proxy for state-specific versions of the statute, but the reader is cautioned that, in any given state, the actual law may differ, and any discussion herein concerning the Model Holding Company Act is no substitute for consulting specific, current state law or obtaining competent legal advice.

The Model Holding Company Act has four essential pillars: (i) registering control of an insurer; (ii) acquiring such control; (iii) transactions between insurers and their affiliates; and (iv) enterprise risk. A brief discussion follows on items (i), (iii) and (iv), with an emphasis on aspects that play a role in acquisition activity. The balance of this chapter focuses on (ii), acquisitions themselves.

- Control. Any insurer controlled by another person or legal entity must register as a controlled insurer with the insurance department in the state in which the insurer is domiciled (the "domiciliary" state). The insurer will be required to file periodic reports to such regulator on certain aspects of the relationship between the insurer and its affiliated entities. "Control" in this context means "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract . . . or otherwise".[3] Control is "presumed to exist if any person, directly or indirectly, owns, controls, holds with the power to vote, or holds proxies representing, 10% or more of the voting securities of any other person".[4] (Voting security is defined to include "any security convertible into or evidencing a right to acquire a voting security". Accordingly, in a model-act state, in situations involving convertible securities, options or warrants, determinations of 10% ownership are generally made on a fully-diluted basis.[5])
  - A person holding 10% or more of the voting securities of the insurer can rebut this presumption in a process typically called a "disclaimer" of control (a statement submitted to the regulator demonstrating non-control). A disclaimer may be an appropriate remedy where a person holds, or proposes to acquire, more than 10% of the voting securities of a target but does not actually control. This might be due to the presence of larger shareholders, the allocation of board seats, the effect of a shareholder agreement or other situation-specific facts.
  - It is important to bear in mind that more than one person can "control" an insurer, such as where multiple persons each hold 10% of more of the voting shares of the insurer. The regulator does not view "control" as exclusive to the largest shareholder.
- Transactions between insurers and affiliates. Under the Model Holding Company Act, a person controlling, controlled by or under common control with another person is an "affiliate" of the other person.[6] Any transaction between an insurer domiciled in the particular state and any affiliate of the insurer must be fair and reasonable.[7] In addition, certain categories of transactions are subject to the requirements that (i) the insurer must notify the domiciliary regulator at least 30 days prior to the effectiveness of the transaction, and (ii) the regulator does not object to the transaction within that time. The Model Holding Company Regulation refers to this type of notification as a "Form D" filing. These filings are discussed below in our discussion of inter-company arrangements entered into in connection with acquisitions. Contracts subject to this prior-notification rule include:

- sales, exchanges and investments in an amount exceeding specified thresholds;
- loans over a certain size threshold to a non-affiliate where there is an understanding that the proceeds of the transactions are to be used to make loans to or an investment in an affiliate;
- reinsurance agreements;
- management agreements, service contracts, tax allocation agreements and cost-sharing arrangements;
- guarantees exceeding a specified threshold;
- acquisitions or investments, exceeding a specified threshold, in a person that controls the insurer or in an affiliate of the insurer; and
- any material transaction that the domiciliary regulator determines may "adversely affect the interests of the insurer's policyholders".[8]

Once the Form D is filed with the regulator, the regulator has 30 days in which he may disapprove the transaction if he determines that it is not fair to the insurer and its policyholders. Alternatively, the regulator may issue a non-objection with respect to the transaction. It is common in significant inter-company transactions for the regulator to ask the filer to add or modify certain provisions of the proposed contract or to provide additional information. Such a request effectively tolls the 30-day period. If the regulator does not respond to the filing within 30 days, the transaction is deemed approved, although in significant transactions, an insurer might wish not to rely on the regulator's silence as consent and instead to wait until a formal non-objection letter is issued.

- Enterprise risk. In the wake of the financial crisis of 2008, insurance regulators concluded that it is not sufficient to regulate merely the transactions and other points of contact between insurers and affiliates. Regulators determined that insurers and affiliates (the insurance "group") contain inherent risks that straddle the enterprise without regard for distinctions between legal entities. To this end, in 2010 the NAIC amended the Model Holding Company Act to require, among other things, ultimate parents of insurers to make an annual filing, known in most states as "Form F", outlining the "enterprise risks" of the company on a group-wide basis.[9] The Form F instructions provide latitude to an insurance group that files periodic reports with the US Securities and Exchange Commission ("SEC") as a publicly-traded company. Such a company can submit, in response to its Form F requirement, its current Form 10-K (Annual Report) as filed with the SEC. Insurance groups based outside the US that are not SEC-filers but have audited financial statements can submit those statements.[10]

II. Acquisitions under the Model Act

We now turn more specifically to the acquisition prong of the Model Holding Company Act. The statute provides that no person may effect one of the two types of acts described below unless (i) such person has filed with the state's insurance regulator a statement (referred to in the Model Holding Company Regulation as a "Form A"), and (ii) the transaction described in the Form A has been approved by the regulator. The two types of acts requiring a Form A and approval thereof are:

- (i) making a tender offer for, or making a request or invitation for tenders of, (ii) entering into any agreement to exchange securities for, (iii) seeking to acquire, or (iv) acquiring any voting security of an insurer domiciled in the state if, after the consummation thereof, such person would, directly or indirectly, be in control of the insurer; or
- entering into an agreement to merge with or to acquire control of an insurer domiciled in the state or any person controlling such a domestic insurer.[11]

The Form A requires detailed information about the acquiring person, its management, its financial condition, the terms of the transaction, any anti-competitive effect of the acquisition and other items allowing the regulator to evaluate the merits of the transaction. Where more than one person will be acquiring control (*e.g.*, an acquirer and its parent company), multiple persons will file a single Form A and will each be regarded as an applicant. (Certain challenges associated with identifying the appropriate applicants for a Form A are discussed below.) The regulator must then make a determination as to the fitness of each such applicant.

Principal components of the Form A include:

- Description of the transaction and copies of all major transaction documents.
- Identification of all "applicants". This will be discussed in more detail below.
- Identification of all directors and officers of each applicant, as well as any new individuals who will become officers or directors of the insurance company target or any intermediate holding company thereof. All of these individuals must submit a detailed biographical affidavit in a form promulgated by the NAIC, and, in many states, fingerprints. These materials are used to conduct criminal background checks and/or other verification procedures to ensure that all members of management have the requisite integrity and credentials to lead an insurance company.
- Audited financial statements of the applicants.
- A description of the "future plans" that the acquirer has for the insurer. This usually involves presenting certain specified *pro forma* financial information showing the effects of the transaction on the performance and condition of the insurer for a three- or five-year period and/or financial projections for such period.
- Statements as to the amount of shares of the target currently held by the buyer and as to brokers or finders involved in the transaction and earning fees.
- A statement that the applicant will provide, to the best of its knowledge and belief, the information required by the Form F (enterprise risk, discussed above) within a specified timeframe post-acquisition.

The acquirer will want to submit a complete Form A to the domiciliary regulator as soon as possible following the execution and delivery by the parties of the definitive deal documents and/or the announcement of the transaction. One of the practical challenges for counsel in preparing the Form A is that frequently the professionals of the acquirer needed to provide information for or feedback on the Form A will be the same professionals working on the deal itself. In the run-up to signing, these professionals must prioritise getting the deal signed up from a commercial and legal perspective and may lack the time to focus sufficiently on the Form A. In addition, purchase and sale agreements customarily contain detailed covenants requiring cooperation between the seller and the buyer on the Form A. Typically the seller will be under an obligation to provide reasonable assistance to the buyer. This may require information about the seller or the target for the Form A. Reciprocally, the buyer will typically be required to share drafts of the Form A with the seller for its review and to consider the comments of the seller and its advisers in preparing the submission (discussed in more detail below). These provisions can add time to the process and can make it challenging to file a Form A immediately upon signing.

III. Practical Concerns Frequently Encountered

In this section, we focus on challenges often encountered in the Form A process and other acquisition-related regulatory steps. The first has to do with the biographical components. As mentioned above, the applicant must provide NAIC-form biographical affidavits and (depending on the specific state) fingerprints to the domiciliary department. This can (but need not) give rise to one or more of the following issues.

- The *first* is cultural. In the case of a non-US acquirer, its directors and officers may regard the process as invasive and even xenophobic. It is important to understand that the requirements are imposed uniformly on US and non-US managements. Still, sensitivity to the very personal, even bodily, nature of the process can touch a nerve.
- *Second*, with non-management directors often located in remote places from the acquirer's headquarters, obtaining their input, signature and fingerprints can be a logistical challenge. Internal staff at the acquiring company may not be as able to assist in locating these as they are with internal management, who may be on-site. Ample time and preparation should be built in to the process to track down the necessary materials from management members, who may in distant places – including, as is often the case, while on holiday in remote locales.
- *Third*, biographicals sometimes prompt judgment calls about disclosure on a particular matter. The questions might be ambiguous when applied to a given context, and sometimes facts from a director's or officer's personal history might not fit neatly within a category of required disclosures. In addition, questions sometimes implicate facts from the director's or officer's past that may be sensitive, such as personal lawsuits or suspension of a professional licence. It must be borne in mind that one of the standards for Form A approval is the competency and fitness of management. Therefore, candour is critical, and navigating such a situation requires tact and discretion.

A second web of issues in a Form A concerns inter-company transactions post-closing. Oftentimes the acquirer will have, among its existing group companies, various cost-sharing, tax-allocation and similar agreements intended to spread costs equitably across the legal entities in the group and to provide liquidity to the holding company. The acquirer will want to include the target insurer in these agreements immediately upon closing. As discussed above, these agreements, or adding an insurer to an existing agreement, are subject to prior notification to, and non-objection by, the regulator pursuant to a Form D. The Form D will include the text of the proposed agreement and a description thereof. An acquirer can attempt to provide the form of these agreements to the regulator, and even a Form D, as part of the Form A and to seek the regulator's approval of these concurrently. This way, when the transaction is approved, these agreements are approved as an incident to the transaction and are entered into at closing.

However, there can be two practical obstacles to this approach. The *first* is commercial. The seller might justifiably object to having regulatory approval for the entire deal hinge on the regulatory merits of inter-company agreement wholly on the buy side, over which the seller may have little if any input. *Second*, the regulator might indicate that during the pendency of the Form A, she will not consider *post*-closing matters such as inter-company transactions. Thus she might require that such agreements can be submitted on the Form D only when the parties are actually affiliated, *i.e.*, upon or after the closing. This might present challenges in having these relationships take effect right at closing and may impose some delay after closing in being able to allocate costs to the insurance company. Experienced counsel should be consulted in order to minimise the risk of disruption in such a case.

A third set of issues that can require time and effort with the regulator in a Form A is the "future plans" item. In a "turn-key" acquisition (where business lines, personnel, systems and operations are largely remaining unchanged), it is usually straightforward to explain in the Form A that no significant changes are planned. However, the regulator may push back on that in the comment process, seeking quantitative and/or narrative evidence that the transaction will have no immediate impact on the insurance carrier. Often, as mentioned above, the Form A instructions or comments from the regulator will require a *pro forma* financial statement showing both the balance sheet and income statement impact of the acquisition over some specified period of time, such as three years or five years.

Often, in transactions involving a third-party purchase of an insurer from its owners, the transaction is capital-neutral – no new capital is being contributed to the carrier, nor is any existing capital being distributed out. In such a transaction, *pro forma* financials can often be prepared by using the existing business-plan financials that the target maintains and rolling these forward the requisite amount of time. Care should be taken that assumptions are thoughtfully applied, explained and held constant across the time horizon. One important factor to be borne in mind is holding company leverage. The regulator will typically expect some discussion of the extent, if any, to which the new parent company will be reliant on the insurer's future profits or surplus for the parent's liquidity needs.

Where changes in the day-to-day management of the insurer are contemplated, these need to be explained. For instance, where a buyer seeks to outsource certain functions that had historically been handled in-house or by other service providers (*e.g.*, investment management, underwriting, claims-handling, etc.), the regulator will want to understand the arrangements with the new service provider as well as the ultimate authority to be exercised by the insurer's board and executive officers over these functions.

IV. Looking "Up the Chain"

A question arising with increasing frequency in Form A processes involves non-corporate acquirers. Examples of these include: public and private funds; limited partnerships and limited liability companies; trusts and separate accounts; and non-US business entity types that may not fit neatly into the taxonomy of US legal entities with which the insurance regulator is familiar. Such acquirers may trigger difficult "up-the-chain" identification of applicants and ultimate controlling parents.

The significance of this set of consideration lies in the fact that each "applicant" on the Form A is required to provide the disclosures, discussed above, about itself and its downstream affiliates including biographical information on directors and officers, financial information, information on affiliates and other enterprise-wide data points. An applicant could be a natural person as well as a legal entity, and so the impact of deeming a natural person to be an applicant on a Form A could be substantial. The financial disclosures alone for an individual applicant can be onerous. Even though some states relax the audit requirement in such cases and allow the applicant to provide information on a "compilation" basis (a less rigorous set of procedures than a full audit), the process can be expensive, distracting and time-consuming.

It could be inferred from the definitions in the Model Holding Company Act that the "applicant" should include the person

furthest upstream in the legal entity chain above the immediate acquirer of control. An "applicant" can be a person not directly involved in or party to the acquisition but rather one or more tiers upstream from where the acquisition is occurring. The definition of "control" includes the concept of "direct and indirect" control;[12] so does the provision of the statute requiring a Form A.[13] This would suggest that, in identifying applicants, one should look beyond the immediate acquirer. In this view, one would identify the person "controlling" that acquirer, and then the person "controlling" that person, and so on, until one reaches a person not controlled by anyone else (this would typically be either a natural person or a publicly or widely held legal entity). That ultimate person, and potentially each person downstream in the chain, would be an "applicant".

However, as an interpretive matter, this is not without some ambiguity. An instruction within the Form A itself asks the filer to identify all people owning 10% or more of the "applicant",[14] suggesting by implication that such 10% owner need not *itself* be an applicant. In addition, the Model Holding Company Regulation specifically defines "ultimate controlling person" as that person not controlled by any other person.[15] Insofar as "applicant" and "ultimate controlling person" are distinct terms used within the same statutory scheme, it stands to reason that they must, or at least could, mean different things. This may be the case in certain states and certain situations.

As a practical matter, however, practitioners often advise that "applicant" should include the person upstream from the immediate acquirer that ultimately controls the acquirer and is not itself controlled. (In other words, "applicant" and "ultimate controlling person" may effectively be synonyms.) The question can also become more complicated in non-corporate structures where "control" (that is, ownership of "voting" securities such as general partnership units, managing membership status under an LLC agreement and so on) can be, and routinely is, decoupled from economic interest, denoted by "passive" limited partnership or LLC interests.

V. Hearings; Approval Criteria

Most states' versions of the Model Holding Company Act empower the regulator to hold a hearing on a Form A application. Such a proceeding is in the nature of an administrative hearing and, when held, is usually public. Although the statutes are usually discretionary, they often provide that a hearing must be held as a predicate to *disapproving* a Form A but need not be held to approve one.[16] Nevertheless, states typically are in the habit of either always having a hearing on a Form A or not having one (assuming ultimate approval). It can often be predicted with confidence whether a given state is likely to have a hearing or forgo a hearing in a given circumstance.

Where a state insurance department holds a Form A hearing, the following considerations are worth noting. *First*, the hearing will be scheduled only when the regulator has deemed the Form A "complete", that is, has had his questions and comments addressed to his satisfaction and has had the applicant supply all written materials requested in support of the Form A. The hearing, in other words, is typically not used as an opportunity to pursue open or surprise topics of interest.

Second, the hearing is usually cast as a proceeding involving three actors: (i) the applicant; (ii) the staff of the insurance department which has reviewed the Form A; and (iii) the presiding officer of the hearing, who is either the insurance commissioner or a person representing the commissioner. The theory of this arrangement is that the applicant is advancing the Form A, the insurance department staff is tasked with reviewing the Form A, and the presiding officer is the neutral arbiter of facts and laws as adduced by the two parties. The presiding officer essentially acts for the insurance commissioner, and sometimes is the the commissioner himself.

At the hearing, the applicant will advocate for its Form A, calling at least one witness from the acquirer to testify to the merits of the transaction. The applicant's job is to establish by evidence and testimony that the acquisition satisfies the criteria for approval – *i.e.*, that the acquisition satisfies the statutory criteria outlined in the following paragraph. The department staff may cross-examine the applicant's witness and will present its own testimony as to how it conducted its review. The department's questioning is usually deductive rather than adversarial in that it is designed to demonstrate to the presiding officer the department's rigour in looking at the Form A and independently assessing the facts and arguments presented therein. After testimony and evidence are heard, the record is closed and the hearing adjourned. The parties then await the presiding officer's/regulator's determination. In very unusual circumstances, third parties demonstrating an interest in the transaction may seek to make statements or even intervene or assert party status in the Form A proceeding.

Under the Model Holding Company Act, the regulator must approve the change of control unless, after a public hearing, the regulator finds that:

- after the acquisition of control, the insurer would not be able to satisfy the requirements for the issuance of a licence to write the lines of insurance for which it is presently licensed;
- the effect of the acquisition of control would be "substantially to lessen competition" in insurance in the state or would "tend to create a monopoly". In applying this standard, Form E-type information and analytical requirements apply (described below);
- the financial condition of an acquiring party is such as might jeopardise the financial stability of the insurer, or prejudice the interest of its policyholders;
- any plans which the acquiring party has to (i) liquidate the insurer, (ii) sell its assets, (iii) consolidate or merge it with any person, or (iv) to make any other material change in its business or corporate structure or management, are unfair and unreasonable to policyholders of the insurer and not in the public interest;
- the "competence, experience and integrity" of those persons who would control the operation of the insurer are such that it would not be in the interest of policyholders and the public to permit the acquisition of control; or
- the acquisition is likely to be hazardous or prejudicial to the insurance-buying public.[17]

VI. Confidentiality Considerations

A Form A filing is generally regarded (with the notable exception of New York, discussed below) as a public document, available for public inspection and copying. In some states, the insurance department might upload the Form A onto the public records page of its website. In states where this is not the case, the insurance department will not necessarily disseminate the Form A but might make it available upon request to a member of the public pursuant to a request under a state's "Freedom of Information Law" ("FOIL") or equivalent (laws regarding public records of governmental entities). States typically entertain requests from an applicant, however, to shield portions of the Form A from public availability as confidential or proprietary. Biographical information, for instance, is always kept confidential. Financial statements of an applicant entity, if not otherwise public, are often treated confidentially by the

regulator if such is requested. By contrast, requests to treat the purchase price or terms of the acquisition (such as a copy of the purchase or acquisition agreement) as confidential are typically not granted. Practitioners should discuss early on with clients, particularly with a client that may not be familiar with US legal custom and practice, expectations around confidentiality. For instance, a client might want to understand the types of documents that can be submitted confidentially, the level of confidentiality that can be expected and the likelihood that any document will be visible to third parties.

Under the Model Holding Company Act, reports and statements made to the regulator pursuant to identified provisions of statute are categorically entitled to confidential treatment.[18] Absent from the list of statutory provisions is the statute requiring the Form A. As a result, the Form A is a public document as discussed above. However, under New York's version of the statute, *all* holding company act reports and statements are generally regarded as confidential.[19] Therefore, parties can submit a Form A (known in New York technically as a Section 1506 application) and supporting materials with the expectation that they will not be made public. A letter from the New York Superintendent of Financial Services *approving* a Form A, however, will be made public upon a FOIL request. But it is the practice of the New York Department of Financial Services to consult with the applicant upon receiving such a FOIL request, so that the applicant can suggest redactions of sensitive content in the letter.

VII. Form E and Competition Matters

Approximately half of the US states have adopted Section 3.1 of the Model Holding Company Act, which calls for a competition-type "Form E" filing in a non-domiciliary state. To illustrate, consider a hypothetical acquisition of an insurer domiciled in Texas and licensed in a number of other states, including Maryland (a Section 3.1-adopting state). The acquirer must file a Form A in Texas but not in any other state. But let us suppose that the acquirer, either itself or through its subsidiaries, conducts insurance business in the same lines of business (that is, the same types of coverages and insureds) in Maryland as the target. Even though the target is not domiciled in Maryland, Maryland law in this instance will require the acquirer to submit a Form E outlining the market shares of the two transaction parties and the combined *pro forma* market share resulting from the transaction. (If the change in concentration is *de minimis*, as determined according to certain quantitative standards, no Form E is required.)

The Form E requires the filer to detail the lines of business in the state that will become more concentrated as a result of the combination. If the amount of this concentration in a given line is below a certain quantitative threshold, the filer may conclude in the Form E that there is no *prima facie* evidence of anti-competitive effect. This should result in a non-objection by the regulator. If, in one or more lines of business, the concentration level will increase by more than the threshold specified in the statute, *prima facie* evidence will exist. In such a case, the filer must explain in the Form E why, despite the evidence, the transaction is not anti-competitive. The filer might provide quantitative or statistical evidence, or explain qualitative differences between the products of the two deal parties, to rebut the presumption of anti-competitive effect. If the Form E is not objected to by the regulator within a certain number of days (usually 30) following submission, the transaction may proceed. Form E requirements are in addition to whatever federal anti-trust requirements (*e.g.*, Hart-Scott-Rodino filings) may apply in a given transaction.

VIII. Practice Notes

Transaction parties usually incorporate the regulatory process into the acquisition agreement in order to allocate risks and responsibilities, taking into account many of the factors described above. Typically, the buyer undertakes in an interim covenant to make the required Form A filing within a certain number of days following the date of the execution of the agreement. Both parties undertake to use commercially reasonable efforts to achieve regulatory approvals needed for completion of the acquisition. The buyer typically agrees to share a draft of the Form A with the seller prior to submission and to consider the seller's comments. Provision is made for confidential materials in the Form A, which the buyer need not share with the seller.

In a provision that has become increasingly complex and heavily negotiated, the seller agrees that the buyer need not complete the acquisition if the Form A approval is obtained but contains "burdensome conditions". Historically, these have been defined as any condition that would materially and adversely impair the buyer's expected benefits from the transaction, but in recent years have come to include specific variables. For instance, a burdensome condition clause might enumerate specific conditions that the buyer may not be required to bear. These might include a condition to contribute capital over some threshold amount, a condition limiting dividends from the insurer, a condition that the buyer backstop insurer surplus (maintain it at a certain threshold or issue a keepwell) and similar mandates. Sellers can attempt to resist or limit these by arguing that the buyer should be required to bear a certain amount of regulatory risk and should not enjoy an option simply because the regulator imposes some expected or anodyne condition. This will be especially sensitive in cases where a target is distressed. Seasoned counsel (for either the buyer or the seller) can help assess the types of conditions that are likely to arise in an approval and thus adjust the transaction document to allocate risk most appropriately for the client, within commercial constraints.

Endnotes

1. NAIC Model 440.
2. NAIC Model 450.
3. Model Holding Company Act, § 1C. Officers and directors of an insurer who exercise control solely by virtue of such positions are excluded from this definition.
4. *Id.* Control can exist by means of a management agreement or other levers, and not just by virtue of ownership of voting securities. This chapter is primarily concerned with control by voting security.
5. *Id.*, § 1L.
6. *Id.*, § 1A.
7. *Id.*, § 5A(1)(a).
8. *Id.*, § 5A(2).
9. *See, e.g.*, Model Holding Company Act § 4L and Model Holding Company Regulation Form F.
10. Model Holding Company Regulation, Form F, Item 1.
11. Model Holding Company Act, § 3A(1).
12. Model Holding Company Act, § 1C.
13. *Id.*, § 3A(1).
14. Model Holding Company Regulation, Form A, Item 3.
15. *Id.*, § 8B.
16. Model Holding Company Act, § 3D(1).
17. *Id.*
18. *Id.*, § 8A.
19. NY Ins. Law § 1504(c).

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Brexit Relocations: Update

Matheson

Darren Maher

The UK's decision to leave the European Union ("**EU**") has resulted in a large number of financial services firms engaging with regulatory authorities across the EU, including the Central Bank of Ireland ("**Central Bank**"), to discuss potential moves and authorisation. This engagement with regulatory authorities ranged from UK firms looking to re-establish themselves in advance of the initial Brexit date in a country with guaranteed access to the single market, to a number of branches of UK entities in Member States considering their future corporate structures post-Brexit.

While the initial Brexit date has come and gone and we now are facing into a "flextension" of 31 January 2020, firms have not delayed in the same way. Most firms have now secured authorisations and are preparing for Brexit deal or no-deal.

Brexit Relocations

In the immediate aftermath of the UK's decision to affect an exit from the EU, Ireland seemed likely to attract more financial services firms than others and was identified early on as a "natural location of choice" based on its stability within Europe, its proximity to the UK, its internationally respected regulatory environment and its established international financial services industry. Ultimately, whilst all of these factors were important and definitely played into the mix, the most persuasive factor that emerged was the potential applicant's perception of the regulator and its confidence in whether it could confidently build a long-term working relationship with that regulator.

The Central Bank of Ireland Process

The Central Bank has always promoted a clear, well-structured and transparent authorisation process and has been closely engaged in efforts at EU level in developing a consistent and predictable approach to Brexit-related decision-making and issues across the sectors.

Based on our experience, having worked on a number of applications ranging from applicants with operations already established in Ireland adopting traditional insurance models to first-time entrants or applicants adopting a new innovative structure, we are of the view that the Central Bank has responded well to the high volume of applications and have processed same in a timely and efficient manner. Notably, the Central Bank committed significant additional resources to deal with the Brexit-related authorisation queries across banking, insurance, investment firms, investment funds and financial markets infrastructures.

The Central Bank strongly encouraged any firm which was considering or seeking authorisation in Ireland to engage with them at an early stage in their planning process to discuss their post-Brexit proposal. This resulted in most firms having an initial meeting with the Central Bank to discuss authorisation. From our experience, the initial meeting with the "short-listed" regulator was of the upmost importance as it set the tone which ultimately determined the potential applicant's preferred jurisdiction for its EU base. These meetings allowed both sides to clarify each other's expectations, discuss the proposed business plan and confirmed whether they could work together on a long-term basis.

Some of the key areas of focus for the Central Bank in the context of Brexit-related authorisations have been around the substance of the proposal, the outsourcing arrangements anticipated to be put in place along with the use of own funds/internal models.

The Central Bank required all Brexit-related applications to demonstrate real substance in Ireland in terms of the applicant's governance structure, personnel and technical resources, distribution of activities, outsourcing arrangements and reinsurance programmes. This extended to having sufficient senior management personnel in Ireland who are able to dedicate sufficient time and resources to running the business. The Central Bank expected senior management personnel to display proper knowledge of local markets, products and risks and of the proposed business plan of the applicant. Proposed senior managers had to be pre-approved as fit and proper persons by the Central Bank and as part of this process, many of these senior candidates were called for interview by the Central Bank where their breadth of knowledge and understanding of their role and the proposed business was assessed in further detail.

The Central Bank's focus on the issue of substance can be further evidenced in the context of permitted levels of reinsurance. The Central Bank expects an Irish-authorised reinsurer to retain a certain level of the risks that it writes and typically will expect an insurer to retain at least 10% of the risk that it writes in the aggregate and potentially more depending on the nature of its business.

In respect of outsourcing, under the Solvency II regime, an insurer can outsource many of its functions to a third party provided that a written outsourcing agreement is put in place and that agreement conforms with the requirements. Scrutiny of these arrangements, to ensure compliance with these requirements and the Central Bank's own specific expectations, was an important component of the Central Bank's assessment of the proposed applicant's submission.

Regarding approval of own funds or the use of an internal model under Solvency II, where prior approval for a previous internal model by other EU/EEA regulators had been secured, the Central Bank was willing to have regard to this in the context of its own assessment.

Supervisory Convergence

The Central Bank engages with a range of EU authorities, including the European Central Bank ("**ECB**"), the European Securities and Markets Authorities ("**ESMA**"), the European Banking Authority ("**EBA**") and the European Insurance and Occupational Pensions Authority ("**EIOPA**") and is an active participant in their various decision-making bodies, playing a role in framing policy positions in the context of EU Directives and guidance.

In an attempt to dissuade the development of any regulatory arbitrage between EU/EEA Member States in the battle to attract Brexit business, ESMA and EIOPA separately published Opinions, setting out principles which have the aim of fostering supervisory convergence and consistency in the authorisation process across the EU Member States related to the relocation of (re)insurance undertakings from the UK. Each opinion is directed to Member State supervisory authorities in the "EU27", i.e., Member States excluding the UK, and assumes that the UK will become a third country post-Brexit.

Commendably, the Central Bank has refused to engage in competitive practices in order to attract business to Ireland and has supported the position adopted by the relevant EU authorities. It has also been committed to and guided by its mandate which is to protect consumers and safeguard financial stability.

UK and Gibraltar-Based Insurers and Brokers Continuity of Services

There is no proposed EU or Irish equivalent to the UK's "temporary permissions regime" which permits EU/EEA-registered financial services providers to continue carrying on new business in the UK for a temporary period post a no-deal Brexit.

To limit the impact on Irish insurance policyholders in the event of a no-deal Brexit, the Irish government introduced legislation to address this issue. This legislation provides for a temporary run-off regime to allow UK and Gibraltar-based insurers and intermediaries, which meet certain requirements, to continue to service Irish customers' existing policies for a period of up to three years from the date the legislation comes into operation or such other date permitted under the terms of the legislation "in order to terminate its activity" in Ireland. Crucially however, such firms will not be permitted to write new business, including the renewal of existing policies. It is a welcomed move by the Irish government which provides some certainty for Irish policyholders in relation to the servicing of contracts – or policies – that were put in place prior to Brexit.

Where Are We Now?

By and large, what we have seen in practice has been firms investing heavily in firming up their Brexit-related contingency planning for how they will adequately deal with the possible effects of a no-deal Brexit. While securing authorisation and relocating has been the focus to date, firms are now turning their attention to the terms of their authorisations from the Central Bank, focusing on the day-to-day supervisory relationship and understanding more of the regulatory scrutiny which they can expect as an entity authorised and supervised by the Central Bank. With regard to the insurance industry in particular, recent communications from the Central Bank have demonstrated its particular emphasis on investment in technology, its expectation that Irish insurance undertakings give full consideration to assessing climate-related risks, its focus on recovery planning for insurers and the importance of diversity and inclusion practices in insurance undertakings.

In assessing applications, the Central Bank has been guided by its mandate to protect consumers and safeguard financial stability rather than incidentally creating gainful employment in the Irish economy. The Central Bank has dealt with all enquiries in an open, engaged and constructive manner, while taking a consistent approach when assessing applications for authorisation. It has openly stated that it would not lower its assessment standards, and if an applicant had not delivered on the Central Bank's expectations, it would not be authorised. Further, the Central Bank has stated that no applicant should expect the Central Bank to provide an "insurance policy" for inadequate Brexit planning. The overall effect has been to emphasise its international reputation as a well-regarded regulatory authority.

The Future

A lack of clarity on future trading links post-Brexit has motivated firms' relocations. To date, the working assumption has been that the UK will be treated as a third country or non-EEA member for market access purposes post-Brexit.

The trend to date highlights that no one EU/EEA city is emerging as a complete alternative to London; however, Ireland has exceeded expectations in attracting Brexit relocators and it has much to offer the financial services sector as the industry adapts to the future. It remains to be seen if more financial services firms will choose Ireland as their EU hub post-Brexit.

For as long as the UK is still part of the EU, it will be possible for Irish insurers to operate on a passported basis into the UK. What the position will be following the UK's exit from the EU is, at this point, unclear and it remains to be seen whether separate authorisations will be required in the UK to deal with UK business post-Brexit.

The extent to which any regulatory changes are required to be introduced will depend on the outcome of the withdrawal negotiations initially and the negotiations of the future trading agreement between the two blocs ultimately.

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Headquartered in Dublin with offices in Cork, London, New York, Palo Alto and San Francisco, more than 700 people work across Matheson's six offices, including 96 partners and tax principals and over 470 legal and tax professionals. Matheson services the legal needs of internationally focused companies and financial institutions doing business in and from Ireland. Matheson's clients include the majority of the Fortune 100 companies and over half of the world's 50 largest banks. Matheson has worked closely with some of the world's largest tech multinationals and high-profile start-ups, advising seven of the top 10 global technology brands.

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Latin America – An Overview

DAC Beachcroft LLP

Duncan Strachan

Introduction

This chapter summarises the current political and economic situation, as well as some of the key issues for (re)insurers when it comes to managing risk and exposure, in nine Latin American jurisdictions.

The current political and economic climate in Latin America has seen fears of instability resurface, most notably following the widespread protests in Chile, Colombia, Ecuador, Bolivia and beyond. The picture is too complicated to explain easily, but it is thought that the protests are motivated by anger at austerity measures and corruption, against the background of growing income inequality. The next 12 months will be a critical time in the region as relatively new governments in almost all of the main jurisdictions look to introduce reforms that will ensure popular support and stability.

All the while, the scale of the corruption scandal centred around the activity of the Brazilian construction company, Odebrecht, continues to be unveiled. What started as a relatively small money-laundering investigation into goods and services supplied to Petrobras has led to the discovery of probably the largest web of corruption ever known.[1] Reforms in Brazil aimed at ending the culture of corruption have followed in Peru, Colombia and other countries. Insurers involved in underwriting the policies for failed infrastructure projects, and for directors & officers implicated in the scandal, will continue to manage the fallout of the scandal for years to come, but there are also opportunities for innovating in areas such as risk management.

The region is still marked by low levels of insurance penetration – between 2–4% compared with over 6% as a global average. However, there are signs of development in local insurance markets, both in terms of capacity and expertise, and the rise of Insurtechs may provide new solutions that drive growth in traditional areas such as home, life and motor. The regulatory framework will be key to enabling access for new products, and we look at how Brazil and Mexico have taken the lead in this area. At the same time, the climate crisis has brought environmental protection into focus, and this is another area where (re) insurers are able to support a shift in culture.

At the other end of the market, there continues to be uncertainty and a lack of protection for commercial agreements reached between sophisticated entities. However, there are signs that the continued development of the markets, albeit at varying pace, will see these issues addressed. For example, after much concern around enforceability of "claims-made" clauses in Colombia, the Contraloría seems to have turned a corner by finally recognising such clauses to be valid in a decision at the end of 2019. The potential for similar controversy in Peru has been removed by a new law recognising "claims-made" clauses, and Ecuador now has specific provisions on the interpretation of reinsurance contracts in the new Commercial Code.

While the development of insurance and reinsurance law across the region is welcome, the risk is that the divergence in principles will lead to more disputes, particularly with respect to international reinsurance contracts. Almost all reinsurance contracts with cedants in Latin America are subject to the law and jurisdiction of the insured risk and, despite the uncertainty this creates, it seems unlikely that there will be a return to allowing the reinsurer to choose the applicable law. In this context, the Principles of Reinsurance Contract Law ("PRICL"), published by a working group in 2019,[2] provide an alternative, particularly in cases where the parties agree to arbitration as the forum to resolve any disputes.

Mexico

Politically, 2018 was a historic year for Mexico, with the election of Andrés Manuel López Obrador ("Amlo"), the first left-wing president since the 1920s. Amlo and his party (MORENA) advocate the eradication of poverty, corruption and violence, whilst achieving sustainable economic growth and a strong currency.

However, 2019 saw the emergence of several political and economic obstacles to these plans, and there is already considerable criticism that sweeping changes have paralysed the country. The revocation of public infrastructure projects and the uncertainty surrounding economic policies have had an impact, especially in fixed investment. This extends to the insurance market, where the majority of management at the regulator (*La Comisión Nacional de Seguros y Finazas*) have lost their jobs.

At the forefront is Amlo's National Hydrocarbons Production Plan (announced at the end of 2018), under which Mexico's refineries and oil and gas infrastructure will be improved and expanded. It is hoped that this will result in the production of 2,624,000 barrels a day by 2024. There is continuing support of the relatively new management at the state-run oil company, Pemex, as well as negotiations with the USA over a new trade deal.

This re-shaping of the future of the oil industry came with many questions over the agreements executed by the preceding D&O and/or public officials, and the investigation of corruption and money-laundering operations. The allegations of corruption centre on projects and contracts entered into by Pemex and Odebrecht, which remain under investigation, have given rise to the notification of many insurance policies. Just as this guide was going to print, the former head of Pemex (Emilio Lozoya Austin) was arrested in Spain on bribery charges in relation to his dealings with Odebrecht.

Mexico's courts are focused on ensuring that victims receive compensation. Public liability insurance is mandatory for certain types of (hazardous) business activity. This means that when judgment is entered against an insured, the insurance will automatically respond and indemnify the victim directly (regardless of policy coverage defences). The insurer must then bring a recovery claim against the insured to recoup the policy indemnity.

Damages and interest can significantly inflate the value of claims. Moral damage awards are assessed by reference to the size of award, the means of a defendant and the number of claimants. As a result, the awards against large corporations can be significant (in the region of USD 1 million upwards per victim). The Mexican Supreme Court has also approved the award of punitive damages as a deterrent for harmful conduct (albeit these are usually excluded under general liability policies). This resolution was issued against a local cedant, as opposed to the original insured, making it necessary to review reinsurers' management of claims to avoid facing extra-contractual awards.

Insurers have 30 days to respond to claims, or they risk being subject to fines or interest. The debate continues as to whether general rules, applicable to commercial contracts under the Mexican Civil Code, should apply to the interpretation of reinsurance contracts. Some people consider that the Insurance Contract Law should apply to address any aspect of a claim not expressed in the reinsurance terms.

Amlo's fight against corruption comes with a set of new reforms, some of them making tax evasion an activity criminalised in a similar way as organised crime, and we could expect the triggering of the D&O policies for some companies. Product recall is being actively enforced by the consumer protection agency in regards to lack of proper and/or deceiving labelling.

Mexico has also recently adopted a Fintech law, which will enable many start-ups to develop in this arena; however, the second-level regulation is still pending to be issued and underwriters must be wary of the new developments when underwriting liability, PI and/or cyber policies for this industry. In addition, some regulatory changes are being promoted with regards to environmental policies, in line with Mexico's international commitments to tackle climate change. The requirement to comply with increasingly strict standards is likely to put insureds under more pressure and may lead to more claims, both in relation to environmental damage and potential breach of reporting requirements at board level.

Brazil

President Bolsonaro's popularity has dropped since taking office in January 2019. Whilst his economic plans are cemented on free-market policies, his initiatives on privatisation and liberalisation will face challenges from a fragmented Congress, where the ruling PSL party has under 10% of the seats in the lower house. However, the President will find some support in lower interest rates and inflation, and a slight improvement in employment rates, pointing to a modest economic recovery.

The new government will want to avoid any major events like those that have rocked Brazil over the past five years. The fallout continues from the Car Wash (*Lava Jato*) corruption scandal, with Lula Da Silva (the former President) released from prison in November 2019, following a Supreme Court judgment that allows defendants to retain their freedom until all appeals have been exhausted.

The 2015 collapse at the Samarco-run Fundão dam was the worst environmental incident in Brazil's history, and 2019 saw a similar scale of tragedy with the Brumadinho disaster in January 2019.

BHP Billiton was served with a USD 5 billion claim for group litigation in the UK courts in 2019 for allegations over its role in the Samarco incident and has stated that it intends to defend the claim. This type of action is part of a growing trend for UK-domiciled companies to be targeted for their worldwide operations, whether through joint ventures or subsidiaries.

BHP Billiton settled a US securities class action in relation to the Samarco disaster in 2018, without any admission of liability. It was announced in June 2019 that a group of investors in Vale, which is listed on the New York Stock Exchange, intend to seek compensation for losses resulting from the Brumadinho disaster. Vale had previously announced a USD 107 million compensation package for workers affected by the dam collapse. In another example of how legal action is increasingly crossing national borders, victims of the tragedy filed a criminal complaint with German authorities against Tüv Süd (the German engineering company which had certified the stability of the dam) in October 2019.

Following the announcement of a USD 44 million investment package, work on a new filtration plant will commence at the Samarco mine, with the aim of restarting operations at the end of 2020. The government also has ambitious plans for infrastructure projects to improve transport links across the country.

The air of a new start is reflected in the steady growth being seen in the insurance and reinsurance market, which is also driven by a greater awareness of the need for protection, both among consumers and corporations. After the first relaxation of protectionist regulations concerning foreign investment in 2017, the Brazilian reinsurance market can now be considered as almost fully open to foreign reinsurers. There is no longer any mandatory rule for placing reinsurance in the local market, only the requirement to offer first choice to local reinsurers of 40% of each treaty or facultative risk.

The relaxation of the rules regulating the Brazilian market continued in 2019 with Decree No. 10.167/2019. The new rules allow insureds to cede 95% (a significant increase on the previous maximum of 10%), based on gross written reinsurance premiums in a calendar year, to 'Occasional Reinsurers'. Similarly, 'Local Reinsurers' are now permitted to transfer up to 95% of risk (based on the same measure), which is an increase on the previous 50% restriction. Occasional Reinsurers need only be registered with SUSEP (the Brazilian insurance regulator), without requiring a representative office in Brazil. With rates hardening in Brazil after recent losses, and the regulatory environment developing, there are opportunities for reinsurers at the top end of the market.

After its approval in July 2018, the Brazilian General Data Protection Law ("LGPD") is due to come into effect on 18 August 2020,[3] although there is now a proposal to postpone this date until 15 August 2022. Once in force, the LGPD must be observed in all data-processing operations carried out in Brazil, as well as foreign processing of personal data collected in Brazil or relating to individuals in Brazil. Breaches of the LGPD may lead to fines of 2% of annual revenue, subject to a maximum of BRL 50 million, and administrative sanctions, such as suspension of data processing activities.

In December 2019, the Ministry of Justice and Public Security hit Facebook with a USD 1.6 million fine for the misuse of personal data of almost half a million users. This is already a significant increase on the GBP 500,000 fine in the UK, and the introduction of the LGPD will put data controllers under more scrutiny. The LGPD includes a broad definition of "personal data", with organisations required to notify breach incidents within a "reasonable time". The uncertainty around how the LGPD will be interpreted and enforced poses a challenge for businesses inside and outside of Brazil, particularly in the financial services sector.

There is optimism among those insurers offering cybersecurity products that the demand for their products will grow exponentially during 2020 and onwards. SUSEP has stated its aim for 2020 is to promote the growth of the insurance industry and pave the way for Insurtech companies. It has already laid the groundwork with Circular No. 592/2019 of 26 August 2019, which permits insurers to offer products with flexible coverage aimed at insureds operating in the sharing economy. This was followed by a number of draft regulations aimed at stimulating and supporting innovation in the market. SUSEP hopes to attract new entrants to the market that will bring much-needed technological advances to traditional lines of business, such as motor, health and life insurance.

At present, the provisions relating to insurance contracts are contained in the Brazilian Civil Code of 2002. Despite signs that progress was being made in 2019, the long-running debate over the draft Insurance Bill has dropped back down the agenda for now.

One of the proposals contained in the draft Bill calls for a prohibition on the use of arbitration clauses in insurance contracts, which many argue would be a step backwards for the liberalisation of the market. The draft Bill currently contains a proposal for stricter requirements on insurers, including automatic confirmation of coverage if a denial is not properly reasoned. The market will be watching how the debate develops over the coming year, although we do not expect to see any significant progress.

The Brazilian courts continue to provide guidance on issues relevant to (re)insurers. Since the introduction of the new Brazilian Code of Civil Procedure in 2015 (Law No. 13,105), the reasoning in decisions of the Brazilian Superior Court of Justice[4] ("STJ") may be binding on lower courts. In 2019, the STJ provided some clarification on the interpretation of the three-year limitation period for claims for "compensation" under Article 206 of the Civil Code. The STJ stated that this provision applies only to claims alleging liability in tort, and therefore claims in contract are subject to a limitation period of 10 years. This clarification is helpful for (re)insurers writing civil liability insurance products for Brazilian insureds.

Argentina

In the final month of 2019, Alberto Fernández took over from Mauricio Macri as Argentina's new president, with former president Cristina Fernandez de Kirchner as his vice president. Macri's free-market policies saw the economy enter a downward spiral and inflation hit 54% before the election. The shift back to the left marks another turn in the economic and political road for Argentina since the financial crisis of 2001. In fact, the first look at the new economic policies suggest a policy U-turn by imposing higher taxes and loosening monetary controls.

Droughts between November 2017 and April 2018 notably hindered Macri's efforts to reduce inflation, with damage to exportable crops totalling billions of US dollars. Ultimately, investors were unwilling to finance Argentina's budget deficit, and Macri's fate was sealed when even the IMF rescue package failed to stabilise the economy.[5] The new government will need to address the debt problem before long-term investment returns.

2019 saw heavy rains in the northeast of the country, causing mass evacuations and power cuts. The rains were attributed to the effects of the El Niño weather pattern, due to the warming of the surface waters in the Pacific. Although a natural weather event, the impacts of El Niño and La Niña (the upwelling of cold water to the surface of the Pacific, usually following El Niño) are likely to increase in frequency and demonstrate more polarised effects, as global warming worsens.

On 28 June 2019, the then president issued a decree allowing businesses or individuals carrying out activities that pose a risk to the environment to take out surety insurance for environmental damage.[6] The requirement for mandatory environmental insurance has been in force since May 2017,[7] in order to guarantee the availability of funds to restore the environment, regardless of whether damage has occurred as a result of a sudden or accidental event.

The State would assume the role of the beneficiary of the surety insurance, whereas typical liability products see the State acting as the third-party claimant. (Re)insurers offering public liability insurance should therefore check that cover for pollution liability aligns with these mandatory requirements and any other insurance held by the insured. There are also strict restrictions on policy limits and excesses for environmental insurance and, more generally, for the insurance of public risks.

In 2017,[8] the Argentine insurance regulator ("SSN") commenced the relaxation of regulations regarding foreign reinsurers who are admitted to reinsure the local Argentine market. As of 1 June 2019, Admitted Reinsurers can compete with local reinsurers for 75% of all risks. However, there remains caution over entering a market which has been problematic for international reinsurers, underpinned by the current economic uncertainty and recent experiences of the unpredictable interpretation of Argentine (re) insurance law.

The Argentine courts are focused on compensating victims and protecting consumer rights. They will refer to this objective as justification for the broad interpretation of policy terms and, in some cases, ignoring terms altogether. This is particularly evident in cases involving public risks (e.g. railways and roads). Policy deductibles of more than 1% of the policy limit are at risk of being deleted entirely or reduced, and there are many examples of the Argentinean courts disregarding policy limits for being unreasonable or illogical.

There is also no established reinsurance law in Argentina. As a result, a court is unlikely to view the purpose and operation of a reinsurance contract as distinct from the original policy. Concepts such as "follow the settlements", and the circumstances in which the response of a reinsurance contract could be distinguished, are not typically recognised.

Colombia

2019 marked the second year of President Ivan Duque's constitutional period. Colombia sought to boost foreign investment through the development of the so-called "orange economy"; an economy based on the creative and cultural industries. Whilst the overall outlook remains favourable due to solid economic policies and continued growth, external trade imbalances, tighter financial conditions and ongoing migration pressures from neighbouring Venezuela will continue to be areas of concern in 2020. While not on the scale seen elsewhere in the region, protests involving hundreds of thousands of Colombians began in November 2019 and look set to continue into 2020.

The last year was noteworthy for the insurance industry, which saw growth in the first half of the year of around 11.4% in premiums, when compared with the first half of 2018. Funds for the Crop Insurance Premium Subsidy ("ISA") – a subsidy created for part of the premium for Crop Insurance in Colombia – increased by over 128.5%. This increase translated to an additional USD 22 million in the budget, which is destined to revitalise the local agricultural industry by means of the public policy called "Agriculture by Contract" that will see the government guarantee the price for produce from local farmers, regardless of the market fluctuations and weather events.

In line with the boost to the ISA funds, 2019 also saw subsidies granted for parametric insurance for crops. These subsidies have helped facilitate access to weather index insurance for smallholder farmers, such as through the CaféSeguro programme backed by the Blue Marble Consortium.

In other developments, the Superintendence of Finance created a new line of business called *Seguro Decenal de Daños* (10-year damages insurance). This product aims to protect homebuyers against damage affecting or originating in the structure of a new building, due to negligence or wrongful construction practices. From 2021, this insurance will be mandatory for building companies.

In respect of judicial decisions, the Supreme Court of Justice established that, in cases of suicide, a life insurance company will be able to deny coverage if it is able to demonstrate that there was a fraudulent intention on the part of the victim at the moment of the suicide. This proof was not required by the Colombian courts previously and has been highly criticised due to the obvious difficulties for insurers in obtaining proof of fraudulent intent.

Colombian law is one of the most developed in the region when it comes to the interpretation of insurance and reinsurance contacts – the Commercial Code and supplementary laws contain detailed provisions, which are supported by guidance in judgments by the Supreme Court of Justice. This includes recognition of the "follow the fortunes" principle in reinsurance contracts, as set out in Article 1134 of the Code of Commerce, and subject to the contractual terms agreed between the parties (Article 1136).

In this context, we reserve our final comment for the issue of most concern to insurers and reinsurers in the Colombian and international markets with regard to the interpretation of "claims-made" policies. Uncertainty over the enforceability of the "claims-made" trigger was introduced following some decisions adopted by the *Contraloría General de la República* ("CGR") – the maximum government authority in charge of fiscal control in Colombia. The CGR deemed claims-made clauses to be disproportionate, or even abusive, and stated the view that the Colombian Commercial Code and Law 389/1997, which regulates insurance contracts in Colombia, was not applicable in Fiscal Liability Proceedings.

After a period of consultation, the CGR revoked one of its more criticised decisions in 2019 and recognised the operation of "claims-made" clauses. This recent development has restored some confidence amongst (re)insurers underwriting D&O and professional risks in the country.

Chile

In the previous edition of this guide, we remarked that Chile remains one of the most politically stable Latin American countries, further to the re-election of Sebastián Piñera at the end of 2017. In 2019, President Piñera was forced to reshuffle his cabinet in response to mass protests that swept the country.

The protests were triggered by a proposed 3% price increase in metro tickets in Santiago, but soon gave way to violence and riots. Following demonstrations in 2006 and 2011, the protests marked a tipping point in the fight against economic inequality in Chile. Despite inequality falling over the same period, Chile still has one of the highest inequality rates amongst developed countries.[9] In the short-term, tensions have been eased by the planned referendum for 26 April 2020 that will ask the population whether they want a new constitution, but there are fears that this process could trigger more protests.

The Chilean insurance market has been hit hard by the protests, with property damage alone estimated at over USD 3 billion. The most pressing question is whether local businesses have sufficient limits in place. Insurers will be looking closely at whether their policies exclude damage arising from risks such as "civil commotion", "riots" and "public disorder", and the interpretation of these exclusions will be crucial. Another challenging coverage issue will be aggregation, particularly in relation to claims by insureds affected in different locations over a sustained period of time, such as supermarket chains.

The Chilean insurance market is amongst the most competitive and innovative in the region. The immediate impact of the civil unrest has seen commercial premiums double and the insurers introduce exclusions for "strikes, riots and civil commotion". In many property policies, cover for political violence had become automatic, due to soft market conditions and the view that Chile was low risk. The events of 2019 are likely to have a knock-on effect for the terms on which (re)insurers offer property cover in emerging markets across the globe.

It will be interesting to see whether the Chilean regulator steps in to regulate the response by the insurance market. Protection of the insured is the principal objective of Chilean insurance contract law,[10] and strict time periods must be complied with for the adjustment and payment of losses.

In our experience, it is important that both reinsurers and reinsureds adhere to the strict rules for the adjustment of insurance claims. This includes challenging the independent adjuster's final report within 10 days of it being issued, if appropriate. In the event of a dispute between an insured and insurer after the final report has been issued, the insured must commence arbitration proceedings with an arbitrator who is an insurance expert (if the loss value exceeds USD 400,000). This provides some comfort to insurers/reinsurers that higher value, more complex losses will be considered by specialists, rather than judges with little insurance experience or expertise.

Reinsurance is classified as being intended to respond as an indemnity policy for the reinsured, subject to the limits and conditions established in the contract.[11] There is also recognition that the terms of the reinsurance do not alter the obligations under the original policy,[12] and that the Chilean courts will look to "international use and custom" when it comes to interpreting reinsurance contracts. This recognition provides grounds for reinsurers in international markets to continue to use established principles, such as "follow the fortunes"/"follow the settlements", and clauses, such as claims cooperation and claims control.

The Courts in Chile are amongst the most specialised in the region and provide regular guidance on issues of relevance to the (re)insurance industry. In an important decision for the liability market, the Supreme Court clarified that it is the date of the manifestation of damage or injury that will trigger the four-year limitation period, as opposed to the date of the defendant's act or omission. It is worth noting here that, in cases of "environmental damage", there is a special limitation period of five years from the date of damage.[13]

Further to the creation of specialist Environmental Courts in 2012,[14] there is increasing scrutiny over operations impacting the environment and the liability for environmental damage. There is also recognition of the impact of climate change, following the severity of the 2017 wildfires and ongoing "mega-drought" in central Chile. The CMF (Financial Market Commission) is consulting on the introduction of laws that will require companies to report on their carbon footprint and environmental impact. In turn, there is a growing demand for environmental insurance products that will respond to the broad range of exposure faced by insureds in all sectors.

Peru

The Peruvian government is still dealing with the fallout of the 2018 impeachment and resignation of President Pedro Pablo Kuczunski, and investigation of several senior politicians and officials in relation to corruption charges. On 30 September 2019, President Martín Vizcarra unexpectedly dissolved Congress and called for parliamentary elections. His new cabinet, hastily appointed on 3 October 2019, will need to re-establish trust between the executive and legislative branches of government, and most importantly with the Peruvian people.

Oil and gas continues to be integral to Peru's economy, but ageing infrastructure undermines the productivity of an industry that has faced increased scrutiny after numerous major spillages over the past decade. According to a 2019 report by the Economy Committee of the Congress, there is an infrastructure gap of USD 159 billion across all areas. In relation to the oil and gas industry, the Government has identified the need for the construction of a pipeline from the Camisea gas fields and the modernisation of the North Peruvian pipeline that has been in service for over 40 years. In October 2016, the Ministry of Energy and Mines issued a resolution suspending key requirements relating to the maintenance of pipelines, with a view to allowing a transition period for operators to present a plan that will guarantee the safe and secure operation of the pipelines in the country.

Insurance penetration (for both business and property) in Peru remains low, although an increase in D&O risks is anticipated (following legislation concerning the liability of officers in public and private entities). In the wake of the Odebrecht scandal, Law 2408 was passed, which provides that in corruption cases, civil damages awarded to the state are immediately payable. There is uncertainty as to whether insurers would be able to exclude liability for such claims.

2019 brought positive developments and much needed certainty in relation to "claims-made" policies, following the October 2018 opinion by the Peruvian regulator, *Superintendencia de Banca, Seguros y AFP* ("SBS"), stating that such policies were not permitted under Peruvian law and would be declared null.[15] The opinion was based on a strict interpretation of the Peruvian Insurance Contract Law,[16] which describes the trigger for civil liability policies as being the occurrence of the harmful act – within the policy period.

After consultation with the domestic and international (re) insurance market and interested law firms, the SBS reconsidered its position on the validity of "claims-made" policies. The SBS issued a draft bill on 17 May 2019 to recognise that civil liability policies may respond to third-party claims made within the policy period or extended reporting period. This passed into law on 19 August 2019 by way of Statutory Law SS No. 3695-2019.

In effect, Peruvian law now allows for the use of "claims-made" triggers for cover in two scenarios: 1) responding to damaging events that occurred during a "retroactive period", unknown to the insured, which give rise to third-party claims during the policy period or extended reporting period; or 2) limited to events occurring within the policy period or extended reporting period, so long as the "loss" has not occurred at the time of placement.

The new law also specifies the need for the insured to be provided with an explanation (in a separate document) of how claims-made clauses work and their effect. All relevant clauses must be highlighted, as well as the parties, insured risk, date of issue, policy period and any retroactive or extended reporting period relating to claims by third parties. These obligations fall to the broker when the insurance is arranged through an intermediary. The insured should sign the policy and any endorsements.

Much of the concern that first gave rise to the SBS opinion appeared to stem from confusion over the distinction between the way a "claims-made" policy responds to a third-party claim and the time for the insured to bring its own claim for coverage under the policy. The new law clarifies therefore that the use of a "claims-made" trigger has no bearing on the 10-year limitation period for the insured to sue its insurer.

In 2018, new rules for reinsurance fronting arrangements came into force, permitting "pay-when-paid" provisions when an insurer cedes 100% of the risk. Peru is one of four jurisdictions (alongside Chile, Colombia and, since 2019, Ecuador), which has a specific definition for a reinsurance contract and that makes it independent of the underlying policy. Reinsurance is defined as obliging the reinsurer to meet the debt of the reinsured, within the agreed limits, as a consequence of its obligations under the insurance contract. The intent is reportedly to prevent insurers from using any delay by reinsurers as an excuse for late payment under the underlying policy. In practice, the interpretation of language used as part of the typical terms, conditions and exclusions contained in reinsurance contracts remains untested in the Peruvian courts.

Ecuador

The centre-left president, Lenín Moreno, is expected to struggle to implement an IMF-backed economic programme. October 2019 saw 11 days of violent protest after the government tried to scrap fuel subsidies that have been in place for 40 years. The protests forced the government into a U-turn, but the underlying tension between the demands of the IMF bailout package and indigenous groups in the country are unlikely to ease.

Politically and economically, Ecuador is one of the least stable countries in South America. President Moreno has now been in power for almost three years, and his shift to the centre (away from his predecessor, Correa) has triggered a rift in the Alianza Pais party. Moreno is focused on reducing public spending, tackling corruption and implementing major infrastructure projects. Progress, however, is constrained by the need to address the challenges of ongoing deforestation, historic pollution events and violence on the Colombian border.

The fallout from the Odebrecht scandal continued through 2019, with the discovery of leaked documents by a news agency in Ecuador. The documents show that the massive corruption scheme led by the Brazilian construction company across the region extended even further than had been publicly reported, including major infrastructure projects in the Dominican Republic, Panamá, Venezuela and Ecuador. Meanwhile, in January 2020 Odebrecht submitted a claim for USD 184 million in alleged unpaid costs against state-owned Petroecuador in relation to the construction of the Pascuales-Cuenca pipeline.

In September 2018, Chevron successfully overturned a USD 9.5 billion environmental judgment by Ecuador's Supreme Court, in the Permanent Court of Arbitration, at the Hague. It was found that Chevron's liabilities had already been settled by the Ecuadorian government and the judgment was "procured through fraud, bribery and corruption". In the previous edition of this guide, we commented that this is a damaging result for the Ecuadorian judiciary, which undermines the courts' credibility internationally. Since then, the Supreme Courts in Canada and the Netherlands have each rejected attempts by Ecuador to pursue the litigation.

Ecuador has borrowed USD 19 billion from China (repaid with 80% of Ecuador's oil exports) to invest in improving its infrastructure. This includes the construction of the Coco Coda Sinclair dam, which, despite promises to solve Ecuador's energy needs, has become another example of corruption at the highest

levels of government. Almost all officials involved in the project are now in prison, while there are serious concerns over the dam's structural integrity, with more than 7,000 cracks forming, the reservoir clogging with silt, equipment failing and the dam only running at half capacity. Ecuador's withdrawal from the OPEC signals an intention to keep increasing its oil output, which has exceeded OPEC quotas since 2017 when Moreno was elected.

Ecuadorian courts are focused on compensating the victim, and are prone to making significant damages awards. There are strict time periods for responding to insurance claims, but no established body of insurance jurisprudence. Until recently, it was arguably possible to reinsure an Ecuadorian risk subject to the law and jurisdiction of England or somewhere other than Ecuador. Opponents to this view point to the rule that requires insurance contracts to adhere to Ecuadorian laws.[17] The new Commercial Code, specifically Article 794, states that rules relating to insurance will also apply to reinsurance contracts by default, but with the possibility for the parties to expressly contract otherwise.

The new Commercial Code entered into force in Ecuador on 29 May 2019; it includes rules on the regulation of insurance contacts in the "Sixth Book" (Article 690 onwards). Amongst these provisions, it is established that the insurance contract is consensual and is perfected with the express consent of the insured party. Under Article 735, there is a description of the scope of cover, including that the insured may never profit from an insurance policy and that cover for financial losses (*lucro cesante*) must be provided for expressly.

Once accepted, cover is in place and the insurer is required to issue the policy within three days. In the event of a loss, subject to the presentation of all relevant documents and any investigation, the insurer is obliged to issue its decision on coverage within 30 days of a formal request for payment. In the event of a dispute, the insured has the right to bring its claim before the regulator (*Superintendencia de Compañías, Valores y Seguros*) for a determination of coverage, although there is a right of appeal to the Ecuadorian courts.

One important distinction in relation to third-party liability policies in Ecuador is that the third-party victim has no right of direct action against the insurer. This principle is confirmed by Article 757 of the new Commercial Code. There are also provisions specific to reinsurance contracts, including the obligation for a reinsurer to "follow the fortunes" of the cedant, unless the cedant has acted in bad faith. This provision, at Article 790, cannot be modified by the parties and it will therefore be important for reinsurers to consider its effect when providing cover for Ecuadorian cedants.

On the other hand, the new regulations imply an advance in the digitalisation of processes, due to the fact that insurance policies and their modifications or renewals are allowed to be issued through any digital or electronic transfer and registration system. However, for the commercialisation of policies by telephone, where the payment is stipulated by direct debit or automatic collection of an electronic account, there is still a need for express acceptance, using electronic means or channels for this purpose.

Bolivia

The October 2019 election saw Bolivian President Evo Morales briefly return to power amid accusations of election fraud. It has been widely expected that it would be Bolivia's former president, Carlos Mesa, who would be making a return. The resulting protests and violence resulted in more than 30 fatalities and forced Morales to step down – he is now seeking asylum in Argentina. There is uncertainty over how long the interim government, led by Jeanine Áñez, will be able to survive.

In spite of the current unrest, long-term economic growth is expected to be among the strongest in the region thanks to robust domestic demand. Likewise, the insurance industry is predicted to grow at 5% over the next three years, following 11% growth in 2018. Much of the growth is expected in the modernisation and simplification of traditional lines of business – some of the 32 licensed insurers have started to launch mobile applications for the distribution of insurance products.

Following the attention on policies with "claims-made" triggers in Colombia and Peru, it is interesting to note that such policies are not specifically regulated under Bolivian law. Under Article 981 of the Bolivian Code of Commerce, any policy will be deemed as null if the risk has disappeared or the loss has already occurred. However, there is an exception to this position if two conditions are met: (i) the parties to the insurance policy were not aware of such circumstances; and (ii) the policy extends coverage to a period prior to its inception. As such, the common view is that clearly worded "claims-made" policies, preferably containing a retroactive date, will be enforceable.

In 2019, there were important regulatory developments relating to workers' compensation. Most notably, the Compulsory Work Accident Insurance Law No. 1155 for the Workers in the Construction Sector obliges construction workers to purchase a yearly policy for workplace accidents to cover medical expenses and payment for death or permanent total disability. Any person or entity that hires or subcontracts construction workers is obliged to check that the cover is in place, or they will assume liability and face sanctions. The subsequent Supreme Decree No. 4058 was issued to clarify the terms of the mandatory coverage.

Venezuela

Venezuela is in a downward spiral of economic, political and social crisis. The UN has been highly critical of the President Maduro Government strategy "aimed at neutralising, repressing and criminalising political opponents…".[18] The IMF predicts a further and steeper decline in the economy to be reflected by a 35% decrease in GDP in 2020. It is now estimated that almost five million Venezuelans have left the country, mostly qualified professionals, who now reside in neighbouring countries (Colombia, Ecuador, Peru and Chile), as well as the USA and Spain.

The difficulties of state-owned PDVSA continue unabated, as highlighted by a succession of major incidents over recent years. Oil exportation has reduced and currency controls have failed to address ongoing hyperinflation. Sanctions issued by the EU remain in place and the US strengthened its sanctions regime in 2019 by freezing PDVSA assets in the USA, estimated to be worth USD 7,000 million, as well as income generated by the sale of oil.

Given the sanctions (and ever-increasing list of individuals and entities), reinsurers in international markets will need to take extra precautions before reinsuring public or government figures, bodies or state-owned companies. The ability of reinsurers to undertake any form of Venezuelan business is subject to a volatile and unpredictable legal regime. A change in the law in 2019 gave the Superintendent of Insurance Activity full control over the selection of arbitrators for (re)insurance disputes.

Conclusions

As demonstrated by the recent and widespread protests, there is a sense that countries across Latin America need to make a leap forward to introduce policies that promote transparency and tackle corruption.

Local insurance markets are growing steadily, and it is a positive sign that previously protectionist regimes such as Brazil and

Argentina are opening up to foreign markets. Careful attention must be paid to the particular nuances of each country's civil liability regime, with the trend for broader duties on companies and their management, as well as stricter enforcement. In response to the recognition of the need to stamp out corruption, and the increasing risks brought about by cyber risks and climate change, there is an opportunity for insurers to support innovation in the region.

The reinsurance picture is becoming increasingly complex, with a mixture of capacity provided by national, "Multi-Latina" and international markets. It may become more difficult for international markets to compete on price, but a more open and developed regulatory environment may also provide support for the development of innovative products in traditional markets, as well as targeting the more specialised markets.

As the region becomes sophisticated, the interpretation of insurance and reinsurance contracts should become easier to predict. The evolution of "claims-made" policies in Colombia and Peru, as well as the introduction of provisions specific to reinsurance in the new Ecuadorian Commercial Code, point to progress in this area. However, care must be taken to understand the development of the laws and regulations on (re)insurance in each jurisdiction, as the default position will be to favour the insured in the event of any ambiguity. Furthermore, the rules in the local market may make it difficult to implement a new product, so (re)insurers must adapt their approach on a country-by-country basis.

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Middle East Overview


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Introduction to the Middle East

Despite various political turmoils, the insurance sector outlook for the region remains stable. Two of the region's largest markets, the United Arab Emirates ("UAE") and the Kingdom of Saudi Arabia ("KSA"), are each in excess of USD 10 billion in gross written premiums – underlining the region's increasing significance to global insurance markets.

As Middle East markets continue to mature due to new regulatory requirements, mandatory lines of business (primarily, motor and health insurance) are driving overall growth. Profitability remains a key concern for insurers, as investment income is impacted by low interest rates, weak equity performance and a stagnant real estate market. Margins remain poorly governed by obsolete processes, outdated legacy systems, low productivity and high incidences of fraud, especially in motor and health lines. The Issuance of Life Insurance Regulations in the UAE, which put a cap on commission limits, is a revolutionary step that will change the life insurance market in the UAE and gradually in the region.

In increasingly competitive markets with price and margin pressures, most insurers are cutting costs to maintain their bottom line. Despite these efforts, short-term financial results in some markets are impacted by regulatory change and the need for better reserving – leading some local insurers to actively look at consolidation.

Low levels of penetration are both a challenge and an opportunity. We believe that insurers willing to invest in innovation and digital technology in Middle East markets will reap significant benefits. Penetration levels will improve as insurance companies break the barriers of traditional distribution channels. This will require insurers to adopt robust actuarial modelling techniques to improve pricing sophistication, apply data analytics to reduce fraud, focus on customers and adopt advanced technology to revamp operations.

We expect economic activity in the region to revive, lead by the Expo 2020 in Dubai and Saudi Arabia's Vision 2030. The industry has many opportunities to capitalise on the economic revival, particularly with large-scale government spending on infrastructure and mega projects. We expect the life and savings culture to develop, as GCC States look for ways to reduce subsidies and large government-funded social security schemes to retain the earnings locally.

In the following parts of this chapter, we will look briefly at the insurance/reinsurance landscape of each of the major economies in the Middle East.

United Arab Emirates

While the overall economic slowdown and disruption in the market has also had some impact on the insurance sector, the UAE insurance market still seems to be going strong. Market reports state that loss ratios continue to present a positive outlook and the total written premium of the industry for the half year ending 2019 was estimated to be AED 13.7 billion, which shows a growth of 9% from the same period for the previous year.

Insurance in the UAE is primarily regulated under the Federal Law No. 6 of 2007 concerning the Establishment of the Insurance Authority and Regulation of Insurance Operations (the Insurance Law). The Insurance Law sets out the requirement for an entity to be able to carry out insurance business in the UAE and sets out that such entity must be either a UAE public stock company, with at least 51% of capital held by UAE or GCC nationals, or legal entities fully controlled by UAE or GCC nationals, or a branch of a foreign insurer. However, the latter category is only permissible if the UAE market requires additional capacity and/or the foreign insurer provides products which existing local insurers do not.

Derived from UAE Insurance Authority information, as of the end of 2018, there are 62 registered and regulated insurance companies, of which 35 are national and 27 are foreign insurance companies. Within the 62 companies: 17 companies (15 national and two foreign companies) are licensed to carry out all insurance activities (including life, property and liability insurance); 32 companies (15 national and 17 foreign) are licensed for property and liability only; and 12 companies (three national and nine foreign) are licensed to provide life insurance only. Twelve companies within the 62 are Takaful insurers.

The Dubai International Financial Centre ("DIFC") and the Abu Dhabi Global Market ("ADGM") are also allowed to license insurance/reinsurance companies and intermediaries, but such entities are not allowed to carry out any direct insurance business in the UAE. DIFC and ADGM have their own Insurance framework and regulator – the Dubai Financial Services Authority ("DFSA") and Financial Services Regulatory Authority ("FSRA"). The regulations in these jurisdictions are modelled on the previous United Kingdom financial regulator, the Financial Services Authority, and the insurers and reinsurers operating in these financial free zones must be authorised by the home regulator. Such insurers can only write (directly) insurance for entities situated or risks arising within the financial free zone and/or outside the UAE. Reinsurers in the DIFC authorised by the DFSA can provide reinsurance capacity for UAE onshore risk, as is the case for the overseas reinsurance market.

As with the trend across the region, the UAE insurance market is led by the compulsory classes of insurance, motor and health, the latter of which is compulsory across Dubai and Abu Dhabi, and the former compulsory in all of the UAE. UAE health insurance is also regulated by the health regulator of the

respective Emirate, the Dubai Health Authority ("DHA") and the Department of Health Abu Dhabi ("DHAA"), which set out its own regulatory regime to which every insurer and insurance intermediary must adhere when dealing with health insurance in these Emirates.

While the above list could go on, the UAE has been at the forefront of regulatory overhaul over the last 12 months, and we set out below in chronological order some of the major developments that are likely to have a medium- to long-term impact on the UAE insurance sector:

- January 2019 – Cabinet Resolution No. (7) of 2019 Concerning the Administrative Fines Imposed by the Insurance Authority – This resolution was a rather unexpected start from the Insurance Authority for 2019. The circular sets out the list of violations applicable to insurers, brokers, TPAs, consultants and even third parties, and administrative fines for breach of such listed violations. Historically, fines and penalties for violations were listed in the respective laws and regulations with very minimal application by the regulator, and this resolution is expected to change the supervisory framework of the insurance authority.
- January 2019 – First draft of the Electronic Insurance Regulations, dated 14 January 2019 – The Insurance Authority's draft 'Board of Directors Resolution Concerning the Electronic Insurance Regulations' intends to govern any insurance business carried out online or concluded electronically in the UAE. These draft regulations apply to insurance companies, insurance brokers, insurance agents and health insurance TPA companies, and prescribe the requirement for such entities to obtain a pre-approval from the Insurance Authority in relation to their electronic insurance operations. The draft regulations also specify the nature of the products that can be sold online, and some of the products such as investment-linked life insurance that cannot be sold online. The intention of these regulations appears to be to register and regulate any entity offering insurance online as an agent, broker or insurance company, and seems to be targeting the unlicensed web aggregation websites that are offering comparison of insurance products. A revised draft was published later in the year (details below).
- April 2019 – Decision No. (50) of 2019 Concerning Enhancing the Shari'a Controller's Role in Takaful Insurance Companies Operating in the State – The decision clearly sets out the qualification and appointment procedure for the Sharia Controller in a Takaful insurer, and that the appointment must be on a full-time basis and on recommendation of the Sharia Supervisory Board of the Takaful insurer. In addition, the decision also sets out the mandatory functions that the Sharia controller must perform in a Takaful insurer.
- April 2019 – Board of Directors' Decision No. (15) of 2019 On the Instructions Concerning the Rules of Ownership Ratios in the Capital of Insurance Companies – This decision of the Insurance Authority is relevant to all insurance companies operating in the UAE and prescribes the disclosure requirements applicable on natural and corporate persons who wish to become stakeholders of insurance companies. This decision also introduces the concept of "Strategic Partner", who could even be a foreign person, provided that this does not change the ownership ratio of UAE nationals.
- May 2019 – Insurance Authority's Board of Directors Decision No. (23) of 2019 Concerning Instructions Organizing Reinsurance Operations – The Insurance Authority issued the final reinsurance regulations after a few tweaks to their prior drafts of the reinsurance regulation issued in 2018. While the expectation was that the regulations would introduce mandatory local retention on some lines of business, the regulation focused largely on setting up local reinsurers in the UAE, the capital requirement for which has been set at AED 250 million, with 51% ownership restricted to UAE nationals.
- July 2019 – Insurance Authority Board Resolution No. (33) of 2019 Concerning the Regulation of the Committees for the Settlement and Resolution of Insurance Disputes – A follow up from the amendment to the Insurance Authority Law issued in 2018, this resolution from the Insurance Authority provided the manner in which the Dispute Resolution Committee will be formed and the manner in which it will carry out its functions, with membership being restricted to one calendar year. The purpose of the committee is to reconcile the differences between parties and if they fail to do so, the parties are free to go through their standard dispute resolution process.
- October 2019 – Insurance Authority Board of Directors' Decision No. (49) of 2019 Concerning Instructions for Life Insurance and Family Takaful Insurance – These regulations on life insurance were issued after three versions of the drafts being shared for public consultation over the last two-and-a-half years. These regulations limit the commission that can be paid to an intermediary for solicitation of life insurance and also cap upfront payments of indemnity commission by an insurer to such intermediaries, which is a highly prevalent market practice. These regulations are revolutionary in what they aim to achieve, and while they may lead to a drop in incentives to the distribution channel, eventually such costs will be passed on to policyholders; this will be a very positive change for the life insurance sector in the UAE.
- October 2019 – Insurance Authority Board of Directors' Decision No. (40) of 2019 Concerning the Amendment of Certain Provisions of the Insurance Authority Board Decision No. (3) of 2010 On the Instructions Concerning the Code of Conduct and Ethics to be Observed by Insurance Companies Operating in the UAE – This decision extends the applicability of the Insurance Authority's Code of Conduct to "insurance-related professions". The Code of Conduct provides the various terms and conditions that must be complied with by any entity licensed by the Insurance Authority, including but not limited to guidance on operations, publicity and advertisement, pricing, proposal form, policy wording, claims and renewal.
- October 2019 – The Insurance Authority Board of Directors' Decision No. (41) of 2019 Concerning the Supervisory Rules for the Experimental Environment of Financial Technology in the Insurance Industry – This decision lays down the financial technology regulatory framework of the Insurance Authority. The decision is aimed at supporting fintech companies and transforming the UAE insurance market into a smart insurance market. This is a great forward-looking step by the Insurance Authority, which will likely result in the development of indigenous solutions in the insurance sector and has set a high benchmark for other insurance regulators in the region.
- October 2019 – The Insurance Authority Board of Directors' Decision No. (42) of 2019 On the Amendment of Certain Provisions of the Insurance Authority Board of Directors' Decision No. (13) of 2018 Instructions Concerning Marketing Insurance Policies through Banks – This decision amends certain provisions of the Bancassurance

Regulations. The Bancassurance Regulations currently require the Designated Officer of the bank to acquire practical training of no less than two months at any insurance company, which has now been replaced by a training requirement of 30 (thirty) hours. Further, the decision provides that insurance companies can utilise the Bancassurance channel for distribution even in the Emirates where they do not have an Insurance Authority licensed "Branch", if they have either a "Point of Sale" in such Emirate or provide insurance services through electronic means.

- October 2019 – Administrative Decision No. (140) of 2019 Concerning the Exclusion of Some Insurance Policies from the Requirement of Being Written in the Arabic Language – Administrative Circular No. 7 of 2019 relating to Administrative Fine stated that if an insurer does not comply with the requirement of issuing the insurance policy in Arabic, fines could be levied. This Decision lists the policies which have been exempted from this requirement of translation to Arabic, such as marine and aircraft policies, oil and gas-related insurance policies, space-related insurance policies and other insurance policies of international nature. The Decision further provides a list of documents that need to be submitted to the Authority for approval of the policy wordings, in relation to each life insurance policy and those in relation to general insurance policy.
- December 2019 – Draft of the Electronic Insurance Regulations, dated 24 December 2019 – The revised draft of the Electronic Insurance Regulations identifies "web aggregation companies" as a separate category, which require prior approval of the UAE Insurance Authority and who will work in conjunction with a licensed insurance broker. This draft also mentions the concept of "digital insurance broker", but does not provide any details around the requirement and licensing procedure; the final draft will hopefully cater to these.

On the back of better loss ratios and underwriting results, most of the insurance companies have shown positive results and continue to maintain a positive outlook for the year ahead. However, we anticipate the year 2020 to be a year of consolidation for Takaful insurers, conventional insurers, insurance brokers and third-party administrators. Consolidation would likely lead to the exit of players with a short-term strategy and bring in more experienced players who are ready to invest in the market with a long-term perspective.

Kingdom of Saudi Arabia

In the last year, Saudi Arabia has announced a number of economic measures and projects in a bid to boost the non-oil economy. One such announcement was the opening of Saudi Arabia to tourism by now allowing tourist visas and developing the supporting infrastructure. The promotion of this has brought Saudi to the attention of world media, and it is likely that this will have a positive impact on the insurance industry; it will go a long way in bringing sustainability to such industry. Also, allowing females to drive cars has been in the news, and is likely to have a medium to long-term impact on the motor insurance sector and overall economy. Saudi Vision 2030, formed on similar lines to Dubai 2020, is an inclusive plan for reforming Saudi Arabia's overall economic structure, aiming to develop various industries and sectors and drive the economy forward. It is therefore expected that Saudi Vision 2030 will also lead to opportunities in the insurance sector.

To achieve the targets laid down in Vision 2030, the Saudi insurance market has been going through an evolution with the introduction of more developed regulations, reforms and other trends. Following the global and local surrounding economic conditions, along with the oil price downturn over the last few years, the insurance industry was affected by a substantial increase in losses of some insurance companies leading to numerous customer complaints.

To overcome such difficulties, the Saudi Arabian Monetary Agency ("SAMA") has formulated tougher rules for insurance companies as part of a drive to support financial solvency. Accordingly, SAMA has compelled insurance companies to review and restructure their businesses and ultimately undergo consolidation. Given the size of the economy and the fact that Saudi Arabia's insurance market is largely fragmented with small companies competing against each other, the insurance industry needs consolidation. SAMA has suspended several insurance companies from issuing new insurance contracts in the past few months until they increase their capital and meet the solvency requirements.

The insurance market in Saudi consists of three business lines: health insurance, protection & savings insurance, and general insurance, which in turn includes seven activities, namely, motor, marine, aviation, energy, engineering, accidents & responsibilities, and property & fire insurance. Health insurance is the largest insurance segment in the Saudi market, with a market share of 53.7% in terms of gross premiums in 2017, followed by motor insurance, which held 30.7%, and followed by general insurance, with 13.1%. Protection and savings insurance accounted for only 2.6% of the total market premiums.

In terms of regulatory changes, SAMA recently announced the separation of retail and reinsurance broking, with the aim that this would lead to better specialisation for each stream of broking. This decision is being lauded by most of the international brokers as it helps to recognise their expertise.

SAMA has also been a pioneer in initiatives for motor insurance business, recently launching a dedicated dispute resolution centre for motor businesses. In addition, SAMA recently signed a co-operation pact with the General Directorate of Traffic aiming to automatically check insurance records in cases where drivers have committed traffic violations. Insurance companies will be linked with the Traffic Police Department through electronic terminals, to guarantee enforcement of compulsory insurance on all vehicles and force motorists of illegally uninsured vehicles to purchase insurance coverage. This step is expected to significantly increase the percentage of insured vehicles in the coming years.

The Solvency II Directive provides a regulatory framework for a new risk-based capital and supervisory regime for almost all European Economic Area ("EEA") insurers and was implemented on 1 January 2016. Non-EEA insurers need to remain competitive with EEA insurers, and therefore may need to evaluate the adoption of Solvency II within their businesses. In January 2018, the United Arab Emirates was the primary country in the Gulf Region to fully implement a model based on Solvency II. It is likely that Saudi Arabia will follow shortly, and it has already introduced regulations in relation to risk management, capital adequacy, and solvency requirements, which will readily provide the foundations for a Solvency II model. SAMA has periodically introduced relevant reforms in the insurance sector. Should insurance regulations move toward the Solvency II model, it is expected that diversified insurance companies will benefit. This would most probably lead to market consolidation, and consequently market growth.

Qatar

Over the past decade Qatar's insurance industry has emerged as one of the fastest growing in the region, showing a compound annual growth rate of 19.7% in total gross written premiums ("GWP") between 2011 and 2016, according to Swiss Re. The expected recovery in energy prices, increased infrastructure spending by the government in the run up to the FIFA World Cup 2022 and the introduction of new products focused on SMEs are expected to drive the growth of the insurance market.

There are two main jurisdictions which govern the Qatar insurance sector:

1. Central Bank Law, Law No. 13 of 2012 (the "Central Bank Law"), which came into force in January 2013, issued through the Qatar Central Bank, related to the supervision and control over financial institutions including insurance companies, replacing and re-appealing the 1966 Decree and Law No. 33 of 2006; and
2. Qatar Financial Centre ("QFC"), namely Law No. 7 of 2005 as amended ("QFC Law"). It has its own legal and regulatory regime. The regulation of a QFC-licensed entity falls outside the jurisdiction of the law of the State.

The Central Bank Law confirms that the Qatar Central Bank is the primary regulator of financial institutions, including the insurance/reinsurance sector. The Central Bank Law deals with several oversight and regulatory controls including consolidation, run-off, mergers of insurance/reinsurance institutions, credit rating agencies, and insurance intermediaries, including providing conduct of business provisions in treating customers fairly and resolution of failing insurance/reinsurance companies.

Non-admitted insurance is prohibited under the Central Bank Law. Article 205 of the Central Bank Law imposes a specific penalty for providing insurance services including underwriting and placement without a licence from the Central Bank. Article 205 imposes liability of imprisonment and a financial penalty in the form of a fine. Under the previous law, a prescribed penalty did not exist for providing insurance services in Qatar without a licence.

Qatar has 14 insurers operating in the State of Qatar and 12 in the QFC comprising eight conventional and four Takaful companies. Under Qatari Law, a company that intends to carry out insurance/reinsurance operations must be licensed by the Central Bank of Qatar. Setting up in the QFC, however, provides considerable administrative independence from the State, as there is exemption from the licensing requirements of the State, and entities within the QFC are allowed to be 100% foreign-owned, where those entities can write risks both onshore and offshore. The top three insurers in Qatar in terms of GWP are: Qatar Insurance; Doha Insurance Group; and Qatar General Insurance and Reinsurance.

Recent regulatory development in Qatar's insurance market:

- The Qatar Central Bank ("QCB") introduced minimum capital requirements of QAR 100 million (USD 27.4 million) and instructed the country's insurers to schedule reports on automated systems, in accordance with modern international standards. Moreover, the regulator has implemented stringent compliance rules in line with the second strategic plan for the Regulation of the Financial Sector between 2017 and 2022.
- Recently, the governor of the Central Bank of Qatar ("CBQ") issued a decree (Decree No. 7 of 2019) which included instructions for the licensing, regulation and supervision of insurance-related service providers. These new regulations aim to develop the insurance sector by building the required legal framework and protecting the rights of policyholders.

Apart from the above regulatory development, there are a few developments which are yet to be implemented by the Qatari Government:

- Health insurance
  Qatar has also been grappling with its health insurance scheme. In 2015, the Government cancelled "Seha", the mandatory health insurance programme scheme administered by the National Health Insurance Company ("NHIC"). The Ministry of Public Health, Ministry of Finance and QCB then formed a committee to consider the introduction of a new mandatory health insurance scheme that would be managed by the insurance industry. The details of the new scheme have not yet been made public, and there is no definitive date or clarity on its implementation.
- Value Added Tax ("VAT")
  The introduction of VAT in Qatar was originally expected in 2019, but was recently deferred until an as-yet unspecified date; it is also likely to present difficulties to the domestic industry.

Qatar's ambitious infrastructure programmes under the Qatar National Vision 2030 programme (projected GBP 140 billion investment), which will focus on economic, social, human and environmental development, are likely to benefit the insurance sector as well. Additionally, Qatar will be the first Arab state to host the FIFA World Cup in 2022, and as preparation progresses, the insurance sector, particularly property, casualty, and retail lines, should be positively impacted.

Kingdom of Bahrain

The insurance industry in the Kingdom of Bahrain is projected to grow at an annual average of 7.3%, from USD 0.74 billion in 2016 to USD 1.05 billion in 2021. Effectively, the country's insurance industry is home to 36 insurance firms, of which 25 are locally incorporated, including six Takaful providers and two each of reinsurer and reTakaful firms.

Hence, Takaful has a strong base in Bahrain, with a share of 22% in the country's total insurance GWP in 2016. Its contribution is mainly high, at over 30% each in medical and motor business lines. Foreign insurance providers comprised eight conventional insurers and three reinsurers. The more interesting development in the Bahraini market over recent years has been a sustained expansion of reinsurance activity. Reinsurance firms licensed to operate from Bahrain have grown steadily in number since 2006.

The Central Bank of Bahrain ("CBB") is a public body established by the Government under the Financial Institutions Law 2006 (the "2006 Law"). It is responsible for maintaining monetary and financial stability in Bahrain and is also the single integrated regulator of Bahrain's financial services sector. Article 40 of the 2006 Law provides that no person may undertake a 'Regulated Service' in the Kingdom of Bahrain unless licensed by the CBB. Regulated Services are defined as financial services provided by financial institutions, including those governed by Islamic Sharia principles.

In its capacity as the regulatory and supervisory authority for all financial institutions in Bahrain, the CBB issues regulatory instruments with which licensees and other specified persons are legally obliged to comply. These regulatory instruments are contained in the CBB Rulebook. The CBB Rulebook is divided into seven volumes, covering different areas of financial services activity. Breach of a Rule contained in the CBB Rulebook can lead to a variety of sanctions being taken against a licensee.

The CBB's wide scope of responsibilities allow a consistent regulatory approach to be applied across the whole of the Kingdom's financial services sector. This, in turn, gives Bahrain a key competitive advantage relative to other GCC states.

Growth in life insurance is likely to be aided by an anticipated rise in population and that in non-life will be driven by revenue diversification efforts, improving business activity and spending on healthcare. On 30 May 2018, Bahrain passed Law No. 23 of 2018 promulgating the Health Insurance Law (the "Law"). The Law came into force on 1 December 2018. Prior to the Law, there was no standalone health insurance law, as health insurance was governed by a number of different laws overseen by the Ministry of Health. The Law applies to all nationals, residents and visitors (the "Beneficiaries"), subject to certain limited exceptions. These exceptions include: civilian and military personnel of the Bahrain Defence Force (the "BDF") and their families; hospitals and medical facilities affiliated with the BDF; and foreigners associated with diplomatic and related missions in Bahrain. Mandatory health insurance benefits will be procured through a dedicated fund, where insurance contributions will be deposited into the Fund. It is anticipated that the fund will provide insurance coverage via licensed insurance companies authorised to pay the beneficiary claims acting as facilitators between the fund and the insured member. It is believed that the law will be enforced through residency requirements and other immigration conditions.

While short-term economic conditions appear stressed, significant investments planned by the Government and a potential rebound in crude oil prices are expected to improve the economic climate in the country.

Kuwait

The insurance sector in Kuwait is expected to reach USD 2 billion in 2024, registering a CAGR of 8.2% from 2019. Factors driving the market include the healthy population, strong infrastructure projects in the pipeline and the establishment of a separate regulatory body for the insurance sector.

Due to mandatory third-party motor insurance, motor is the largest insurance line, accounting for nearly 30% of the country's GWP. Health and life are the other key segments. A growing base of population and recouping economy presents a large opportunity for the insurance players to penetrate the market, given the present low penetration levels.

The presence of 23 local players and 10 foreign companies in the small insurance market has led to intense competition. Limited regulatory oversight and permission to hold 100% ownership have attracted many foreign insurers, including Takaful providers. Nevertheless, domestic firms lead the insurance industry with the top five local players accounting for more than 56% of the country's GWP.

Both the age of the insurance law and the lack of a specialised regulatory body pose challenges to the expansion of the industry. The relatively unregulated market allows smaller players to compete with larger operations by reducing premiums to levels that are unsustainable, which Kuwait's more established firms are unable to respond to without violating their underwriting principles. It is therefore this segment of the market that has been most vocal in its call for regulatory reform.

Rather than being overseen by an independent regulator, the domestic insurance industry is governed by the Ministry of Commerce and Industry ("MoCI") through its Insurance Department. To date the, MoCI has not sought to introduce a solvency framework in a similar vein to the EU's Solvency II, which is widely seen as the global standard. Neither has it sought to control the actuarial practices of domestic insurers – the process by which they apply probability and statistical theory to price their products – as its neighbouring jurisdictions have done.

The current requirements and effects of the current legislation:

- Locally incorporated non-life insurance companies must comply with a minimum capital requirement of KD 5 million (USD 16.5 million), while reinsurance companies must meet a level of KD 15 million (USD 49.6 million).
- Insurance companies must deposit guarantee funds in a Kuwaiti bank or a Kuwaiti branch of a foreign bank, the amount of which depends on the number of insurance lines that the company is licensed to offer, and ranges from KD 500,000 (USD 1.7 million) to KD 1 million (USD 3.3 million).
- The foreign insurance companies which operate branches in Kuwait are exempt from capital requirements.

The Government is looking at implementing a new insurance law and setting up an autonomous body to regulate the industry. Moreover, in a move to reduce the burden of health costs on government coffers, members of parliament have introduced mandatory health insurance for visitors. Such developments are likely to set a progressive path for the insurance sector.

Sultanate of Oman

The Omani insurance market looks to enjoy positive growth prospects in the next two to five years, even while short-term growth may be subdued. Oman has a young, growing population that is progressively becoming aware of the benefits of insurance. The development of explicitly Sharia-compliant Takaful insurance products in Oman will support awareness of the insurance sector and the benefits of insurance protection in certain segments of Omani society. Oman's insurance sector, although small, has outperformed many of its peer countries in terms of return on equity in the recent past.

The principal legislation governing conventional insurance activities in Oman is provided under Royal Decree 12/79 (Insurance Companies Law). Separate legislation has applied to Takaful operators since 2016. The law of 1979 liberalised the insurance market in Oman from previous competitive restrictions in favour of "national" companies. In 2004, the supervision of the insurance sector was moved from the Ministry of Commerce to the Capital Market Authority ("CMA") under Royal Decree 90/2004 in order to develop and restructure the legislative and regulatory framework of the insurance sector. Since then, the CMA has issued several circulars, laws and regulations looking to adopt global best practice whilst taking local market conditions and requirements into account. Further implementing regulations for the Takaful law are currently being drafted by the regulator. This includes, *inter alia*, the Sultani Decree number 39/2014 in relation to the legal form and the share capital requirement of companies that conduct insurance business in Oman.

Under the new CMA regulations, all insurance companies (excluding foreign branches) must convert to public joint stock companies, divesting a 25% stake owned by promoters, instead of the normal 40%, in initial public offerings, and increase their minimum paid-up capital from USD 12.9 million to USD 25.9 million. In the long-term, these regulations are expected to improve insurers' access to funds, strengthen capital, increase transparency and enhance financial strength. This should result in market consolidation and help ease competitive pricing pressures.

Recent regulatory development in the insurance sector:

- Residents in Oman will be required to have in place a minimum level of medical insurance coverage with minimum benefits pursuant to the prescribed provisions of *Resolution No. 34 of 2019 For the Issue of Unified Healthcare Insurance Policy Form*, which was issued by the CMA as at 24 March 2019 and is now in force.

- The CMA issued Takaful regulation *vide* its Decision No. 103/2019 indicating finalisation of the legislative framework for Takaful products and the companies operating in this field. By issuing this legislation, the CMA has aimed for:
  - Clear clauses for segregation of policyholders' and participants' funds.
  - The establishment of a Supreme Sharia Supervisory Committee, Sharia Supervisory Committee and External Sharia Supervisor to ensure sound practices of Takaful.

Although the Omani insurance market is facing challenges due to low oil prices and the resulting macroeconomic environment, it is poised for robust long-term growth, benefitting from favourable regulations, government diversification policies to increase private participation and a strong pipeline of infrastructure investments.

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Anand has extensive experience in advising insurance companies, reinsurers, insurance brokers and agents across multiple jurisdictions on incorporation, distribution strategy, regulatory, compliance and other advisory matters. Having worked across jurisdictions, he is able to provide cross-jurisdictional advice to financial services clients who have a global footprint.

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Anand is a regular contributor of articles and commentaries for local insurance magazines and online publications on current topics in the GCC insurance market. He was recently recognised by the *India Business Law Journal* as one of the go-to lawyers for India-related transactions.

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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

The Argentine Superintendence of Insurance (*Superintendencia de Seguros de la Nación*) (SSN) is the government body responsible for regulating and supervising the insurance and reinsurance industry. Insurance companies are also subject to the jurisdiction of other government authorities for certain specific aspects of their business (e.g., the Public Registry in charge of legal entities, the tax authority, consumer protection authorities, Superintendence of Labour Risks, Financial Information Unit, and the Central Bank of the Argentine Republic).

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

In order to set up a new insurance (or reinsurance) entity a company is required to obtain a licence from the SSN. Among other requirements, a company must:

- Have insurance or reinsurance activity as its exclusive corporate purpose.
- Comply with minimum capital requirements.
- Register with the Public Registry.
- Submit information on the proposed management and organisational chart, main business policies, customer service guidelines, risk management policies, policies preventing money laundering, etc.
- Provide a chart with the group structure, identifying all affiliates, as applicable. The company must also provide information regarding transactions with and links between affiliated companies.
- Present a feasibility report and business plan.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

No, persons, goods and any other insurable interest of Argentine jurisdiction can only be insured with insurers established in Argentina and licensed by the SSN.

Reinsurance and retrocessions must be placed with either local reinsurers or, upon certain conditions and limitations, with foreign reinsurers admitted by the SSN. Local reinsurers are established in Argentina and must maintain local capital.

Admitted reinsurers are foreign reinsurers that act from their home offices and are registered with the SSN. Admitted reinsurers may write certain portions of Argentine risks subject to limitations set forth by the SSN (e.g., for contracts starting from July 1, 2019 – up to a maximum of 75% of premiums ceded under the contract).

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

The Insurance Law No. 17,418 (IL) provides for a number of so-called mandatory provisions that cannot be contractually derogated nor modified. Also, there are a number of terms that are included in the insurance contract which can be modified only in favour of the insured (e.g., the possibility of mitigating the effects of misrepresentation in the absence of bad faith, the term for reporting a loss and the notice that an insurer must give if it rescinds a policy), and other terms that can be freely modified by the parties.

1.5 Are companies permitted to indemnify directors and officers under local company law?

In principle, there are no express legal restrictions under the Argentine Companies Law No. 19,550 (ACL) for companies to indemnify directors and officers, although the instrumentation of such indemnities may give rise to certain issues that need to be carefully considered.

1.6 Are there any forms of compulsory insurance?

Yes, there are forms of compulsory insurance for certain lines such as labour risks, third-party motor insurance, public transportation liability insurance, environmental insurance, aviation insurance and certain types of marine insurance.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

The substantive law and case law is generally more favourable to insureds.

2.2 Can a third party bring a direct action against an insurer?

In principle, only insureds may bring direct actions against insurers. However, there are exceptions, such as beneficiaries of a life insurance contract. In liability insurance, a third-party victim is entitled to have the liability insurer join into the lawsuit against the insured.

2.3 Can an insured bring a direct action against a reinsurer?

In principle, policyholders, insureds or third parties cannot bring actions against reinsurers, unless specifically agreed, e.g. by means of a cut-through clause.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

Misrepresentation or non-disclosure of circumstances known to the insured, even if made in good faith, which in the opinion of experts would have prevented the contract or altered its conditions if the insurer had been advised of the actual condition of the risk, would render the contract void.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

There are no express legal provisions specifically dealing with the disclosure duties of prospective insureds. Clearly, the insurance contract is deemed to be based on the utmost good faith, which sparks a series of possible constructions that would need to be assessed on a case-by-case basis.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

The IL expressly provides a statutory right of subrogation in favour of the insurer.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

Except for certain specific matters that are subject to federal jurisdiction (e.g., marine and aviation insurance), most insurance disputes are heard by civil or commercial ordinary courts. No distinction in relation to the value of the dispute is made. Trial by jury is not established for commercial disputes.

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

Plaintiffs are required to pay a court tax of 3% of the amount in dispute, including interests, which may be recovered at the end if they prevail.

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

Mediation is a pre-litigation compulsory requirement in Buenos Aires and many other provinces prior to reaching court. On average, litigation may take approximately four to five years to reach a final judgment.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

Argentine civil and commercial courts have broad powers to order disclosure of documents in respect of both parties to the action as well as non-parties. While pre-trial discovery – as known in certain common law jurisdictions – is in principle foreign to Argentine procedural rules, in practice courts may exercise ample jurisdictional powers to seize documents. That said, in principle, parties are under no obligation to produce documents other than those on which they rely. Parties may request that opponents or third parties produce documents specifically identified which are relevant to the dispute. If a party fails to produce documents that have been ordered to be produced, the court may draw a negative inference against such party. Likewise, non-parties must also produce documents within a deadline set by the court, and if such documents are not produced in time, the party may require the court to take legal action to enforce the non-party's obligation.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

A party is entitled to withhold documents that are covered by legal professional privilege. All communications between lawyers and clients, including advice given by lawyers and documents relating to it, must be kept confidential. Unless expressly authorised to do so by the client, lawyers must refuse to disclose privileged information.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

Witness testimony will be obtained at court-appointed hearings from those witnesses offered by each party that are admitted to testify by the court. Witnesses are required to testify on the relevant disputed facts under oath, and criminal sanctions apply for perjury. The party that proposes the witness may submit in

writing a list of questions to the judge. The court has the power to ask those questions, amend them, or eliminate some, or may even decide to ask questions that have not been proposed by the party.

4.4 Is evidence from witnesses allowed even if they are not present?

No, witness evidence must in general be taken in court.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

There are no restrictions on calling expert witnesses, other than the court admitting such expertise as relevant to solve the dispute. Parties may request that experts be appointed by courts. Additionally, courts may appoint experts even when the parties have not requested them. Parties may and normally are assisted by party-appointed experts, who may advocate for the party who appointed them, on a science or skill in which the party-appointed expert is proficient.

4.6 What sort of interim remedies are available from the courts?

In general, judges may grant whatever precautionary measure they consider appropriate to protect the rights in dispute, provided they are *prima facie* convinced of the likelihood of the rights invoked by the applicant and the risk of irreparable harm in the event of a delay. Among the most important are: attachment of goods; seizure of goods; appointment of a controller or auditor for a company; general prohibition upon the disposal of encumbering of assets; and injunction, etc.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

Except for disputes involving relatively low amounts, the parties may appeal from first instance decisions on the merits of the case, on the merits of certain ancillary issues arising over the course of the proceedings or on mere procedural issues provided they may adversely affect a party in a way that relief would not be possible by the judgment on the merits. In the context of ordinary appeals to the Court of Appeals, the nature of the alleged errors may involve issues of fact as well as issues of law. In certain limited cases, parties may apply for a grant to appeal to the Federal Supreme Court provided there is an issue of federal law involved or in cases involving an apparent arbitrary decision.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Yes. Parties may contractually agree the applicable rate of interest. If no contractual provision exists, the parties can still claim interest on sums due. Once litigation commences, the defendant will owe interest on a justified claim if it was found in default. Interest rates vary, but the courts in Buenos Aires usually award interests in respect of peso-denominated obligations at an annual rate of 60%, and at 6–8% in respect of US dollar-denominated obligations or other international currencies.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

The general principle is that the losing party pays all the legal costs. These mainly include the court tax and attorneys' and experts' court-awarded fees. Depending on the particular circumstances, legal costs may be significant and can roughly be estimated in approximately 40–50% of the amount in dispute, including interests. Settling a case in mediation stage (i.e., prior to litigation) or in the initial stages of the litigation (i.e., prior to commencing the evidence stage) could serve to significantly reduce attorneys' fees and avoid experts' fees.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

Yes, procedural rules authorise judges to compel the parties at any stage of the proceedings to personally attend conciliatory hearings at any point of the proceedings. The first instance judge is in fact required by law to invite the parties to settle the dispute in a preliminary hearing which is called prior to opening the evidence stage. Notwithstanding that mediation is mandatory prior to commencing litigation, the court may compel the parties to engage in a new mediation attempt if the nature and stage of the conflict justifies it.

4.11 If a party refuses to a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

Mediation is mandatory in the City of Buenos Aires and other provinces as a condition to bringing a legal action in disputes. Plaintiffs that fail to file for pre-litigation mediation when required to do so will be required by the judge to show that a mediation attempt has been made in order for the judge to continue the case. In the case of a defendant, failure to attend the first mediation hearing will result in the imposition of a fine. If the mediation or other forms of alternative dispute resolution were promoted by the judge and a party refused to participate, a judge could theoretically impose monetary sanctions, although they would hardly do so given that the parties are generally free to decide whether or not to settle.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

The National Civil and Commercial Code (NCCC) and the International Commercial Arbitration Law 27,449 (ICAL) constituted key steps towards ruling and enhancing this method of dispute resolution in Argentina. Both regulations are mainly inspired by the United Nations Commission on International Trade Law (UNCITRAL) Model Law and include the principle of party autonomy in their rulings. From this principle comes out the right of the parties to agree upon an arbitration clause in order to resolve their controversies and to freely choose the applicable law and to determine the place and language of arbitration, the type of arbitration and the arbitration procedure.

In accordance, judicial courts remain respectful of the principle of party autonomy in determining the arbitration as the way to resolve their disputes. This is consistent with Section 1656 of the NCCC, which states that any doubt on the matter of enforcing arbitration agreements shall be decided in favour of the arbitral agreements' effectiveness.

As a result of the competence-competence principle, arbitrators will rule upon their jurisdiction and conduct the arbitration until rendering a final award. Therefore, judicial tribunals are not entitled to intervene in arbitration unless it is required to resolve any initial dispute on jurisdiction, or at the end of the arbitral proceedings when a party files a request for annulment of the award.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

Arbitration clauses cannot be included in insurance policies (Section 57 of IL). However, arbitration agreements can be reached after a conflict has arisen. By contrast, arbitration clauses are admitted in reinsurance agreements provided that the seat of the arbitration is established in Argentina.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

If one of the parties' subject to an arbitration clause brings an action before a judicial court, this court will refer the parties to arbitration, unless the arbitration clause was included over matters that cannot be resolved by arbitration.

In principle, parties are allowed to resolve by means of arbitration all disputes over matters of economic content which they would be allowed to conclude in a private settlement.

However, according to the NCCC, disputes derived from (i) civil status or capacity of persons, (ii) family affairs, (iii) users and consumers, (iv) standard form contracts, (v) labour law, and (vi) matters in which the Federal State or local states are parties, will be considered excluded from any arbitration agreement and may not be resolved through arbitration.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

The NCCC and the ICAL state that the parties to arbitration may request interim measures to a judicial tribunal with competent jurisdiction, even before commencing the arbitration proceedings. This will not imply a breach of the arbitration agreement or a waiver to the arbitration clause and does not affect the jurisdiction of the arbitral tribunal.

The ICAL expressly provides that, in these cases, the judicial tribunal shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.

With respect to the interim form of reliefs that may be requested, the ICAL establishes four different categories with general descriptions on the nature of such measures. Therefore, the relief could be directed to:

(a) Maintain or restore the *status quo* pending determination of the dispute.
(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself.
(c) Provide a means of preserving assets out of which a subsequent award may be satisfied.
(d) Preserve evidence that may be relevant and material to the resolution of the dispute.
(e) For examples of measures that may be obtained from courts, see question 4.6 above.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

Argentine law requires that arbitral awards be motivated.

The NCCC and the ICAL sets forth that the arbitral tribunal shall state in the award the reasons on which it is based.

The ICAL also requires the award to be motivated, unless the parties agree that the award is rendered on agreed terms after the controversy has been settled during the proceedings.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

Yes, the parties have the right to challenge before the judicial courts awards rendered by an arbitral tribunal in a domestic arbitration. Under the NCCC, domestic arbitral awards are subject to appeal, unless the parties have previously waived that right. Pursuant to the National Procedural Civil and Commercial Code, the challenge on the grounds of nullity of the award may only be based on: (i) essential procedural faults; (ii) the award having been rendered after the term to render the award had elapsed; (iii) the award dealing with matters not contemplated by or not falling within the terms of the submission to arbitration; and (iv) the award being self-contradictory.

With regards to the judicial revision of international commercial arbitral awards, the ICAL provides that these awards may only be challenged through a "request for annulment", based on limited grounds such as: (i) the arbitration agreement is invalid under the laws of Argentina; (ii) a party was unable to present its case in the arbitral proceedings; or (iii) the award deals with matters not contemplated by or not falling within the terms of the submission to arbitration.

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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

There are two separate government bodies which regulate general insurance and reinsurance companies in Australia. These are:

- the Australian Securities and Investments Commission (**ASIC**); and
- the Australian Prudential and Regulatory Authority (**APRA**).

ASIC

ASIC, under section 11A of the *Insurance Contracts Act 1984* (Cth) (the **ICA**), is the responsible government body for the administration of the ICA.

ASIC's powers in relation to the ICA include:

- allowing ASIC "*…to do all things that are necessary or convenient to be done in connection with the administration of the relevant legislation…*";
- requiring insurers (and re-insurers) to provide copies of documents relating to insurance cover provided or proposed to be provided by the insurer (or re-insurer);
- to review insurers' (re-insurers') administrative arrangements; and
- to intervene in any proceeding relating to a matter arising under the ICA.

ASIC is also responsible for issuing financial services providers with an Australian Financial Services Licence (**AFSL**) under the *Corporations Act 2001* (Cth) (the **Corporations Act**).

An AFSL permits insurers to provide financial services to Australian clients, which includes the issuing of insurance policies and providing financial product advice for insurance policies.

APRA

APRA has the power to authorise both insurers and reinsurers to carry on a general insurance business in Australia.

APRA is responsible for the administration of the *Insurance Act 1973* (Cth) (the **Insurance Act**). This includes both the publication of legally binding prudential standards for general insurers and the authorisation for an insurer to conduct general insurance business.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

Who may apply?

All insurers (and reinsurers) in Australia are required to obtain an authorisation from APRA in order to conduct insurance business in Australia, and an AFSL from ASIC to carry on a financial services business.

The Insurance Act only allows bodies corporate or Lloyd's underwriters to carry out insurance business in Australia, and expressly excludes partnerships or unincorporated entities from applying for APRA authorisation.

A foreign incorporated company is able to seek authorisation from APRA to carry on insurance business in Australia by either establishing a locally incorporated subsidiary, or seek an authority to operate in Australia through a branch.

In circumstances where a general insurer will be a subsidiary of a non-operating holding company (**NOHC**) that does not hold a NOHC authority under the Insurance Act, the NOHC must apply to be authorised under the Insurance Act. The application of the NOHC should be submitted concurrently with the application to be authorised as a general insurer.

Criteria for applicants

APRA's authorisation criteria requires applicants to have the capacity and commitment to conduct insurance business on a continuing basis, with integrity, prudence and professional skill.

It is also an APRA requirement that all applicants are able to comply with all of its prudential requirements, from the commencement of insurance business in Australia and continuously thereafter.

In respect of ownership, the *Financial Sector (Shareholdings) Act 1998* (Cth) (**FSSA**) limits the interests of an individual shareholder or group of associated shareholders in an insurer to 15% of the insurer's voting shares. If the 15% limit is exceeded the applicant must apply for approval under the FSSA.

Applicants are expected to satisfy the governance requirements set out in *Prudential Standard GPS 510* with regard to the composition and functioning of its board. In addition, directors and senior management must satisfy APRA that they are fit and proper for the purposes of *Prudential Standard GPS 520*.

With respect to foreign insurers, they are required under the Insurance Act to appoint an agent in Australia who is required to be an Australian resident.

There are further requirements required by APRA as provided in its prudential standards with respect to capital and assets in Australia, risk management framework, compliance, reinsurance management, and information and accounting systems.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Foreign insurance companies are permitted to carry on insurance business in Australia subject to authorisation from APRA under the Insurance Act.

If a foreign company wishes to carry on insurance business in Australia they will be subject to the same requirements listed at question 1.2 above, and will also be required to either:

- establish a foreign-owned subsidiary in Australia; and/or
- seek an authority to operate in Australia through a branch company.

In circumstances where a foreign company is not authorised by APRA to carry on a business in Australia, they are still able to write insurance for Australian consumers for:

- risks that cannot be reasonably met by the Australian market;
- insurance required by foreign law;
- atypical risks as designated in the legislation; and
- high-value insureds with operating revenue greater than AUD 200 million.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

Yes, insurance contracts in Australia are subject to the statutory rules in the ICA.

Pursuant to the ICA, certain terms may be void, including:

- clauses which attempt to modify the operation of the ICA;
- arbitration clauses;
- other insurance clauses (other than compulsory insurance); and
- prejudicial contract variance clauses.

As discussed below at question 2.1, in the future insurance contracts will be subject to the unfair contract terms regime.

1.5 Are companies permitted to indemnify directors and officers under local company law?

Yes, but with some exceptions to ensure that directors and/or officers act responsibly and are held accountable for their actions. Section 199A of the Corporations Act prohibits a company or related body corporate from indemnifying directors and/or officers against:

- a liability owed to the company or related body corporate;
- a pecuniary penalty order or compensation order made under certain sections of the Corporations Act; and
- a liability owed to someone (in that person's role for the company) other than the company or related body corporate which arose from conduct that was not in good faith.

Companies are also prohibited from paying insurance premiums on behalf of directors, officers or auditors for risks involving a wilful breach of duty in relation to the company or unlawful use of position of information for personal gain.

Additionally, the Australian Consumer Law (in the *Competition and Consumer Act 2010* (Cth)) prohibits companies indemnifying directors and/or officers for their liability to pay a pecuniary penalty and legal costs in respect of a breach.

Generally companies are able to indemnify directors and/or officers for legal costs incurred in defending proceedings, except in relation to costs incurred in defending or resisting:

- proceedings in which the director and/or officer is found to have a liability for which they could not be indemnified in relation to the above liabilities;
- criminal proceedings in which the director and/or officer is found guilty;
- proceedings brought by ASIC or a liquidator for a court order if the grounds for making the order are found by the court to have been established; or
- in connection with proceedings for relief to the director and/or officer under the Corporations Act in which the court denies relief.

1.6 Are there any forms of compulsory insurance?

There are a number of types of compulsory insurance in Australia dependent upon the industry or sector. Some of the most common types are:

- professional liability insurance;
- professional indemnity;
- property insurance;
- workers' compensation insurance;
- product liability insurance;
- motor vehicle insurance; and
- marine or shipping insurance.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

Generally, insurance law in Australia is considered to be more in favour of protecting the interests of insureds, particularly in respect of retail insurance products.

The ICA provides significant protection of the interests of insureds, including:

- section 22: the insurer must, before a contract of insurance is entered into, inform the insured in writing of the nature and effect of the insured's duty of disclosure;
- section 26: certain statements made by the insured which are untrue, but were made on the basis of a belief that the insured held or being a belief that a reasonable person in the circumstances would have held, the statement will not be a misrepresentation;
- section 28: for contract of general insurance if the insured failed to comply with the duty of disclosure or made a misrepresentation to the insurer before the contract was entered into, but the insurer would have entered into the contract for the same premium and on the same terms and conditions, the insurer may not avoid the contract;
- section 52: any provision/s in a contract of insurance which purports to exclude, restrict or modify the operation if the ICA, to the prejudice of a person other than the insurer, is void;
- section 54: prevents an insurer from denying a claim on the basis of an act or omission of the insured provided that the act or omission did not cause the loss; and
- section 58: an insurer cannot cancel a contract of insurance if it has failed to notify the insured of the expiration or renewal of cover.

It was also recommended by the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry that the unfair contract terms regime be extended to insurance contracts. In addition, it was recommended that for consumer contracts, the duty of disclosure will be replaced with a duty on the customer to take reasonable care not to make a misrepresentation. These recommendations have not yet been passed into legislation.

2.2 Can a third party bring a direct action against an insurer?

On 1 June 2017, the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW) commenced operation.

This Act allows third parties to bring a claim against a relevant insurer directly, if the insured has an insured liability to the third party. The third party can recover the amount of the insured liability from the insurer, and if it can be shown that the insurer was on risk under the relevant liability policy. A claimant's right to indemnity under a policy of insurance will only attach to monies owed by the insured to the claimant, rather than all monies under the policy. The third party needs leave to commence such proceedings against an insurer.

The Australian Capital Territory and the Northern Territory also have laws that permit a claim to be brought directly against an insurer.

2.3 Can an insured bring a direct action against a reinsurer?

No, the doctrine of privity of contract prevents an insured bringing a direct action against a reinsurer as there is no direct contractual relationship between the insured and the reinsurer.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

Depending on the type of misrepresentation or non-disclosure made by the insured, the insurer may have the right to void the policy *ab initio* under the ICA.

The only circumstance where an insurer may be entitled to avoid the policy is in the case of fraudulent non-disclosure or misrepresentation by the insured.

However, the insurer cannot avoid the contract if:

- the insurer did not inform the insured in writing of the general nature and effect of the insured's statutory duty of disclosure as set out in section 22 of the ICA; and
- the insurer would have entered into the contract with the same premium and on the same terms and conditions despite the misrepresentation or non-disclosure.

If the insured's non-disclosure or misrepresentation is merely negligent or innocent, the insurer cannot avoid the policy and can only reduce its liability by an amount that would put it in the same position it would have been but for the non-disclosure or misrepresentation.

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry recommended that for consumer contracts, the duty of disclosure will be replaced with a duty on the customer to take reasonable care not to make a misrepresentation. Further, it was recommended that section 29(3) of the ICA should be amended so that an insurer may only avoid a contract of life insurance on the basis of non-disclosure or misrepresentation if it can show that it would not have entered into a contract on any terms.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

An insured has a duty to disclose to insurers, before the contract of insurance is entered into and this obligation is ongoing, every matter known to the insured which the insured knows to be relevant (or a reasonable person could be expected to know to be relevant) to the insurer's decision to accept the risk and the terms.

Insurers should insist on insureds answering all questions being asked to insureds and, where required, make further enquiries, in order to not waive compliance with the insured's duty of disclosure.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

No, there is no automatic right of subrogation available to the insurer upon payment of an indemnity by the insurer. Commonly, a right of subrogation is included in an insurance policy which provides for an express right of subrogation where an insurer agrees to indemnify the insured. In other circumstances, insurers may be able to rely upon equitable principles for their right to subrogation.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

In Australia, there are both state courts (Local, District and Supreme) and federal courts (Federal Court of Australia, Family Court and Federal Circuit Court).

Cross-vesting legislation allows the state and federal courts to hear both state and federal issues with respect to civil matters, subject to jurisdictional monetary limits.

For example, the courts at the state level only have jurisdiction to hear civil matters for:

- the Local Court up to $100,000;
- the District Court up to $750,000; and
- the Supreme Court for more than $750,000.

Generally, commercial insurance disputes are heard by the relevant Supreme Court or the Federal Court of Australia. The Federal Court of Australia has a specific insurance list which caters for the prompt and efficient resolution of legal issues, involving insurance, to enable the parties to otherwise resolve their disputes without the need for full-blown hearings where a crucial issue could be decided discretely and swiftly.

Jury trials

In Australia, a civil proceeding will not be trial by jury unless the court orders otherwise. In making such an application, the court must be satisfied that a trial by jury in the proceedings is in the interests of justice.

Application for a trial by jury in these circumstances must be made by notice of motion.

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

As stated at question 3.1 above, commercial insurance disputes are generally heard by the relevant Supreme Court or the Federal Court of Australia. The fees for commencing a commercial insurance dispute vary depending on whether the person commencing proceedings is a corporation or a person or entity, other than a corporation.

Currently, the state Supreme Courts' filing fee to commence proceedings for a corporation ranges from $939.60 to $4,336.40, depending on the size of the corporation (in some jurisdictions). With persons or entities, other than a corporation, the Supreme Courts' filing fee to commence proceedings ranges from $1,257 to $2,652.

The Federal Court of Australia's current filing fee for a corporation to commence proceedings is $4,100 and for a person or entity other than a corporation, the fee is $1,410.

Filing fees are continually updated throughout the year, and it is therefore recommended that a party check the relevant court website for the current fee amounts.

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

There is no defined period which sets out how long a commercial case will take to bring to court once proceedings have been initiated. How quickly the case is heard depends on a number of factors, including the complexity of issues, how many matters are before the court, and how many parties are involved.

In many courts, there is a requirement for the parties and the court to seek to resolve disputes as efficiently as possible. For example, section 56 of the *Civil Procedure Act 2005* (NSW) requires the court to manage disputes and proceedings in conformity with the overriding purpose, being to facilitate the just, quick and cheap resolution of the real issues in proceedings.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

The courts have the power to make an order for discovery for both parties and non-parties in a proceeding. Generally, the court will not make an order for discovery until the close of pleadings so that the issues between the parties have been identified, but before evidence has been exchanged.

For example, in the Equity Division of the Supreme Court of New South Wales, the court will not make an order for discovery unless it is necessary for the resolution of the real issues in dispute. Disclosure will only be considered necessary when it is reasonably required for the fair disposition of the proceedings.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

Generally, a party who is required to produce documents may object to the disclosure of documents for the purposes of discovery on the basis of legal professional privilege.

Legal professional privilege may be claimed by the producing party with respect to documents and/or communications between a client and solicitor if such documents or communications were brought into existence for the dominant purpose of either:

- the lawyer providing legal advice to the producing party; and/or
- the client being provided with professional legal services relating to an Australian or overseas proceeding, or anticipated proceeding, wherein the producing party may be, or might have been, a party.

The court in determining whether legal privilege exists will need to address whether the claim for privilege has been established; and if so, has the privilege been waived.

Unlike legal professional privilege, without prejudice settlement offers between the parties may not be disclosed to the court except by the consent of the parties.

However, without prejudice settlement offers may be adduced when courts are determining whether costs should be awarded (see question 4.9 below).

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

Australian courts have the power to compel witnesses to attend to give evidence in proceedings by issuing a subpoena. Should a witness fail to attend, they may be held in contempt.

In circumstances where a witness is located in an overseas jurisdiction, courts may allow that witness to attend via video link if their physical attendance would cause undue delay and cost.

4.4 Is evidence from witnesses allowed even if they are not present?

In circumstances where a witness cannot be physically present, due to death, terminal illness or disappearance, a party may be able to rely on an exception to the hearsay rule.

In other circumstances where a witness is available to give evidence, but it would cause undue expense, undue delay, or would not be reasonably practicable to call the witness to give evidence, again the hearsay rule may not apply.

If neither of these exceptions apply, courts will not usually allow witness statements into evidence when the witness is otherwise available.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

Courts generally have a broad discretionary power in respect of the use of expert evidence in proceedings, which allows the court to give directions as it considers appropriate.

In certain circumstances, a court may give directions regarding the use of expert witnesses where it considers appropriate. This may include a direction:

- as to the time for service of expert reports;
- that expert evidence may not be adduced on a specified issue, or only on leave of the court;
- that expert evidence may be adduced on specified issues only;
- limiting the number of expert witnesses who may be called to give evidence on a specified issue;
- instructing the parties to instruct a single expert or a court-appointed expert in relation to a specified issue;
- requiring experts in relation to the same issue to confer;
- that may assist an expert in the exercise of the expert's functions; or
- for an expert who has prepared several reports to prepare a single report to reflect their evidence-in-chief.

An increasingly popular approach adopted recently by Australian courts is the concept of hot-tubbing (experts giving evidence concurrently) to assist the parties in identifying the legal issues in dispute. Before trial, each party instructs their own experts to prepare their own reports, and once completed, their reports are exchanged. Thereafter, both parties' experts meet to draft a joint report which summarises all areas of agreement and disagreement. This joint report will be then used as a guide for giving expert evidence concurrently at trial.

4.6 What sort of interim remedies are available from the courts?

Australian courts have the power to make several different interim remedies in a proceeding, including:

- freezing orders, to prevent the frustration or inhibition of the court's process by seeking to meet a danger that a judgment of the court will be unsatisfied;
- ancillary orders, to prevent the frustration of a court's process (for example, an order for a respondent to disclose the nature, location and details of its assets);
- Anton Piller orders, relating to search and seizure;
- interlocutory and interim injunctions, which aim to preserve the status quo by preventing one party from committing, repeating or continuing a wrongful act prior to trial;
- declaratory relief, by which a court can make an order declaring a particular factual state exists, with a particular legal outcome;
- security for costs, by which a court may order a plaintiff to pay money into court to ensure that unsuccessful proceedings do not disadvantage defendants; and
- stay of pending proceedings, by which all courts have the statutory power to stay any proceedings permanently or temporarily before the court.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

At first instance, there is no automatic right to an appeal, with an appeal permitted where allowed by legislation or leave of the court.

If a party to a proceeding wishes to make an appeal, generally an application must be made to the court within 14 to 28 days (depending on the jurisdiction) after the date on which the decision was given by the court.

At a state level, a party may make an application to bring an appeal from the local, magistrates, county or district courts to the Supreme Court of that particular state or territory. At a federal level, a party may make an application to bring an appeal from the Federal Circuit Court or Federal Court of Australia to the Full Federal Court or the High Court of Australia.

Once an application for appeal has been lodged, depending on the jurisdiction, the length of the appeal may be in the order of 12 months.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Courts generally have discretionary power to award pre-judgment and post-judgment interest on application by a party in proceedings.

In circumstances where a court awards pre-judgment interest, the interest is to be calculated at a rate the court thinks appropriate on part or the whole of the money, and for the whole or part of the period of time the action arose to when the judgment takes effect.

If a court awards post-judgment interest, the rate is 6% above the cash rate last published by the Reserve Bank of Australia before that period commenced, or at any other rate the court orders.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

The standard rule is that costs will ordinarily follow the cause or event unless it appears to the court that some other order should be made. The court may award costs on either a party/party basis or on an indemnity basis.

Some tribunals, such as the state Civil and Administrative Tribunals, and the Fair Work Commission, are a no cost jurisdiction where each party pays their own costs.

Attempting to settle prior to trial, by way of Calderbank offers under common law and/or offers of comprise under statute, is advantageous when seeking to obtain a cost order or indemnity costs from the court.

By way of example, should a plaintiff not accept an offer from a defendant and the judgment awarded was not more favourable to the plaintiff, unless the court orders otherwise, the defendant would be entitled to an order against the plaintiff for their costs on an indemnity basis from the date of the offer.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

The court has a wide discretion to make an order to refer any proceedings to mediation if it considers the circumstances are appropriate. Alternatively, the parties can agree to mediation. This aligns with the court's overriding purpose of a just, quick and cheap resolution of a dispute.

In the majority of civil disputes, if mediation is not agreed by the parties, mediation will be ordered by the Court as an interlocutory step before hearing, unless there are very compelling grounds against it.

Alternatively, the courts may refer a matter to other forms of Alternative Dispute Resolution, such as arbitration and conciliation.

A court may refer a matter to arbitration in certain circumstances. For example, in NSW a court may make such a referral where the proceedings are in respect of a claim for the recovery of damages or other money, or for any equitable or other relief ancillary to such claims, subject to several considerations.

A court may also refer a matter to conciliation, wherein an independent third party with professional expertise in the subject matter of the proceedings will provide advice about the issues and options for resolution for the parties. However, conciliators do not make a judgment or decision about the proceedings. Generally, conciliation is suitable in circumstances where the parties want to reach an agreement on some technical or legal issues and/or want advice on the facts in the proceedings.

4.11 If a party refuses to a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

In circumstances where a court has used its discretion to order mediation, or other forms of Alternative Dispute Resolution, parties have a duty to participate in good faith. This requirement of good faith is directed to the conduct of each of the parties in participating in the mediation, rather than mere attendance.

If a party is found to not be participating in good faith, a plaintiff may be subject to a stay of proceedings, or an adverse costs order made be made against either party impeding the mediation or Alternative Dispute Resolution, and could amount to contempt of court.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

There is a strong legislative framework that governs domestic arbitration and international arbitration in Australia. In recent years, the Australian courts have adopted a pro-arbitration approach which enables domestic and foreign parties to have confidence in the overall process, and expect, where necessary, the Courts to enforce arbitral awards and assist arbitral processes by granting interim relief.

For example, the High Court in *Rinehart v Hancock Prospecting* [2019] HCA 13 confirmed that arbitration agreements should be interpreted broadly and are to be informed by the language used by the parties, the surrounding circumstances, and the purposes and objects of the contract wherein the arbitration agreement is contained.

In some limited circumstances, courts may refuse to recognise an award on the grounds of incapacity of a party, public policy, invalidity, and manifest error on the face of the award.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

Pursuant to section 43 of the ICA, provisions in a contract of insurance which have the effect of referring disputes to arbitration are void. However, this does not eliminate the possibility of disputes relating to insurance contracts being dealt with through arbitration. The parties to such insurance contracts can mutually agree to arbitration after the dispute has occurred.

Reinsurance is specifically excluded from the ambit of the ICA, and therefore arbitration clauses in reinsurance contracts are not deemed void on principle.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

There are two areas of dispute in which Australian courts will not enforce an arbitration clause.

The first pertains to insurance contracts (refer to question 5.2). The second concerns contracts for the carriage of goods by sea.

Section 11 of the *Carriage of Goods by Sea Act 1991* (Cth) provides that arbitration agreements providing for the Hague Rules to govern the agreement are not effective unless the arbitral location is in Australia. In practice, this provision has been invoked in Australian courts to combat the enforcement of a foreign award in a maritime law dispute.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

The courts have the same power to grant interim relief in relation to arbitration proceedings as it has in relation to proceedings in courts. Examples of such interim relief include security for costs and injunctions (as outlined in question 4.6 above). In addition, courts may also:

(a) issue subpoenas upon the request of a party;
(b) make decisions on the appointment/termination of an arbitrator;
(c) allow or prohibit the disclosure of confidential information in certain circumstances;
(d) set aside arbitral awards, on application; or
(e) order costs where an arbitration has commenced, but fails.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

Under the Model Commercial Arbitration Acts in each State and Territory, the award must be in writing and state the reasons upon which the decision was made, unless the parties agree that no reasons are to be given or the award is made on agreed terms by way of settlement. Unfortunately, there are no guidelines as to how detailed the reasons must be, and the reasons are not expected to be of the same length or detail as judicial reasons.

For parties that are unsure of the reasoning for the decision, there is some recourse. Within 30 days of receipt of the award, parties (with notice to the other party) may request the arbitral tribunal to correct the award with respect to typographical errors or provide an interpretation of a specific point or part of the award.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

There is a right of appeal to the courts from a decision of an arbitral tribunal; however, the threshold set by the courts is high. Parties seeking to appeal the decision of an arbitral tribunal must apply to set aside an award within three months from the date of the receipt of the award. However, there are limited grounds on which an application can be brought to set aside an award. The award can be set aside in instances of incapacity of a party, public policy, invalidity and manifest error on the face of the award.

Alternatively, parties may also apply to the court to appeal a question of law arising out of an award (after three months have elapsed since the receipt of the award).

Courts also have the power to confirm, vary, remit or set aside the award (in whole or in part).

David Amentas has practised insurance law for more than 20 years and has extensive experience across various areas of insurance, including acting as both defence and coverage counsel.
David's practice involves acting on behalf of clients and for the provision of advice to clients in disputes concerning professional indemnity, directors' and officers' liability, employment practices liability, defamation and management liability.
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Avryl leads the Australian resilience team and is a core member of the global resilience group. The team delivers solutions to clients with the aim of building organisational resilience.
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Austria

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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

Insurance and reinsurance companies are regulated by the Austrian Financial Market Authority (the 'FMA'). This federal agency is responsible both for monitoring insurance and reinsurance undertakings as well as for controlling their activities. The FMA offers a wide range of information in German and English, *inter alia*, on its website, concerning mandatory legal provisions and procedures to adhere to (www.fma.gv.at).

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

As a general rule, in order to write business in Austria, both local and foreign insurers are required to obtain a licence from the FMA, the requirements being laid down in sec. 8 of the Austrian Insurance Supervision Act. Insurance and reinsurance undertakings must operate under the legal form of a stock company, a *Societas Europaea* (SE) or a mutual insurance company. Moreover, the undertaking's administrative headquarters have to be located in Austria. Apart from fulfilling minimum capital requirements as well as ensuring the sufficient professional qualifications of the undertaking's board members, applicants must submit a detailed business plan to the FMA. Additional licensing requirements apply for insurance undertakings from outside the European Economic Area (*cf.* sec. 16 *et seq.* of the Austrian Insurance Supervision Act).

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

While insurers are generally required to obtain a licence from the FMA (*cf.* above, question 1.2), no licence is necessary for insurance undertakings already licensed in another Member State of the European Union or the European Economic Area. However, where such undertakings want to write business in Austria, they have to notify the FMA of the intended establishment of a branch or of the intended commencement of cross-border services (*cf.* sec. 21 and sec. 23 of the Austrian Insurance Supervision Act, respectively).

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

The parties' freedom of contract is, to some extent, limited by mandatory substantive law as well as by settled case law. First of all, the writing of insurance contracts is regulated by the Austrian Insurance Contract Act, which governs the rights and duties of both the insurer and the insured, and also sets certain minimum requirements for different insurance branches. It also contains a general section, applicable to all types of insurance. For some branches, such as motor vehicle third-party liability insurance, separate laws exist, which set forth special terms as well.

Nevertheless, the parties' freedom of contract remains virtually unrestricted for some branches such as credit insurance and transport insurance. For these scenarios, the legislator assumes that the insured is sufficiently experienced in the area of business and equally familiar with the risk to be insured, thus not requiring the same level of statutory protection.

Another aspect limiting freedom of contract stems from the fact that insurance policies and conditions not individually negotiated are considered general terms and conditions and are thus subject to an unfairness test. In general, a certain provision is deemed to be unfair, if – contrary to the requirement of good faith – it significantly alters the balance of the parties' contractual rights and obligations to the detriment of the other party. While the standard is especially strict *vis-à-vis* consumers, it also applies, in its basic form, to entrepreneurial insureds.

Ambiguities of a policy's wording are resolved by carrying out a hypothetical interpretation: how would an average and reasonably well-informed insured interpret the provision? Such fictitious interpretation by the (equally) fictitious insured has to take into account customs and usage as well as linguistic usage. If the ambiguity cannot be resolved by way of this hypothetical interpretation, such ambiguity will, as a general rule, be at the expense of the insurer as the author of the relevant provision.

While the principles on interpretation established by doctrine and case law do give guidance, certainty – to the greatest degree possible – can ultimately only be determined by the courts. Experience and pertinent knowledge of the case law will, of course, help make use of the overlapping general principles and rulings.

1.5 Are companies permitted to indemnify directors and officers under local company law?

Under Austrian company law, the shareholders of a company are free to decide on whether or not to indemnify the company's directors and officers. For stock companies, the members of the Executive Board and Supervisory Board can be discharged by way of a resolution of the annual shareholders' meeting.

Notwithstanding the possibility to discharge directors and officers with retrospective effect, a growing number of companies doing business in Austria are deciding to take out directors' and officers' insurance ('D&O insurance') with the aim

of mitigating the consequences of misconduct on the part of the executives. Unlike other European legal systems such as Germany, Austrian law does not provide for a certain minimum deductible to be borne personally by the executive. In fact, D&O-specific statutory provisions do not exist at all.

1.6 Are there any forms of compulsory insurance?

Apart from areas covered by the Austrian social security insurance system, insurance coverage is mandatory in a number of different areas. Arguably, one the most important examples is the compulsory motor vehicle third-party liability insurance with a minimum insured sum of €7.6 million. Moreover, professional liability insurance is compulsory for various freelance professionals such as lawyers, architects, engineers, public accountants, tax advisers and most medical professionals such as doctors and dentists.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

The most important statutory provisions on substantive insurance law are contained in the Austrian Insurance Contract Act, complemented by the general provisions of the Austrian Civil Code. In fact, of course, a number of further acts and statutes may be of importance, especially where the insured is a consumer.

Due to various acts of European Union secondary law, provisions aiming at increasing the protection of insureds have increased considerably. However, declaring Austrian substantive law as overly consumer-friendly would, at least by European standards, fall short of the mark.

It is, nevertheless, true that the courts are quite strict in interpreting insurance policies and conditions (*cf.* above, question 1.4).

2.2 Can a third party bring a direct action against an insurer?

Generally, direct action can only be brought by the policyholder and – under certain circumstances – by other insured persons in case of insurance for the account of another. Third parties, on the other hand, lack the necessary contractual or other legal relationship with the insurer necessary to bring a claim.

The most relevant exception to the general rule concerns cases involving motor vehicle third-party liability insurance. Where a third person has a claim resulting from a car accident, he or she may bring a direct action against the liable person's insurer. In this constellation, the insurer and the person causing the accident are joint and several debtors. Similar provisions exist, e.g., for claims resulting from the operation of aircraft.

Another situation, in which a third party gains capacity to sue, of course, is where the insured assigns contractual rights to be performed by the insurer to a third party.

2.3 Can an insured bring a direct action against a reinsurer?

No, the insured does not have capacity to sue the reinsurer. Exceptions may apply where the reinsurance agreement itself confers direct rights onto the insured; e.g., by way of a cut-through provision.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

Where an insurer's decision to underwrite a certain risk is based on an intentional fraudulent misrepresentation by the insured, the insurer may avoid the contract based on principles of general contract law.

The Austrian Insurance Contract Act provides a set of additional remedies for cases of misrepresentation or non-disclosure. The availability of these remedies depends on the time of the breach against the duty to disclose (i.e., before conclusion of the contract, during the insurance period or after the occurrence of a loss) and the degree of culpability. In practical terms, the insurer may be entitled to terminate the contract, to cancel the contract or to refuse (full) settlement of an insurance claim.

As a general rule, the insurer is required to formally assert its rights against the insured in writing within one month after becoming aware of the infringement.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

The Austrian Insurance Contract Act distinguishes between duties to disclose prior to the taking out of the insurance, during the insurance period, and duties after the occurrence of a loss. After the occurrence of a loss, for example, the insured is only required to provide information at the insurer's request.

Prior to the taking out of insurance, however, comprehensive pre-contractual disclosure duties require the insured to provide information on all aspects germane to the insurer's decision on whether or not (or under what conditions) to underwrite the specific risk. If the insured intentionally refrains from notifying the insurer of an important circumstance, the insurer has a right to terminate the insurance contract.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

The Austrian Insurance Contract Act provides for a statutory subrogation of claims for damages that an insured has against a third person. More specifically, such claim for damages is *de jure* transferred to the insurer to the extent that the insurer compensates the insured for the loss suffered. As a consequence, the insurer can directly initiate recourse proceedings against the third party without having to bring the claim in the name of the insured.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

Depending on the amount at issue, the local district courts will hear cases in which the dispute value does not exceed €15,000, whereas the regional courts are competent where higher amounts are in dispute. For a more detailed illustration of the Austrian court system and the various stages of appeal, *cf.* below (question 4.7).

The courts have specialised departments for commercial matters. In Vienna, there are even stand-alone specialised

commercial courts – both at the district and regional level. Resorting to these specialised departments or courts can be advantageous in complex proceedings, such as cross-border or major loss insurance disputes.

As a general rule, claims have to be brought before the competent court. If the defendant does not challenge the territorial jurisdiction of the court, a proceeding can also be conducted before a different court. Equally, the parties may jointly request the dispute to be transferred to a different court of the same type.

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

Whenever a civil claim is filed, the claimant is obliged to pay a one-off court fee. Further court fees will accrue in appeal proceedings. These court fees are usually collected via automatic debit transfer from the law firm acting on behalf of the claimant. The court fee is non-refundable. However, when the claimant fully prevails in court, he may be entitled to full reimbursement of the costs (including court fees).

The amount of such fees is regulated by the Austrian Court Fees Act and mainly depends on the amount in dispute. The fees are linked to a certain percentage, whenever the amount in dispute surpasses €350,000 (1.2% of the amount in dispute plus an additional flat fee of €3,488). Where, for instance, a party files a claim in the amount of €350,001 before a regional court, the court fee amounts to €7,688. When the same claim has a value of €1 million, the fee would be €15,488. Where the dispute value is lower than €350,001, the Austrian Court Fees Act provides for certain threshold values and fixed court fees. The Austrian Court Fees Act also provides for percentage surcharges whenever more than two parties are involved in the claim brought, as well as higher or lower fees for certain other cases.

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

The first court hearing is usually scheduled a few months after the claim has been lodged and the defendant has, in turn, filed a statement of defence. However, in very rare cases where a court or single judge is temporarily overburdened with cases already pending, this period may surpass 12 months.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

The concept of pre-trial discovery or disclosure is alien to Austrian civil procedural law. Thus, pre-trial, courts cannot order documents to be disclosed. In any event, a party intending to bring a claim should ascertain it has the necessary evidence at its disposal. The burden of proof generally lies with the party bringing the claim or invoking a fact.

During the proceedings, a party may – under limited circumstances – request document production, e.g. where its claim depends on a document in the possession of the other party and the document's context relates to the legal relationship between the parties. The court may also issue an order to disclose where the requesting party has an enforceable claim against the possessing party under substantive law.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

Austrian civil procedural law does not recognise the concept of pre-trial disclosure (*cf.* question 4.1). Where disclosure of documents is ordered during the course of a trial, the aggrieved party may refuse such production under certain circumstances. Grounds for refusal include the protection of business secrets, the adherence to non-disclosure obligations or the risk of exposure to criminal prosecution.

However, contrary to the common law concept of privilege, correspondence between lawyer and client is not protected by strict attorney-client privilege. Thus, documents relating to advice given by lawyers may be subject to disclosure during trial.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

Once a court has summoned a witness, this witness is, in principle, required to appear and testify, although grounds to refuse testimony exist. These grounds are similar to the grounds for refusing to provide documents (*cf.* question 4.2) but are broader in scope. For example, attorneys can refuse testimony regarding information entrusted to them in their professional capacity by clients.

A witness refusing to testify has to state the underlying reasons or, where the stated reasons are self-contradictory, to furnish more detailed corresponding *prima facie* evidence. If a witness fails to attend a hearing or give testimony without sufficient excuse, the court can enforce the testimony by ordering fines or even an arrest for contempt of court.

Where a party presents a witness who is domiciled in another country, the Austrian court will contact the foreign court at the witness' domicile and – provided there is an intergovernmental collaborative basis stipulating a mutual legal assistance framework – seek for the foreign court to either directly interview the witness or serve the request to appear before the Austrian court.

4.4 Is evidence from witnesses allowed even if they are not present?

The Austrian Code of Civil Procedure does not allow written witness statements. Such written statements do not comply with the procedural principles of oral presentation and of directness.

Rather, witnesses can only provide oral testimony before the court. Where a party wishes to introduce an expert witness, such party-appointed expert witness may also submit a written expert report.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

Each party may request the court to appoint an expert witness with regard to specific questions of evidence disputed by the other party. Court-appointed expert witnesses must be impartial and conduct their inspections and examinations thoroughly and to the best of their ability. If the object of investigation requires a physical inspection or examination, the expert will usually invite both parties to attend.

The expert witness will give a written expert report and, where at least one party so requests, clarify the report or answer additional questions (in writing or during a court hearing). The expert's costs

will initially be paid by advances on costs as ordered by the court and, once the court decides on the merits of the case, be included in the decision on costs (*cf.* question 4.9).

The evidential value of a court-appointed expert witness is regarded to be considerably higher than that of a party-appointed expert. Hence, court-appointed expert witnesses are more common than party-appointed experts.

4.6 What sort of interim remedies are available from the courts?

Interim remedies may be granted by the courts to protect the enforceability of a claim or to protect a party from irreparable harm. Austrian law distinguishes between three types of interim measures: interim measures to secure a monetary claim; interim measures to secure a claim for specific performance; and interim measures to secure a right or a legal relationship.

Monetary claims may be secured, *inter alia*, by an order for the deposit of money or movable assets, by an order prohibiting the selling of movable property or by an order prohibiting the transferring or encumbering of immovable property. With regard to interim measures securing claims for specific performance or rights, other means such as establishing a right of retention or ordering the debtor to refrain from any action adversely affecting the claim, right or object are available.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

The Austrian civil court system provides for proceedings in three instances. District courts have jurisdiction for general civil law matters where the amount in dispute is below €15,000. Regional courts are competent where higher amounts are in dispute or district courts do not have competence for other reasons.

Appeals from district courts are heard before regional courts. If a regional court was acting as the first instance court, appeals against its decision are heard by one of the higher regional courts. In cases concerning legal issues of fundamental importance, a further appeal may be made to the Austrian Supreme Court of Justice as the third and final instance.

Reasons for appealing against a judgment of a court of first instance include nullity (serious procedural errors), procedural irregularities, the wrong establishment of facts or an incorrect legal assessment. Appeals may be filed within four weeks after the passing of the original judgment. The court of appeal will, usually after purely written proceedings, either dismiss the appeal, amend or set aside the original decision. Where the judgment is set aside, the court of appeal may either retry the case itself or refer it back to the first instance court.

Appeals against first instance decisions do not require admission by the first instance court or, as in other jurisdictions such as Germany, require the adverse effect for the unsuccessful party to surpass a certain minimum amount. The duration of appeal proceedings varies considerably depending on the complexity and the competent court of appeal. Usually, appeals take at least several months.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Where a court awards a monetary sum and the winning party expressly claimed interest, the court will also award such additional claim for interest. The interest rate is currently 4 per cent or, in cases where both parties are entrepreneurs, 9.2 per cent above the base interest rate, as published by the Austrian National Bank.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

The court renders its decision on costs together with the decision on the merits. In general, Austrian law provides that the losing party has to reimburse the winning party for all costs. If neither party fully succeeds, only partial reimbursement will be ordered. Costs to be reimbursed include legal and court fees as well as certain expenses. Legal fees are calculated in accordance with the Austrian Lawyers' Fees Act, which might be lower than the fees individually agreed upon between attorney and client.

Depending on the merits of the case and the burden of proof, settlement negotiations may prove to be a viable path in seeking to avoid or reduce legal fees, be it prior to the trial or even during proceedings. Where a settlement is reached out of court, however, regard should be had to a special characteristic of Austrian law – the Austrian Fee Act. According to this act, a fee of 1 or even 2 per cent of the matter value may be incurred.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

Austrian courts have launched pilot projects in which judges are supposed to propose the initiation of mediation proceedings prior to commencing litigation, if deemed appropriate. However, at least in insurance and reinsurance disputes, the courts cannot force parties to resort to mediation or otherwise reach an amicable agreement. For various reasons, most judges will still encourage the parties to reach a settlement before taking evidence.

While the transposition of the EU Mediation Directive 2008/52/EC into national law introduced the possibility to file a request for pre-trial mediation prior to the formal initiation of legal proceedings (before the district courts), this procedural option is rarely made use of in practice.

Apart from commercial disputes, however, there are some mandatory meditation requirements concerning certain specific types of cases such as tenancy disputes.

4.11 If a party refuses to a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

As participating in Alternative Dispute Resolution proceedings is not mandatory as far as insurance-related disputes are concerned, there are no detrimental consequences in refusing requests or offers to reach an (amicable) solution using forms of Alternative Dispute Resolution.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

Austria is generally considered a very arbitration-friendly jurisdiction. Courts will refrain from intervening in arbitral proceedings unless requested by one of the parties or the tribunal.

In particular, a party may request a court:

- to appoint an arbitrator if the parties cannot agree or a party fails to do so;
- to grant an interim or protective measure;
- to decide on the challenge of an arbitrator; or
- to intervene if an arbitrator's mandate has been terminated and the arbitrator does not resign or the other party does not agree to the termination.

Also, the arbitral tribunal itself can request judicial assistance from a court:

- to enforce an interim or protective measure; or
- to gather evidence for which the arbitral tribunal has no authority (e.g. to apply coercive measures).

Of the above powers, only the competence of courts to issue interim measures upon a party's request, the right to challenge an arbitrator before a court, as well as the tribunal's competence to request judicial assistance by the courts, are mandatory and unalterable. All other powers may be set aside by the parties' agreement.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

Under Austrian law, the only formal requirement for validly concluding an arbitration agreement is that the arbitration agreement must be in writing, i.e. in a written document signed by both parties or in letters, faxes, emails or other forms of communication that prove the existence of the agreement.

Aside from the writing requirement, in order to be enforceable, an arbitration agreement must also fulfil certain substantive requirements, such as identifying the parties and clearly expressing their intention to specifically submit a dispute to arbitration. However, no specific form of words is required for the enforceability of the arbitration clause.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

As a general rule, if the arbitration agreement is valid and the subject matter is arbitrable, Austrian courts will uphold and enforce the arbitration clause.

Only if the clause is invalid, or the subject matter of the dispute is inarbitrable, will the courts refuse to enforce it. All proprietary claims are arbitrable, with some exceptions to be found in family law and cooperative apartment ownership rules. Moreover, consumer and employment-related matters are only arbitrable if the parties entered into the arbitration agreement after the dispute arose. Also, if a contract containing an arbitration clause is rescinded, the arbitration clause is no longer enforceable, unless the parties have expressly agreed on its continuation.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

Arbitral tribunals and state courts may order interim measures in support of an arbitration. In general, a party is free to choose whether it directs its request towards the courts or the tribunal. For the relief to be granted, certain conditions need to be met. First, relief can only be granted in respect of the subject matter of the dispute. Second, the granting of the relief must be crucial for preventing the otherwise impeding frustration or complication of future enforcement or for preventing irreparable harm.

An arbitral tribunal may order any interim relief it deems appropriate. However, arbitral tribunals lack coercive powers and their decisions must be enforced by state courts, which are limited to the enforcement measures foreseen under Austrian law. Thus, the enforcing court may transform the tribunal's order into such interim measure it is authorised to enforce.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

Austrian arbitration law stipulates that the arbitral tribunal must state the reasons on which it bases its award. However, the parties may deviate from this requirement by mutual agreement.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

The grounds for challenging an award are set out in the Austrian Code of Civil Procedure. The grounds closely mirror those provided for in Article V of the New York Convention and Article 34 of the UNCITRAL Model Law on International Commercial Arbitration. The list is exhaustive and there is no right to a further appeal.

The grounds are as follows:

- the invalidity of an arbitration agreement or a lack thereof;
- a party's incapacity to conclude an arbitration agreement;
- a violation of the right to be heard;
- the subject matter is beyond the scope of the arbitration agreement;
- a failure in the constitution or composition of the tribunal;
- the proceedings violate Austrian public policy;
- the requirements for an action for revision are fulfilled;
- the matter in dispute is not arbitrable; and/or
- the award violates Austrian public policy.

As of 2013, the Austrian Supreme Court of Justice acts as the only instance in proceedings for challenging an award. Challenges to the award have to be brought before the court within three months after the award has been handed down.

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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

The Ministry of Finance of the Republic of Azerbaijan is the central executive body which carries out state financial policy and organises the management of state finance. The Ministry operates on the basis of a statute approved by Decree 48 of February 9, 2009 of the President of the Republic of Azerbaijan. The Decree approved the Ministry's structure and statutes for the establishment of the State Treasury Agency, Public Debt Management Agency, State Financial Control Service, **State Insurance Control Service** and State Service for Control of Precious Metals and Stones, which are all included in the structure of the Ministry.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

To carry out insurance and reinsurance activities in the territory of the Republic of Azerbaijan, it is necessary to obtain an appropriate licence in the manner prescribed by the Law on Insurance Activity № 519-IIIQ, dated December 25, 2007.

An insurer, as a legal entity and a commercial organisation, can carry out its activities only in the organisational and legal form of an open joint-stock company.

The issuance of licences for insurance and reinsurance activities, and the temporary suspension, restriction and cancellation of licences, is carried out by the State Insurance Control Service.

Applications for obtaining a licence for insurance and reinsurance activities are reviewed by the State Insurance Control Service in two stages:

1) consideration of the preliminary application for a licence, submitted by the founders or by a person(s) authorised by the appropriate legislation; and
2) consideration of the final application for a licence after the acceptance of state registration as an open joint-stock company.

The preliminary licence for the respective insurance and reinsurance activity of the new joint-stock company is issued for a period of five years, and the final licence for the respective insurance and reinsurance activities of the insurer is unlimited.

For a preliminary application for a licence, along with documents proving that the founders or shareholders of an open joint-stock company established to become an insurer meet the requirements of the law, the following documents should also be submitted:

- a written application for a licence, reflecting the name and address of the open joint-stock company established in accordance with the law, and established to become an insurer;
- a copy of the charter of the open joint-stock company, certified by a notary; if the number of founders is more than one, a copy of the certified memorandum of association must also be submitted;
- information on founders who are legal entities;
- information and documents reflecting the ID, permanent place of residence and place of work (type of occupation) of founders who are individuals, as well as documents confirming the sufficiency of the funds for the acquisition of shares;
- if applicable, a certified document confirming the authority of a person applying for a licence on behalf of the founders;
- information on the prevailing interests of the founders in other legal entities, as well as, for each founder who is a legal entity, the prevailing interests of other persons in its authorised capital; and
- a business plan that reflects the following information for at least the next three years: a list of persons foreseen for appointment to the position of executive officer; and documents proving their civil faultlessness, certified by a notary.

After receiving a positive response from the State Insurance Control Service to a preliminary application for a licence, an open joint-stock company established to become an insurer is accepted for state registration as a legal entity in accordance with the law.

After acceptance for state registration, a legal entity established to become an insurer must submit to the State Insurance Control Service the following documents in order to obtain a licence:

- a final appeal, reflecting its name, organisational and legal form, location, current account number and the name of the relevant bank, and the name of the type of activity for which a licence is applied;
- a copy of the certificate of state registration, certified by a notary;
- a notarised copy of the document on the acceptance of an open joint-stock company established to become an insurer, to be registered by the relevant tax authority;
- a copy of its charter, certified by a notary;
- documents confirming the payment of the authorised capital of an open joint-stock company established to become an insurer to a bank account in accordance with the law;
- information confirming the compliance of persons appointed to executive positions within the requirements

of the law, including notarised copies of relevant documents on education and work experience;
- insurance rules for the types of voluntary insurance for which permission is requested; and
- a copy of the document confirming the right to use the office building in which an open joint-stock company established to become an insurer will operate.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

The market is admitted. Execution of insurance by foreign insurance companies on the territory of the Republic of Azerbaijan is not allowed.

Insurers can reinsure risks for property interests related to insurance subjects located or present in the territory of the Republic of Azerbaijan, from local insurers or from foreign insurers that meet the requirements of the law, as well as those entered in the Register of Reinsurers and Brokers monitored by the Ministry of Finance. Such reinsurance can be carried out directly or through local or foreign insurance brokers, as well as those entered in the Register.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

There are internal rules of insurance developed by each insurance company independently, in line with the authorised state bodies' guidelines.

1.5 Are companies permitted to indemnify directors and officers under local company law?

Yes. There are no restrictions relating to a company indemnifying directors and officers.

1.6 Are there any forms of compulsory insurance?

Compulsory insurances are regulated by the Law on Compulsory Insurances № 165-IVQ dated June 24, 2011.

These are:
- compulsory real estate insurance;
- compulsory insurance of civil liability in connection with the operation of real estate;
- compulsory insurance of civil liability of owners of motor vehicles;
- compulsory personal accident insurance for passengers; and
- compulsory insurance against disability as a result of workplace accidents and occupational diseases.

Specific types of obligatory insurances are:
- compulsory ecological insurance;
- compulsory insurance of auditors' professional liability;
- compulsory state personal insurance of military personnel;
- compulsory insurance of employees of judicial and law enforcement bodies;
- compulsory insurance of government officials; and
- compulsory insurance of persons serving in diplomatic missions of the Republic of Azerbaijan, or operating in foreign countries and international organisations.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

In general, (re)insurance agreements protect the interest of the insurance company. The authorised body is in the process of creating ombudsmen, which will enable insureds to make complaints with respect to their policies and related claims.

2.2 Can a third party bring a direct action against an insurer?

A party which does not have any title in an insurance agreement cannot bring a direct action against an insurance company.

2.3 Can an insured bring a direct action against a reinsurer?

As per the insurance legislation, the fronting insurance company which issues the insurance contract is fully responsible in front of the insured and the insured has no right to go directly to the reinsurance company.

Cut-through clauses are not popular with local insurance companies. However, if such a clause is attached to a reinsurance contract, this will enable the insured to take action against the reinsurer, if required.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

As per the law, the insurance company can reject the claim, not return the premium and, if required, take legal action against the insured.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

Yes. Insureds are obliged to inform the insurer of all the circumstances that should be included in the contract, as well as all the circumstances known to him which may affect the insurer's decision to refuse the contract or to conclude it with altered terms, as well as all the circumstances connected to any change of the insurance risk after the conclusion of the contract, including information on all previous insurance contracts for the relevant type of insurance, insurance events that occurred under these contracts, and paid insurance reimbursements, and submit the relevant documents.

Otherwise, the insurance company can reject the claim, if any, and not return the premium as well.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

A subrogation clause is a standard clause within an insurance agreement, unless otherwise agreed.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

The court system of Azerbaijan consists of three instances:

1) Courts of first instance – district (city) courts, military courts, administrative-economical courts and courts on grave crimes.
2) Courts of appeal – function in six regions of the country and consist of four boards: civil; criminal; military; and administrative-economical.
3) Court of cassation – there are four boards under the Supreme Court: civil; criminal; military; and administrative-economical.

If the parties, in their agreement, have agreed upon a pre-trial procedure for dispute resolution (e.g. through negotiations), they should follow that procedure before going to court. If negotiations have failed, only then may the parties go to court. Otherwise, the court will dismiss the case.

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

State dues are subject to be paid when applying to the court. Any additional payments are not allowed.

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

Courts of first instance

A case must be heard and settled within three months from the date of receipt of a statement of claim by the court.

Entry into legal force: if the court decision has not been appealed, it enters into legal force one month after it has been issued.

Period for appeal: appeals may be submitted within one month of official submission of the court decision.

Courts of appeal

Cases must be heard in courts of appeal within three months of their submission to the court.

Entry into legal force: if the decision of the court of appeal has not been appealed, it enters into legal force two months after it has been issued.

Period for appeal: appeals may be submitted within two months of official submission of the court decision.

Court of cassation

A case must be heard in the court of cassation within two months of its submission to the court.

Entry into legal force: the decision of the court of cassation enters into legal force from the moment of its issuance.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

The courts have full power in this regard.

Each party must prove the circumstances it refers to as the grounds for its claims and objections. Legal representation in court involves a deep analysis of all the circumstances of the case. For this, it is necessary to examine all the documents, all the evidence, to question the concerned parties, etc.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

No. A party cannot withhold documents from disclosure.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

Yes, they do. In cases where one party is reluctant to give evidence, the court is able to ask the embassy in his territory to send an application via the local court, inviting him to the court in order for him to provide his evidence. In cases where the parties are resident in Azerbaijan, the court can request them to attend court on a specific date to provide their evidence, and local law enforcement bodies are used by the court to enforce this.

4.4 Is evidence from witnesses allowed even if they are not present?

No. In cases where the party is not present, he is able to provide his evidence via his lawyer or by referring to a notary public and then sending the legalised version to the country where the case is in process.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

Depending on the case, an expert witness can be called in. It is not common to have a court-appointed expert.

4.6 What sort of interim remedies are available from the courts?

Depending on the case, remedies can vary, and may include a fine, imprisonment with the right to pay a fine to avoid the period of confinement, or imprisonment subject to not being prosecuted by the prosecutor office.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

Yes, appeal is possible; usually the court of appeal accepts a maximum of between three and five appeals.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Yes, it is recoverable. The current rate is between 0.1% and 0.5%.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

Civil lawyers and solicitors charge their clients as per the regulated tariffs. Cases can be settled prior to trial in the case that there will be benefits for the parties due to the status of the claim. But usually, the general trend is to refer cases to court.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

This is not a usual practice. However, if the court decides to use a mediator either for one party or all the parties involved, they have to invite them to the court, advise them on the purpose for invitation and ask them to introduce their mediators. The court can use legal enforcement authorities to make a party/parties obey.

4.11 If a party refuses to a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

A party will receive a court application with the deadline to mediate.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

Arbitration practice in the Republic of Azerbaijan is still in the process of development.

The following matters are within the exclusive jurisdiction of the courts of the Republic of Azerbaijan, in accordance with Article 444 of the Civil Procedure Code, and cannot be resolved via arbitration:

- Litigation related to property rights, rent or mortgages, where the case relates to real estate located in the territory of Azerbaijan.
- Cases related to the legal status of entities, dissolution and deregistration of legal entities, if such legal entities have a legal address in Azerbaijan.
- Cases relating to claims in respect of recognition of the validity of patents, marks or other rights where registration or an application for registration of these rights has been carried out in Azerbaijan.
- If a decision on mandatory enforcement measures, taken in the course of litigation, has been implemented in Azerbaijan.
- Cases related to claims against cargo shippers, deriving from contracts for transportation services.

The International Commercial Arbitration Court of Azerbaijan, established in accordance with the Law of Azerbaijan Republic 'On International Arbitration' and other normative instruments, which has succeeded in popularising the idea of arbitration by becoming the first arbitration court in the country. It is the only arbitration institution currently functioning in Azerbaijan.

A court before which a case has been initiated, on a matter in respect of which the parties entered into an arbitration agreement, may, at the request of one of the parties, send the parties to arbitration unless it is established that the agreement is invalid, inoperative or incapable of being executed.

When a claim is brought to court, the arbitration may be initiated or continued, and a decision may be made while the issue of jurisdiction is pending before the court.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

In case a reinsurer includes such clause in the contract, the local insurance company, i.e. the fronting company, will insert such a clause into the insurance agreement. Such an agreement must be in writing and specify the consent of the parties to refer the dispute to arbitration. The Law of the Azerbaijan Republic 'On International Arbitration' specifically states that an arbitration agreement may be concluded via an arbitration clause in a contract or as a separate agreement. An arbitration agreement must be concluded in a written form. An agreement shall be deemed concluded in writing if it is reflected in a document signed by the parties, or is signed by a letter, electronic communication, teletype, telegraph, etc., to which the opposite party does not object. A reference in a contract to an arbitration clause shall be deemed an arbitration agreement, provided that the contract is concluded in writing and such reference makes that clause a part of the contract. (Article 7, Law of the Azerbaijan Republic 'On International Arbitration'.)

Concerning insurance, an arbitration clause should be inserted within the insurance agreement.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

A recent review of the judicial practice regarding recognition and enforcement of decisions rendered by foreign (arbitration) courts shows that the courts do not have a unified methodology for considering such cases.

The arbitral tribunal, or any party with the approval of the arbitral tribunal, can request assistance from the Supreme Court when taking evidence (Article 27, Law of the Azerbaijan Republic 'On International Arbitration'). The court can execute this request within its competence and according to the rules on taking evidence. It is also possible for a party to request from the court, before or during arbitral proceedings, an interim measure of protection and for the court to grant it (Article 9, Law of the Azerbaijan Republic 'On International Arbitration').

In practice, however, this article does not work well, since courts prefer not to interfere in arbitration proceedings.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

Parties to arbitration proceedings may apply to the court for interim security measures. The petitioner must provide the court with confirmation that the arbitration proceedings have been properly commenced in order for the court to review the request.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

Yes. The tribunal must provide details. However, this can be included within the documents of the application for arbitration before it is submitted to the tribunal.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

Courts cannot appeal the decision. However, the arbitral conclusion can be challenged by an arbitral head appointed by both parties.

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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

In the wake of the financial crisis, Belgium moved to a "twin-peaks" supervisory model. Pursuant to the Law of 2 July 2010 amending the Law of 2 August 2002 relating to supervision of the financial sector and financial services (the "2002 Law"), the National Bank of Belgium (the "NBB") assumed responsibility for prudential supervision of the financial sector. A separate authority, the Financial Services and Markets Authority ("FSMA"), became responsible for regulation of financial services and markets, including the conduct of business of (re) insurance undertakings in Belgium. In addition, the Law of 13 March 2016 on the status and supervision of insurance and reinsurance undertakings (the "2016 Law") – Belgium's implementation of the Solvency II Directive – sets out the competences of the NBB.

The NBB is, therefore, the entity responsible for the authorisation of (re)insurance undertakings in Belgium, and, for prudential purposes (above all, solvency), monitoring and supervising their activities. The FSMA monitors and supervises these entities' compliance with conduct of business rules. Implementing measures adopted pursuant to the 2002 Law ensure extensive cooperation and consultation between the NBB and FSMA. The FSMA is also responsible for regulation of (re)insurance intermediaries, following registration in specific registers (broker, agent, sub-agent and ancillary insurance intermediary). As part of a package of measures for a "no-deal" Brexit, a Law of 3 April 2019 introduced new rules for insurance intermediaries that carry on activities as managing general agents and are incorporated as such in Belgium. A separate register has been set up for this category (known in Belgium as "mandated underwriters").

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

The primary legislative text for the authorisation and supervision by the NBB of (re)insurers is the 2016 Law.

The 2016 Law applies to various categories of (re)insurance undertakings, including the Belgian branches of foreign/third-country, *i.e.* non-EEA, (re)insurers.

Authorisation is granted on fulfilment of statutory and regulatory conditions. The insurer is authorised for specific classes of insurance (grouped under life and non-life headings; for example, in life, unit-linked and in non-life, accident, sickness, etc.; classes can be combined or "supplementary"). Authorisation must be granted or refused within a period of six months from the date of receipt by the NBB of a complete application. Authorisation is published in the State Gazette.

The 2016 Law and its implementing decrees (principally, the Royal Decree of 22 February 1991 regarding the general regulation on the supervision of insurance undertakings – the "1991 Decree") provide a comprehensive list of the documentary requirements for an application for authorisation.

Applicants for authorisation must also demonstrate that, taking into account reinsurance cessions, the company's technical and financial resources are sufficient for its scheme of operations and that they meet other conditions and rules of the 2016 Law. By way of example, the 2016 Law prescribes: the form of a Belgian insurance company (essentially, joint stock or mutual) and the scope of the objects of the company; that the constitutive documents must avoid any provision detrimental to insureds, contracting parties and beneficiaries; and that restrictions apply in relation to loans in any form whatsoever to directors or management. Numerous provisions of the Belgian Code of Companies and Associations ("BCCA"), referring to the classic form of a joint stock company under Belgian law, apply to Belgian (re)insurance entities, while specific adjustments also reflect the characteristics of Belgian mutual insurers.

Application for authorisation of the Belgian branch of a third-country insurer is subject to similar requirements. In addition, the insurer must appoint an authorised agent for its Belgian branch, such agent being officially authorised to represent the company before the Belgian authorities and courts. Authorisation may be refused to a third-country company if that country refuses equivalent treatment to Belgian insurers. Lastly, a 2019 legislative amendment has restored cross-border supply of (re)insurance from third countries, albeit subject to discretionary requirements set by the NBB and in international agreements, such as the EU-U.S. Covered Agreement.

The 1991 Decree further regulates the authorisation procedure.

The NBB issues the authorisation. Authorisation must be used within 12 months, and without interruption for a period exceeding six months, or it will be forfeited.

In 2017, the NBB released a guidance memorandum for applicants seeking authorisation as insurers. These guidelines set out a two-phase procedure for the application (preparatory and approval in principle, and formal filing) and comment on the scope of information required in support of the application, for example, a business plan, insurance classes, organisation and management of the company, internal supervision, audit and compliance, technical and financial questions, asset liability management, etc.

The quality of the application and the scope of activities contemplated determine the statutory and additional capital and other requirements which the NBB has set in a given case.

The NBB is no less rigorous than its larger neighbours in its scrutiny of applications. Full and frank disclosure when preparing an application will be required, but the NBB is also pragmatic, for example, in the context of UK firms considering Belgium for their post-Brexit operations. Furthermore, with regard to third-country applicants, the NBB will fulfil its duty, under international reciprocity arrangements, to inform the European Commission of authorisations granted to such companies.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Incorporation and authorisation of a Belgian insurer (or authorisation of the Belgian branch of a non-EEA insurer) is not the sole basis for market entry: EEA insurers can exercise "passport" rights in the market on a freedom of services or branch basis; and insurers can also take a holding in an existing company (whether active or in run-off), but will still face authorisation requirements – for example, NBB review (within a prescribed period of 60 business days, which can be extended) of the suitability of the proposed shareholders.

Foreign, *i.e.* third-country insurers are generally required to set up a local branch and fulfil detailed prudential and other conditions. The 1991 Decree does, however, allow limited direct business in certain cases laid down in international agreements. Third-country reinsurers are also required to set up a branch. The NBB has, however, expressly recognised that, in accordance with the EU-U.S. Covered Agreement and subject to its conditions, US reinsurers can write business on the Belgian market without having to set up a branch or post collateral.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

Belgium is a civil law jurisdiction: the Civil Code includes summary provisions on insurance, as well as the general rules on contract and tort.

In addition, Belgium has detailed legislation on contracts of insurance: the 2014 Law noted above. It contains numerous provisions designed to protect the consumer – often by virtue of its public policy basis, but with the exception of provisions whose drafting enables the parties to waive their application by agreement. The provisions of the 2014 Law, together with a list of legal texts published by the FSMA, are deemed to protect the general good and are therefore binding on non-Belgian insurance undertakings active on the Belgian market.

Belgium has also enacted specific texts on insurance contracts, all of which may restrict freedom of contract, for example for workplace accidents and insured pension schemes.

The numerous provisions restricting freedom of contract include:

- Belgium's laws on the use of an official language;
- the 1991 Decree provisions on pre-contractual disclosures for life and non-life contracts and on the use of plain language;
- the 2002 Law provisions on fair, clear and non-misleading information;
- various Royal Decrees on pre-contractual disclosures and mandatory terms:
  - Royal Decree of 14 November 2003 regarding the activity of life insurance (the "2003 Decree");
  - Royal Decree of 2 May 2017 regarding approval of the FSMA regulation on costs and charges that service providers must communicate to their clients in the context of the provision of insurance mediation services in Belgium;
- the 2014 Law provisions on insurance contract conditions;
- restrictions on choice of law and pre-contractual disclosures; and
- restrictions on choice of competent jurisdiction.

Finally, various general texts apply to the insurance sector. A key example is the Code of Economic Law of 28 February 2013, which sets out Belgium's current implementation of the 1993 Unfair Contract Terms Directive, the 2005 Unfair Commercial Practices Directive and the 2011 Consumer Rights Directive. A further, recent example is a Law of 4 April 2019 which extends rules on unfair contract terms and unfair commercial practices to the B2B sector.

1.5 Are companies permitted to indemnify directors and officers under local company law?

This has been a controversial question under Belgian law. Legal commentaries have varied regarding the validity of clauses: (i) excluding or limiting liability by providing that a company waives rights of action against its corporate officers; or (ii) providing that the company will guarantee its corporate officers against claims from third parties.

The BCCA, which entered into force on 1 May 2019, introduced a new director's liability regime. This new regime has removed the uncertainty regarding the indemnification of liability of directors. Except for statutory exclusions (*e.g.* fraud) set out in the BCCA, the BCCA now caps the liability of directors. The liability cap is linked to the average yearly turnover and average balance sheet of the same year. A company, its subsidiaries or the entities controlled by it may not exclude in advance liability of directors or officers towards the company or third parties. Any provision in the articles of association, in an agreement or a unilateral expression of will that is contrary to these provisions is deemed to be null and void. A parent company or other shareholders of the company may, however, still indemnify the directors of the company.

Belgian law recognises the validity of liability insurance for corporate officers. The policy is typically taken out by the company for the benefit of its corporate officers. Coverage is not dependent on the legal basis for proceedings for liability of the corporate officer, nor does it depend on the legal categorisation of the fault imputed to the insured officers, subject to the exclusions of the policy itself, for example intentional fault of the insured.

D&O coverage will typically insure against extra-contractual (*cf.* tort) and contractual liability based on specific provisions of the Civil Code and the BCCA.

1.6 Are there any forms of compulsory insurance?

Belgium has a highly developed system of compulsory insurance. There are two particularly important examples: motor insurance (Law of 21 November 1989 relating to compulsory insurance of motor vehicle liability); and insurance for workplace accidents (Law of 10 April 1971 on workplace accidents).

There are at least 30 examples of compulsory insurance, the full list of which is published annually by the FSMA, *e.g.* carriage,

hunting, campsites, architects, travel agents, insurance intermediaries, estate agents and voluntary associations. There are also variants of compulsory insurance, for example, a non-compulsory insurance may become compulsory if a certain risk is covered, *e.g.* civil liability in the nuclear energy sector.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

See question 1.4 above. As noted above, the 2014 Law is the key text and sets out the primary source of substantive law.

Commentaries on the 2014 Law distinguish between those of its provisions which protect the insured and those which protect the insurer. The legislator's primary concern is to protect the insured, but the 2014 Law also recognises that the insured's behaviour may be a threat to the insurer and its interests are therefore protected, for example: certain provisions in relation to declaration of risk (Articles 58–60); exclusion of claims which have been intentionally caused (Article 62) and claims arising from war (Article 63); failure to pay the premium (Articles 69–72); and the insured's duties in the event of a claim (Articles 74–76). Parliamentary documents add that the insurer cannot waive these provisions in its favour.

Distinguishing between protection of the insurer and the insured can be complex: the 2014 Law may impose duties on the insured (which protect the insurer) or may regulate their scope or sanctions for failure in order to avoid excess of rigour (thus protecting the insured). By way of example, detailed rules on omissions and misstatements protect the insured, in particular with regard to: unintentional omissions (Article 60); certain disclosure requirements (Article 58); and the consequences of intentional omissions and inaccuracies (Article 59) protect the insurer.

With regard to insurance distribution, Belgium has implemented Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution, *i.e.* the "Insurance Distribution Directive" ("IDD"), in particular by amending Part 6 of the 2014 Law on insurance mediation and distribution. The effect is to implement rules similar to "MiFID" into the Belgian insurance sector. This implementation does not amend radically; instead, it reflects a constant evolution, as Belgium had already extended EU MiFID II provisions to the insurance sector (a process often referred to as "AssurMiFID"). Certain obligations arising from the AssurMiFID legislation continue to apply, in particular those relating to the intermediary's conflict of interest policy, information on costs and charges, the customer file, registration of all insurance distribution activities and the presumption of a causal link applicable in the event of a breach of various rules of conduct.

In the savings insurance sector, the PRIIPs Regulation, *i.e.* Regulation 1286/2014 on key information documents for packaged retail and insurance-based investment products, applies in Belgium (effective since 1 January 2018) and, in particular, requires provision to the prospective insured of a "key information document" setting out harmonised pre-contractual disclosures.

The industry has recently developed a code of conduct including criteria to assess whether companies which receive inducements comply with the requirement to act honestly, fairly and professionally. This code of conduct includes a non-exhaustive blacklist of inducements that are considered to have a detrimental impact on the quality of the service. The code of conduct was approved by a Royal Decree of 18 June 2019.

In conclusion, Belgian substantive law relating to insurance – at least in the retail/B2C sector – is generally more favourable to the insured.

2.2 Can a third party bring a direct action against an insurer?

The 2014 Law expressly provides that liability insurance grants a third party, the victim, an independent right to claim from the insurer (Article 150), as a result of which indemnification due by the insurer vests in the victim to the exclusion of other creditors of the insured (Article 150, §2).

2.3 Can an insured bring a direct action against a reinsurer?

Under Belgian law, reinsurance does not create any legal relationship between the insured and the reinsurer. Therefore, in principle, the insured cannot seek payment of indemnity from the reinsurer. Legal commentaries do, however, note with approval the option to include a "cut through" clause, enabling the insured to bring an action against the reinsurer in the event of insolvency of the insurer. The commentaries note the same option in relation to the insurer's action against a retrocessionnaire.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

The 2014 Law regulates disclosure and the consequences of intentional and unintentional non-disclosure (omissions) and misstatements.

With regard to the duty of disclosure, the insured is bound, at the time of conclusion of the contract, to declare all circumstances known to him and which he must reasonably consider as comprising, for the insurer, factors for determining the risk. However, the insured does not have to declare to the insurer circumstances which are already known to the insurer or which the insurer should reasonably know. Genetic data may not be disclosed. If no reply is given to certain written questions of the insured and if the insured nevertheless concludes the contract, other than cases of fraud, the insurer cannot subsequently rely on such omission (Article 58).

As for intentional omission or misstatement, where these induce the insurer into error as to the factors for determining the risk, the contract is null and void. Premiums due up to the time when the insurer becomes aware of the intentional omission or misstatement are payable to the insurer (Article 59).

As for unintentional non-disclosure or misstatement, the contract is not null and void (Article 60, §1). Instead, within one month from the date when the insurer became aware of the omission or misstatement, the insurer must propose an amendment of the contract with effect from such date. If the insurer proves that it would not in any event have insured the risk, the insurer may terminate the contract within the same period. If the proposal to amend the contract is refused by the policyholder or if, on expiry of a period of one month from receipt of such proposal, the proposal has not been accepted, the insurer may terminate the contract within 15 days. An insurer which has not terminated the contract or proposed an amendment within the period set out above cannot in the future contest facts which are known to it.

If the omission or misstatement is not imputable to the policyholder and a claim arises before the amendment of the contract

or the termination has taken effect, the insurer must provide the agreed benefit (Article 60, §2).

If the omission or misstatement can be imputed to the policyholder and if a claim arises before the amendment of the contract or the termination has taken effect, the insurer is only bound to provide a benefit proportionate to the premium paid and the premium which the policyholder should have paid if he had properly disclosed the risk. If, however, on a claim, the insurer proves that it would not in any circumstance have insured the risk whose real nature has been disclosed by the claim, its benefit is limited to repayment of all of premiums paid (Article 60, §3).

If a circumstance which is not known to the two parties at the time of conclusion of the contract becomes known in the course of performance of the contract, specific provisions (Articles 80 and 81) apply depending on whether such circumstance is a reduction or aggravation of the insured risk.

Finally, for life insurance contracts, the insurer can no longer rely on an unintentional omission or misstatement after a period of one year (Article 162, 2014 Law and Article 10, 2003 Royal Decree). In health insurance, specific rules restrict the insurer's right to challenge on grounds of failure to disclose a pre-existing condition.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

See question 2.4. By way of further comment:

- the insured is not liable for not declaring what he does not know. The 2014 Law requires him to declare what "he must reasonably consider" to be pertinent, not what "he should reasonably know" (Article 58);
- if the insurer wishes information in certain circumstances whose relevance is likely to be missed by a layman, the insurer must seek disclosure;
- since the insured is not required to disclose circumstances which are already or should be known, the insurer's need to know is limited to what is actually known; and
- genetic data must not be disclosed. Other disclosures regarding the insured's privacy/personal data may be requested, but may be open to challenge on grounds of breach of fundamental rights. Case law includes criminal records, health (in particular, AIDS), medical secrecy and discrimination on grounds of gender.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

The 2014 Law (Article 95) expressly provides for subrogation on payment of an indemnity. The insurer is subrogated, up to the amount of such indemnity, in rights and actions of the insured or of the beneficiary against the third party liable for the damage. If, because of the insured or beneficiary, the effects of subrogation are denied to the insurer, the insurer may claim repayment of the indemnity paid up to the amount of the harm suffered. Subrogation may not prejudice the rights of the insured or beneficiary who has only been partly indemnified. In such case, the insured or beneficiary may enforce his rights for the balance in preference to the insurer's rights.

Other than cases of malice, the insurer has no right of action against specified categories of persons – essentially family members. In the event of malice by minors, the insurer's right of action may be restricted depending, in particular, on whether their personal liability is insured.

The insurer does not sue in the name of the insured. The insured's rights are transferred, by operation of law, to the insurer: the subrogated insurer exercises the insured's right of action against the third party. There is no express duty in law on the insured to cooperate, but he must not hinder the insurer's action either, for example through negligence in preparing evidence, delay in notifying a claim, granting a discharge to the person liable, etc. As noted above, in such cases, the insurer may claim repayment of the indemnity paid up to the amount of the harm suffered. Finally, subrogation by agreement is also possible and known.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

Proceedings before Belgian courts are mainly governed by the Judicial Code. The following sections are drawn from the relevant articles of that Code.

The Judicial Code allocates jurisdiction according to the value of the claim, the basis for the claim, the capacity (*e.g.* trading or other capacity) and the urgency. The parties may not waive such rules. Likewise, faced with a breach of the allocation rules, a court must *ex officio* declare that it does not have jurisdiction to hear the case.

The Judicial Code confers jurisdiction on the court of first instance for all matters except those which are reserved to other courts. Typically, where the parties are acting in a trading capacity, the commercial court – now known as the enterprise court – will be the appropriate court. For claims related to workplace accidents, mandatory sickness and disability insurance and occupational pensions, the labour court is competent.

Additional rules govern territorial jurisdiction and, in certain cases, the parties may enjoy freedom to vary such jurisdiction. In principle, the courts of the domicile of the policyholder are competent. However, exceptions related to work disability and marine insurance contracts apply.

In commercial and civil matters, there is no right to a hearing before a jury.

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

In general, the plaintiff launches proceedings by a bailiff serving a summons. This usually costs €200 to €300, but can also be more expensive – for example, if there are several defendants. In specified cases, proceedings can also be initiated by *ex parte* application, which is more cost effective.

During the proceedings, parties are obliged to pay costs arising out of the proceedings, for example investigative measures, travel costs, etc.

After the proceedings, the losing party or, in case there is no losing party, the claimant, has to pay the court registry fees, which are set at €165 for the courts of first instance and enterprise courts. The court registry fee is payable in full by the plaintiff, except:

- in the event that the defendant is ruled against, in which case the fees are payable in full by the defendant; or
- the parties have been unsuccessful on any point of contention, in which case the fee is owed partly by the plaintiff and partly by the defendant, according to the decision of the court.

Lastly, the court may grant an award for costs, *i.e.* a fixed contribution to the costs and fees of the successful party's lawyer, which varies according to the nature of the case and the value of the dispute. The judge may reduce or increase the award, but without exceeding certain minimum and maximum amounts. In doing so, the judge takes into account the financial capacity of the losing party, the complexity of the case, the contractually determined fees for the successful party and the manifestly unreasonable nature of the case.

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

A commercial case will typically take 12–24 months from the date of issue of the initial writ to first instance judgment. The appointment of an expert, as well as other procedural steps, such as additional rounds of pleadings, may substantially delay the proceedings.

A 2016 study on the length of proceedings shows that the average time before the Brussels court of appeal is about 30 months. This average varies for the other courts of appeal between 20 and 30 months.

Certain simple cases, as prescribed in the Judicial Code, may be dealt with at an introductory hearing. In such cases, the above period may be reduced to one to two months.

Proceedings in particularly urgent matters are subject to shorter periods.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

Belgium does not have a formal procedure of discovery in civil and commercial proceedings and the court has a limited role in the gathering of evidence.

There is no specific duty on a party to disclose documents which contradict that party's case. However, parties are subject to a duty of good faith and must cooperate to a certain degree in the production of evidence. If a party has reason to believe another party or a third party possesses a document that is relevant to the proceedings, it may request the court to order the production of the document. The court may also issue such order upon its own initiative (Articles 877–882, Judicial Code).

Before the case has commenced, interim measures, *e.g.* seizure, can be ordered to ensure documents remain available.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

Correspondence between an attorney and his client (under (a)), or among attorneys (in respect of (b) and (c) above), is in principle privileged, *i.e.* may not be used as evidence in civil or commercial proceedings. Other privileges apply to other professions, such as the medical profession ("medical secrecy"). Such privileges are generally considered to be public policy (and may be subject to provisions of the Criminal Code), which means that the privilege may not be waived.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

The Judicial Code sets out the procedure for hearing witnesses (Articles 915–961). However, witnesses are seldom heard before the Belgian courts.

Although only the court may interrogate witnesses, in the presence or absence of the parties, the parties may invite the court to ask specific questions.

Generally, minutes are drawn up after hearing a witness. The final hearing is then set at a later date. However, a court may always decide, even after the final hearing, to re-open the debates. Therefore, theoretically it has the power to require witnesses to give evidence at any time.

A witness who is absent or refuses to give evidence without legitimate reason may be liable to a fine. Professional secrecy is considered to be a legitimate reason.

If the witness cannot attend the hearing, for example because he is sick or resident abroad, the magistrate may travel to hear the witness or issue letters rogatory.

4.4 Is evidence from witnesses allowed even if they are not present?

In civil proceedings, witness evidence is not allowed to prove contractual claims with a value exceeding €375 and is never accepted to contradict written evidence (Article 1341, Civil Code).

However, for the interpretation of contracts or for disputes founded on extracontractual liability, witness evidence can be adduced to prove a claim, but, as stated above, Belgian courts are very reluctant to hear witnesses.

In commercial and criminal proceedings, rules of evidence are more flexible and witness evidence is accepted at all times (*e.g.* Article 1384*bis*, Civil Code).

If a civil court rules on a claim, based on a criminal offence, it must apply criminal evidence rules to that offence and *vice versa*. For example, a declaration form signed by both parties involved in a traffic accident will not prevail over a witness declaration in relation to that accident.

Procedural rules require, in principle, the presence of the witness, but certain exceptions apply, for example where a witness has been threatened in criminal proceedings.

Parties can also refer, in their pleadings, to documents written or produced by third parties and file these in the court file. The court will generally take such documents into account.

Finally, written declarations can enjoy the same evidentiary status as witness evidence (Articles 961/1–961/3, Judicial Code).

See also question 4.3 above.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

Parties may present expert evidence, but one party's expert statements and findings are not binding on any other party, unless accepted by that other party.

Therefore, a party will generally ask the court to appoint its own expert. The court can also appoint an expert on its own initiative.

The expert must be independent, and the relevant requirements in the Judicial Code for magistrates also apply for experts. For instance, an expert can be dismissed if he is connected to a party to the proceedings. Furthermore, a party should not, in

principle, meet separately with the court-appointed expert, as this could give rise to a suspicion of bias.

Generally, the costs of the expert must be pre-paid by the party applying for appointment of the expert, but the court enjoys discretion to decide otherwise. In most cases, the losing party is ordered to bear the expert's costs.

Although a court is not bound by the final findings of the expert, it will often follow the expert's conclusions.

4.6 What sort of interim remedies are available from the courts?

As for disclosure of documents, see question 4.1 above.

The president of a civil court of first instance or of an enterprise court may grant a provisional order in all matters of extreme urgency (except for those which by law are removed from the court's jurisdiction). Examples include an order to cease an activity temporarily (and subject to sanction in the event of failure to comply), or a temporary injunction to refrain from an act (Article 19, Judicial Code).

The court can also issue an interim but definitive order against a party, for instance in commercial claims for payment of a sum of money and covering the part of the claim which is not contested by the defendant.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

Subject to time limits provided for in supranational and international provisions, the time limit for lodging an appeal is 30 days from the date of formal notification of the judgment by a bailiff. Other periods can therefore apply, in particular where a party is resident abroad (Article 1051, Judicial Code). In some cases, the appeal period starts to run from the date of the judgment itself.

Either side may appeal on grounds of a mistake in both law and facts. When considering the appeal, the appeal court enjoys all the powers of the lower court. The appeal court has power to affirm, set aside or vary any judgment made by the lower court. Except for cases where it confirms certain procedural matters, *e.g.* taking of evidence, ordered by the lower court, the appeal court is seized with the case (the "devolutive effect" of appeal): it may not therefore refer the appeal back to the lower court and must exercise its powers in relation to all aspects of the decision of the lower court. It must address all factual and legal arguments raised by the parties before the lower court and which were included in the appeal; in practice, an appeal requires exchanges of further pleadings.

Parties may request a court to make a reference for a preliminary ruling to the Constitutional Court or, on questions of EU law, to the Court of Justice of the European Union. The reference must take place during proceedings (and not after the judgment has been rendered).

Finally, a decision rendered on appeal may generally be challenged before the supreme court in Belgium (the Court of Cassation), but only on the basis of a mistake in law. The appeal must be lodged within three months of the notification by bailiff of the appeal decision. The supreme court's judgment is final, except for appeal to the European Court of Human Rights.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

In monetary claims, interest will normally be awarded as from the date a formal notice of claim has been served or, if the contract provides for interest, on the date determined by the contract. The applicable rate will be that provided in the contract, subject to reduction by the court, failing which the general statutory rate applies (2% in 2019 for civil claims and 8% for commercial claims).

A party must always apply to the court for an award of interest.

As of the date of the writ of summons, certain courts apply a reduced general statutory rate.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

The court will generally order the losing party to bear the costs of the litigation. The order will award the costs of the writ of summons, the court registry fees and a lump sum intended to compensate the winning party for costs incurred in defending the claim. The court awards the sum by reference to minimum and maximum amounts fixed by Royal Decree. In practice, the award will often fall far short of the costs actually incurred.

When setting the amount of the award, the court may take into account the behaviour of the parties; for example, if there has been a genuine attempt to settle prior to a hearing. When the claim is settled before the introductory hearing, the award for costs can be substantially reduced.

A registration fee, which is a percentage of the amount of the judgment, is due and is generally borne by the losing party.

See also question 3.2 above.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

In Belgium, there is no legal obligation for judges in civil or commercial courts to inform parties of alternative dispute resolution. Specific legal provisions do, however, exist for lawyers and bailiffs: in order to persuade litigants to consider alternatives to judicial proceedings, they have a duty to inform potential litigants about mediation, and other forms of alternative dispute resolution.

The court can only compel parties to exhaust alternative dispute resolution methods, on the request of the parties and if the parties have previously agreed on such methods.

The court can order a judicial mediation if the parties so request or on the initiative of the court and with the agreement of the parties (Article 1734, Judicial Code). If the court considers that conciliation between the parties is possible, it may, of its own motion or at the request of one of the parties, order conciliation at the opening or a subsequent hearing and after having heard the parties. If all the parties are opposed to it, the court cannot order mediation. If the parties agree on the choice of mediator, that mediator will be appointed. In other cases, the court will appoint an accredited mediator. It is not general practice for Belgian courts to appoint a mediator other than on request by the parties.

In class action procedures, the court will always order negotiation. Once again, the parties must agree on the appointment of a mediator before the court will do so.

In an arbitration, a court called upon to consider an arbitration agreement may declare that it has no jurisdiction, unless the agreement is not valid with regard to the dispute in question or the agreement has been terminated. On penalty of inadmissibility, the objection to the court's jurisdiction must be presented before any other objection or defence.

Parties can always settle the dispute on their own initiative. If they reach an agreement, the parties can ask the court to grant an order recording the settlement. The court's order has the same value as a judgment.

4.11 If a party refuses to a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

There are no significant consequences following such a refusal other than the court ruling on the merits of the dispute.

In an arbitration, a court called upon to consider an arbitration agreement may declare that it has no jurisdiction, unless the agreement is not valid with regard to the dispute in question or the agreement has been terminated. On penalty of inadmissibility, the objection to the court's jurisdiction must be presented before any other objection or defence.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

The Judicial Code specifically regulates (and promotes) arbitration proceedings (Articles 1676–1723, Judicial Code).

Subject to any mandatory rules that may be applicable, the parties are free to organise the arbitral proceedings as they deem fit, including:

- the method for selecting the arbitrator(s);
- the place of the arbitration;
- the procedural rules (including the choice of language, the amount of the legal costs to be borne by the losing party, confidentiality, the right to appeal and the period of time set for the proceedings);
- whether the arbitral tribunal may proceed as a mediator; and
- the applicable substantive law, failing which the arbitral tribunal will decide.

The court may intervene in various circumstances, including:

- in the event of the failure of the parties and/or of the persons appointed to agree on the appointment of the arbitrator/the arbitral tribunal, the president of the court of first instance may do so. This decision is binding on the parties;
- when an award is subject to proceedings for annulment, or when an award is incomplete, as explained below (Article 1708, Judicial Code);
- prior to enforcement, an award must be declared enforceable by means of an enforcement order (*exequatur*) of the president of the court of first instance, applied for on an *ex parte* basis. The court's control is minimal, since the *exequatur* can only be refused for strict reasons, for example when the award is contrary to Belgian *ordre public*; and
- when the arbitral award includes provisional enforcement, a court may suspend such provisional enforcement in specific cases or only grant it following provision of security.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

The agreement to arbitrate must be evidenced in writing, either as a clause in a contract, in a separate agreement dealing solely with the question of arbitration, or even in an exchange of letters showing the parties' consent to arbitration. No formal wording is required.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

A court may refuse to enforce a clause in specified circumstances, including the following:

- When the parties have waived application of the arbitration clause.
- When the arbitration clause or agreement has expired or is invalid; for example, when the arbitration clause confers an advantage on one of the parties or with regard to the appointment of the arbitrator(s).

In insurance, the general rule is that arbitration clauses are prohibited. The 2014 Law (Article 90, §1) provides that a clause in which the parties to the contract undertake in advance to submit disputes arising out of the contract to arbitrators is deemed null and void. There are two exceptions to this prohibition:

- The parties may resort to arbitration once a dispute has arisen – arbitration clauses are forbidden, not a subsequent agreement to arbitrate.
- Arbitration for disputes arising out of certain classes of insurance may be permitted: a 1992 Royal Decree in fact provides that contracts of insurance for numerous classes of risk may include arbitration clauses.

The classes which may never include arbitration clauses comprise: motor liability; fire ("simple" risks as defined); personal liability; accidental injury on an individual basis; and assistance and legal expenses (Articles 85, §2 and 90, §2, 2014 Law). Likewise, there is no Royal Decree allowing arbitration clauses in life insurance.

In practice, unless in one of the prohibited classes, arbitration clauses are regularly included in insurance contracts, including in classes not covered by the 2014 Law. Case law has also extended the validity of arbitration and other comparable clauses.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

The courts retain jurisdiction to order interim or provisional measures, which include conservatory measures for the preservation of assets or evidence. See question 4.6 above.

Such measures may be ordered by the court until such time as the arbitral tribunal is fully constituted. Thereafter, an application for such measures would normally be made to the arbitral tribunal, although the courts in principle retain jurisdiction to order measures which the arbitral tribunal is not in a position to enforce, for instance:

- any seizure order, including any conservatory measure;
- questions of alleged forgery of documents; and
- compulsory appearance of witnesses when the arbitral tribunal has decided to hear witnesses.

Regarding such measures, the arbitral tribunal may order the parties to the arbitration to pay a daily penalty for failure to comply with any order it may issue. This penalty can, however, only be enforced and recovered in the context of a final award issued by the arbitral tribunal.

The arbitral tribunal may order and organise the holding of an expert investigation, an on-site investigation, the appearance of parties before the arbitral tribunal as well as the taking of statements under oath.

As the parties are generally free to determine the rules of proceedings, Anglo-American discovery procedures may be applied by an arbitral tribunal sitting in Belgium if expressly provided for in the arbitration clause. In that case, the arbitral tribunal may ask a court to grant orders requiring such disclosure.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

Unless otherwise agreed by the parties, the arbitral tribunal has no power to decide on purely equitable, rather than legal, grounds. It is not a mediator.

The award must be reasoned and the reasons must be set out in the award, failing which the award can be annulled by the court, upon application by one of the parties. The annulment is full or partial if the award is divisible. Legal commentaries are, however, uncertain as to the adequacy of the reasoning required.

The court does not have power to remit the matter back to the arbitral tribunal so that the reasons for the award can then be given. However, if the arbitral tribunal has failed to answer all parts of the claim, the parties, or to some extent the court, may remit the matter back to the arbitral tribunal to complete its award.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

Unless the parties have agreed otherwise, the award is final and binding and not subject to appeal.

The award can, however, be annulled by the court, upon application by one of the parties in any of the circumstances listed in the Judicial Code (Article 1717).

As a general rule, an appeal must be introduced within three months of the date of notification of the award to the parties.

A court decision granting an order to enforce the arbitral award may generally be challenged within one month of its notification.

Finally, whether a third party may challenge an arbitral award is uncertain, notwithstanding supreme court support for such challenge where the third party has been a victim of fraud.

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Bermuda


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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

The Bermuda Monetary Authority (the "BMA"), an independent (non-governmental) body created by statute, is responsible for the licensing and supervision of insurance and reinsurance companies and has broad enforcement and disciplinary powers. The Minister of Finance has limited powers, on the advice of the BMA, to make regulations prescribing the division of insurance and reinsurance companies into different insurance classes, the value to be attributed to assets and liabilities of insurance and reinsurance companies, the information to be provided by insurance and reinsurance companies in their regulatory returns and to make exemptions from provisions of the Insurance Act 1978 (the "Insurance Act"). In addition, the Minister of Finance is responsible for issuing permits to "non-resident insurance undertakings" (see the answer to question 1.3 below).

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

An application for registration as an insurer under the Insurance Act must be made to and be approved by the BMA. Only bodies corporate may be registered as insurers, thus a separate, parallel application must be made to the Registrar of Companies seeking to register the corporate body. The BMA may not register the applicant unless it is satisfied that it will, when registered:

- Maintain a prescribed minimum margin of solvency and (to the extent it carries on general business) a minimum liquidity ratio.
- Meet the "minimum criteria" of registration, namely that (among other things):
  - officers and controllers are fit and proper;
  - the business of the applicant will be conducted in a prudent manner;
  - the position of the applicant within the structure of any group to which it belongs will not obstruct effective consolidated supervision; and
  - the business of the applicant will be carried on with integrity and the professional skills appropriate to the nature and scale of the applicant's activities.

Bermuda has a multi-licence system of regulation which divides insurers carrying on general insurance business into six classes (Classes 1, 2, 3, 3A, 3B and 4) and insurers carrying on long-business into five classes (Classes A, B, C, D and E). Insurers licensed as Classes 1, 2, 3, A and B are known as "captive" insurers and have less complex risk profiles than commercial insurers (Classes 3A, 3B, 4, C, D and E).

There are also two licence classes for insurers carrying on "special purpose business", the Special Purpose Insurer class ("SPI") and the Collateralized Insurer class. Special purpose business is distinguished by the fact that the insurer's liabilities are fully collateralised by qualifying debt issuance, other approved financing, cash or time deposits. SPIs and Collateralized Insurers are used for insurance-linked securities transactions. The BMA applies relatively rigid rules regarding the type of cedant, product type and approved funding that may be reinsured or used by SPIs. Given the correspondingly low risk profile of an SPI, only limited prudential requirements apply (see below). A Collateralized Insurer is able to participate in a wider range of special purpose business transaction structures, specifically structures that would not be available for an SPI. For example, the use of reinsurance as collateral and inward limits which do not flex with the value of the value of the collateral held by the Collateralized Insurer are both permissible.

The regulatory regime for insurers is calibrated based on whether the insurer is a captive insurer, a commercial insurer, an SPI or a Collateralized Insurer. An applicant seeking registration as a commercial insurer must meet more rigorous standards than those that must be met by an applicant seeking registration as a captive insurer.

In terms of prudential requirements, all insurers must maintain a minimum margin of solvency. Commercial insurers must in addition maintain statutory capital and surplus at least equal to their "enhanced capital requirement", the results produced by mathematical models applying a range of risk capital charges to the insurer's risk profile measured by reference to a range of risk factors.

For insurers carrying on general business, the minimum margin of solvency is a function of the greater of net written premiums and discounted loss reserves and other insurance reserves, subject to a minimum floor of $120,000 for single-parent captives at one end of the scale and of $100 million for "Class 4" reinsurers at the other. For insurers carrying on long-term business, the minimum margin of solvency is a proportion of assets reported on the insurer's statutory balance sheet, subject to a floor of $120,000 for single-parent captives at one end of the scale and of $8 million for "Class E" insurers at the other.

For SPIs, the minimum margin of solvency (the amount by which special purpose business assets must exceed special purpose business liabilities) is $1.00. For Collateralized Insurers, it is $250,000. Recognising that its risk profile is more complex than that of an SPI, the Collateralized Insurer must keep some permanent capital by maintaining capital and surplus

at least equal to its Collateralized Insurer ECR, calculated by reference to market, credit and operational risk capital charges but without reference to other risk capital charges used to calculate the commercial insurer ECR.

All multi-parent captives and commercial insurers carrying on general business must appoint a suitably qualified, approved loss reserve specialist to confirm the insurer's reserves. Insurers carrying on long-term business must appoint a suitably qualified actuary approved by the BMA. However, for certain insurers carrying on fully-funded business, this requirement may be dispensed with.

All insurers must maintain a principal place of business in Bermuda. Commercial insurers must in addition maintain their head office in Bermuda.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Foreign insurers are able to write business directly insuring Bermuda risks (subject to any rules imposing eligibility requirements on insurers permitted to insure certain compulsory classes of business) without being registered under the Insurance Act, provided that they do not thereby carry on insurance business in or from within Bermuda.

The exception to the above proviso (that a foreign insurer must not carry on insurance business in or from within Bermuda unless it is registered under the Insurance Act) is the small number of "non-resident insurance undertakings", being foreign insurers which write business in Bermuda through resident representatives pursuant to permits granted by the Minister of Finance under the Non-Resident Insurance Undertakings Act 1967. Such insurers may carry on insurance business in Bermuda through their Bermuda agents without being registered under the Insurance Act.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

In a commercial context, the parties to insurance and reinsurance contracts have broad freedom to contract on terms as they see fit. The Supply of Services (Implied Terms) Act 2003 implies terms as to consideration, time of performance and standard of performance that are not excludable by agreement. However, this statute is seldom of any practical relevance in the insurance and reinsurance context.

1.5 Are companies permitted to indemnify directors and officers under local company law?

Bermuda companies are permitted to indemnify the liability of their directors and officers in respect of any negligence, default, breach of duty or breach of trust. Such agreements are void insofar as they purport to extend to fraud or dishonesty. Bermuda companies are also permitted to purchase insurance insuring their directors and officers against liability for breach of their duties of care, skill and diligence, and in respect of their negligence, default, breach of duty or breach of trust.

1.6 Are there any forms of compulsory insurance?

There are a number of forms of compulsory insurance in Bermuda. Some of the more significant examples are those required pursuant to the following acts:

- Merchant Shipping Act 2002.
- Workmen's Compensation Act 1965.
- Motor Car Insurance (Third-Party Risks) Act 1943.
- Bermuda Bar Act 1974.
- Institute of Chartered Accountants of Bermuda By-Laws 2006.

In addition, a variety of regulated persons are required, as part of statutory duties imposed under the following acts to carry on business in a prudent manner, to procure insurance against risks inherent in the operation of their business:

- Investment Business Act 2003.
- Investment Funds Act 2006.
- Trusts (Regulation of Trust Business) Act 2001.
- Corporate Services Providers Business Act 2012.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

Bermuda law relating to the pre-contractual duties of insureds and insurers, the interpretation and performance of policy terms and the remedies for breach is similar to English law prior to the coming into force of the UK Insurance Act 2015 and the UK Consumer Insurance (Disclosure and Representations) Act 2012 and is perceived to be fairly pro-insurer. However, parties to insurance and reinsurance contracts may agree to limit the scope of the insured's or reinsured's pre-contractual duties of disclosure and accurate representation and/or the insurer's/reinsurer's remedies for breach.

2.2 Can a third party bring a direct action against an insurer?

Except in a limited range of cases discussed below, a third party cannot bring a direct action under Bermuda law against an insurer under an insurance policy unless it is a party to the insurance policy.

The Third Parties (Rights Against Insurers) Act 1963 allows a third party to bring a direct action against liability insurers on the bankruptcy of an insured person whose liability to the third party has been ascertained and quantified by judgment, settlement or award.

In certain circumstances, direct actions are permitted against insurers who issue policies insuring ship owners in respect of liability under The Merchant Shipping Act 2002. Insolvency of the insured is not a pre-condition. Under the Motor Car Insurance (Third-Party Risks) Act 1943, claimants may, in certain circumstances, proceed directly against insurers in the event of the bankruptcy or winding-up of the insured.

Under the Contracts (Rights of Third Parties) Act 2016, a third party may enforce a term of a contract of insurance or reinsurance in its own right where the:

- third party is identified in the contract by name, as a member of a class, or as answering a particular description; or
- contract expressly provides in writing that the third party can enforce the term.

The assignee of an insured's right against its insurer may enforce the right in its own name where the assignment is made in writing under the hand of the insured and notice of assignment has been given to the insurer (a statutory assignment). A statutory assignment requires a matured right against the insurer; in other words, the insurer's liability to the insured must

have been ascertained and quantified by judgment, settlement or award.

In certain circumstances, a right against an insurer which is assigned pursuant to a transaction which does not meet the formal requirements of a statutory assignment may be enforced by the assignee by borrowing the name of the insured.

Assignees of a life insurance policy may enforce rights of the life assured under the policy pursuant to the Life Insurance Act 1978 (the "Life Insurance Act").

2.3 Can an insured bring a direct action against a reinsurer?

An insured cannot bring a direct action under Bermuda law against a reinsurer under a reinsurance contract unless the insured is a party to the reinsurance contract, is entitled to enforce a term of the reinsurance contract pursuant to the Contracts (Rights of Third Parties) Act 2016 (see the answer to question 2.2 above) or holds the right pursuant to a statutory assignment (see the answer to question 2.2 above).

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

Unlike the position under English law, the remedies of an insurer (other than an insurer in respect of a policy of life insurance within the scope of the Life Insurance Act) in cases of material misrepresentation or non-disclosure are not governed by statute. Under the common law, the insurer's remedy for material nondisclosure or misrepresentation is avoidance of the policy *ab initio* (rescission). The insurer must establish that the non-disclosure or misrepresentation induced its entering into the policy. As noted above (in answer to question 2.1), the parties may agree to limit the scope of pre-contractual duties of disclosure and accurate representation and the insurer's remedies for breach. Where the misrepresentation is fraudulent in nature, the insurer may also have a claim for damages in the tort of deceit. The remedies of an insurer for material non-disclosure or misrepresentation inducing the issuance of a life insurance policy within the scope of the Life Insurance Act are avoidance, but are subject to certain limitations imposed by the Life Insurance Act.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

Yes. The insured must disclose all circumstances known to the insured or which ought to be known to it which are material to the risk, regardless of whether the insurer specifically asks about them. However, the insured need not disclose circumstances that tend to reduce the risk, which are known or presumed to be known to the insurer or of which the insurer waives the need for disclosure.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

The insurer is automatically subrogated to the rights of the insured upon discharging its duty to indemnify the insured in respect of the loss. The purpose of subrogation is to prevent unjust enrichment of the insured as a result of a "double recovery". Subrogation does not give the insurer the legal right to sue in respect of the subrogated rights. However, in certain circumstances, the insurer can borrow the name of the insured in litigation to establish or enforce the subrogated rights. Nevertheless, absent any express provision, the insured retains the right to compromise claims in respect of the subrogated rights. The insurer is not subrogated to the rights of one coinsured under a policy against another.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

Insurance and reinsurance disputes are assigned to the Commercial Court Division of the Supreme Court of Bermuda. Its purpose is to ensure that commercial litigation is tried expeditiously by an experienced commercial judge, in accordance with the best modern practice. In order to qualify for the Commercial Court, a case must contain a claim or counterclaim arising out of the transaction of trade and commerce, which is either an application under the Companies Act 1981 (including insolvency matters) or relates to one of a number of designated categories, including insurance, reinsurance and arbitration.

Bermuda's rules of procedure are based on the 1979 English Supreme Court Practice Rules, subject to a number of modifications and updates including, for example, providing for the exchange of witness statements and modifying the costs regime. The Civil Procedure Rules ("CPR"), practice directions and pre-action protocols that have revolutionised English Court procedure since 1999 have, with two significant exceptions, not been adopted in Bermuda. Bermuda, therefore, continues to use the "old" litigation terminology, discarded in England, such as "plaintiff", "subpoena", "interlocutory", "discovery" and "writ". The rules of procedure in Bermuda have incorporated two significant aspects of the English CPR regime: the "overriding objective" of enabling the court to deal with cases justly; and the related duty on the court to further the overriding objective by actively managing cases.

Where there is no express local provision, the Commercial Court will follow the practice and procedure of the Commercial Court in London, as set out in the current Commercial Court Guide.

The Magistrates Court adjudicates cases with a value of less than $25,000.

There is no right to a hearing before a jury as regards insurance cases. Although there is provision in the rules for a judge to order that cases involving allegations of fraud may be tried by a jury, the authors are unaware of any incidence of this happening in modern times.

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

Commencing Commercial Court proceedings requires payment of a fee of $50 relating to the issue or presentation of originating documents.

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

Most matters before the Commercial Court proceed by way of originating summons, originating motion or petition and

are generally resolved within a few months. For writ actions – where discovery, witness statements and perhaps expert evidence is required – cases can take between one and two years to get to trial.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

Broadly speaking, the Commercial Court has powers to order documentary discovery from the parties to the action along similar lines to the courts in the U.K. and the U.S. Discovery involves the litigating parties exchanging lists of documents and then allowing inspection of the non-privileged documents listed. The breadth of discovery tends to be narrower in Bermuda than in the U.S.

The focus is on discovery being provided only by the parties to the action and applies to documents which are or have been in their possession, custody or power relating to matters in question in the action. If a party is dissatisfied with the discovery given by the opponent, an application may be made to the court for an order for specific discovery.

A party to the action may seek the production of the documents of a non-party by issuing a subpoena for their production. However, a subpoena issued by the Bermuda court is only effective within the jurisdiction of the court. It is possible to obtain discovery of documents from non-parties outside of Bermuda through asking the Bermuda Court to issue a letter of request to the foreign court of the jurisdiction where the non-party resides.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

A party may withhold inspection of privileged documents. The Bermuda Court will usually be guided by English decisions concerning privilege. In general terms, documents are privileged if they are confidential and produced for the purpose of giving or receiving of legal advice ("legal advice privilege") or if brought into being for the sole or dominant purpose of conducting or seeking advice about actual or contemplated litigation ("litigation privilege"). Communications (including notes of meetings and telephone conversations) containing or recording settlement negotiations are also privileged. In Bermuda, as in England, these are called "without prejudice" communications. So there is no misunderstanding, it is usual to mark all correspondence between parties concerning settlement "without prejudice" and at the start of any settlement discussions, for the parties to agree that the discussion is "without prejudice".

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

A party to an action may issue a writ of subpoena requiring a witness to attend court to testify and/or produce documents. Non-compliance with a subpoena will render the witness liable to being held in contempt of court.

Where a witness is based outside of Bermuda and is unwilling or unable to testify at trial, a party to proceedings in Bermuda may apply to the court to issue a letter of request to the judicial authorities of the county where the witness resides.

4.4 Is evidence from witnesses allowed even if they are not present?

The court has the power to order the taking of a deposition of a witness before a judge or officer or examiner of the court. However, this is not a U.S.-style discovery deposition but a deposition for the purposes of obtaining the witness's evidence for trial. Typically, such depositions (which are relatively rare) would take place closer to the time of trial and in circumstances where the witness is unable to attend the trial to testify.

Direct witness testimony or evidence-in-chief is given in the form of written witness statements that are filed in advance of the trial.

Generally, the witness must be called to attend trial to be cross-examined. If the witness does not attend trial, the court may disregard the contents of the statement and no other party may rely upon it. This, however, does not apply if the statement is accompanied by a hearsay notice; for example, in circumstances where the maker of the statement is deceased or is resident outside Bermuda. The court has discretion concerning the evidential weight to give to a statement of a witness who is not produced for cross-examination.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

Expert evidence may only be adduced with leave of the court. The court has considerable flexibility in dealing with the service of expert evidence depending on what it thinks is appropriate in the circumstances of each case. For example, it may order the parties to simultaneously exchange expert evidence and then allow each party to serve rebuttal reports. Alternatively, the court may order one party to serve its expert evidence first followed by the other party's response and then a rebuttal report.

Joint or court-appointed experts are uncommon but party-appointed experts must be independent and not act as advocates. Regarding this, the Bermuda Court has followed the approach to expert evidence as articulated by Cresswell J in the English case, *National Justice Compania Naviera SA v Prudential Assurance Co Ltd* ("*the Ikarian Reefer*") [1993] 2 Lloyd's Rep 68, [1993].

4.6 What sort of interim remedies are available from the courts?

Bermuda has not introduced the provisions of the English Civil Procedure Rules that enable the court to order pre-action discovery. However, the Bermuda Court has applied the general principles laid down in the English case, *Norwich Pharmacal Co. v Customs & Excise Commissioners* [1973] 2 All ER 943, which enables documents to be obtained, where necessary and in the interests of justice, to enable action to be brought against the ultimate wrongdoer.

The Bermuda Court has jurisdiction to grant injunctions, which are similar to U.S. restraining orders. If granted, an injunction will require a party to do or refrain from doing a specific act. In the insurance context, injunctions are often granted to restrain a party from acting in breach of contract by commencing foreign proceedings in breach of an arbitration or exclusive jurisdiction clause (known as an "anti-suit" injunction).

A "Mareva" injunction (now known as a "freezing" injunction in England) may be obtained in circumstances where the applicant can show that there is a real risk of dissipation of the assets in question, that the applicant has a good arguable case in relation to which the assets would satisfy any judgment and that the order is just and convenient in all the circumstances.

In addition, the court has jurisdiction to make an order for the detention, custody or preservation of property which is the subject matter of litigation.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

There is the possibility of an appeal from decisions of the Supreme Court of Bermuda first to the Court of Appeal in Bermuda and finally to the Privy Council in London.

The Court of Appeal, consisting of three judges, hears appeals in Bermuda and hearings take place in three sessions each year. A civil appeal can usually be heard within six to nine months, although it may be possible to have an earlier hearing in a case of real urgency. It is possible for the Court of Appeal acting by a single judge to hear and determine interlocutory applications (such as an application to stay execution of a judgment) before the court hears an appeal.

Bermuda's final appeal court is the Judicial Committee of the Privy Council in London. Five judges, who also sit in the United Kingdom's final appeal court, the Supreme Court (formerly House of Lords), hear appeals. Save for urgent cases, it can take over a year for an appeal to be heard by the Privy Council.

The permission of either the Supreme Court of Bermuda or the Court of Appeal is needed to appeal either an interlocutory order or a costs order. There is no need to seek permission to appeal a final judgment of the Supreme Court. For an appeal to the Privy Council, an appeal lies as of right from any final judgment of the Court of Appeal, where the matter in dispute on the appeal amounts to or is of the value of $12,000 or upwards or where the appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of $12,000 or upwards. At the discretion of the Court of Appeal, any other judgment may be appealed to the Privy Council if, in the opinion of the Court of Appeal, the question involved in the appeal is one which, by reason of its great general or public importance, or otherwise, ought to be submitted to the Privy Council for decision.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

The court has discretion to award pre-judgment and post-judgment interest. Pre-judgment interest is awarded at the statutory rate on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of judgment. Post-judgment interest is awarded, unless the court orders otherwise, at the statutory rate from the time the judgment is given until the judgment is satisfied. There is no power to award compound interest. The statutory rate is currently 7%.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

Bermuda follows the English "loser pays" practice and so, in general terms, the successful party of a trial or application is usually awarded its costs (i.e. attorneys' fees and expenses/disbursements) on either the standard or indemnity basis. (An award on the more penal indemnity basis means that costs are assessed with a presumption in favour of reasonableness, thus producing a higher costs recovery from the successful party.) However, the court has discretion and may penalise unreasonable behaviour by either party; for example, when superfluous issues are raised unnecessarily.

The usual order is that costs must be paid on the standard basis. However, on rare occasions the court may award indemnity costs, often as a way of expressing its displeasure with the behaviour of a party concerned.

A defendant to a money claim may make a payment into court and the plaintiff will suffer adverse costs consequences if it fails to beat the payment in at trial. Usually, the plaintiff will recover its costs until the date of the payment in, but thereafter have to pay the defendant's costs.

Alternatively, a party may make an offer that is "without prejudice save as to costs". This is usually only effective for offers that cannot be made by a payment into court. The costs consequences are similar to a payment into court.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

Mediation is used in Bermuda occasionally and on a voluntary basis at the discretion of the parties.

While the Bermuda Court will not compel the parties to mediate or use other forms of alternative dispute resolution, it nevertheless has the power to make costs orders to encourage parties to explore mediation and other alternative dispute resolution procedures, or to sanction parties who have unreasonably refused to mediate or use other procedures. For example, in *Knight v Warren* [2010] Bda LR 27, the Bermuda Court of Appeal held that a party's willingness to attempt mediation, or his refusal to do so, may be relevant to costs orders.

Having said that, judicial sanctions for failure to mediate are rare and do not provide a particularly strong incentive to mediate except in extreme cases. Outside the family law context, there is as yet no reported decision in Bermuda in which the Court ordered mediation. There is a reasonable argument that the Court has the power to stay proceedings pending mediation.

4.11 If a party refuses to a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

As indicated above, the Bermuda Court has not hitherto identified a power to compel parties to mediate, other than in the family law context. Parties to commercial disputes remain free to mediate or engage in other forms of alternative dispute resolution voluntarily, and unreasonable conduct may attract costs consequences. However, at this stage there is no compulsory mediation of commercial disputes in Bermuda and the Court has not evidenced a willingness to reprimand parties for failures in this regard.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

The great majority of insurance and reinsurance contracts

issued in Bermuda contain arbitration clauses and the Bermuda Court is very supportive of the arbitration process. There are significant differences between arbitration in Bermuda and England. In the first instance, there are two different regimes for commercial arbitration in Bermuda: the Arbitration Act 1986, which applies to domestic arbitrations; and the Bermuda International Conciliation and Arbitration Act 1993 ("the 1993 Act"), which applies to international arbitrations or where designated. Almost all insurance and reinsurance arbitrations take place under the 1993 Act, which implements the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law"), and the remaining answers in this section deal only with the position under the 1993 Act.

Under the 1993 Act, party autonomy prevails and this principle is enthusiastically supported by the Bermuda Court. Court intervention is very limited. Situations in which the Court may intervene include: where the arbitrator appointment process has failed; where the neutrality of an arbitrator is challenged; to secure the attendance of witnesses; to grant injunctive relief restraining proceedings in breach of an arbitration agreement; or to enforce an award.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

The 1993 Act does not require any specific form or format for an arbitration clause, save that there must be an agreement recorded in writing, which can include an agreement formed by an exchange of communications. The Act expressly allows an arbitration clause contained in another document to be incorporated by reference.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

Only if it can be shown that the arbitration clause is invalid; for example, because it was procured by fraud. The arbitration clause is deemed to be a separate contract and so may survive even if it is shown that the contract in which it is contained is void. Under the 1993 Act, the tribunal is expressly given the power to decide issues concerning its own jurisdiction, with the court then retaining a power of review.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

The power of arbitrators is limited to the giving of monetary or declaratory relief. The court will support arbitrations by, for example, compelling the attendance of witnesses, facilitating the taking of evidence and discovery from non-parties and issuing injunctions, including injunctions to restrain a party from proceeding in breach of an arbitration clause.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

Under the 1993 Act, the award must be in writing and signed by the arbitrators and the reasons upon which it is based must be given, unless the parties have agreed that no reasons are to be given.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

An award is final and not subject to any appeal on the merits. There are very limited grounds to challenge an award under the 1993 Act, including invalidity and conflict with the public policy of Bermuda.

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Mr. Chudleigh's insurance/reinsurance practice has covered most classes of business, including general liability (particularly the "Bermuda Form"), directors' and officers' liability, professional liability, product liability, cyber and intellectual property liability, property, environmental liability, marine, satellites and space, financial reinsurance, personal accident and workers compensation. He frequently advises on issues concerning the captive insurance industry.

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Mr. Chudleigh provides counselling on complex insurance and reinsurance claims, and advises on regulatory issues affecting the insurance industry, particularly in relation to the Bermuda market. He has acted as an expert witness on issues of Bermuda law in the context of US court and arbitration proceedings and has also acted as an arbitrator.

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- M&A.
- Corporate reorganisations.
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Kennedys Law LLP operates in Bermuda through its association with Kennedys Chudleigh Ltd. Kennedys was founded in 1899 in London and has evolved to become one of the leading insurance and litigation firms in the world. Globally, the firm now has more than 800 lawyers.

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Brazil

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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

The insurance and reinsurance market is essentially governed by two laws, namely Decree-Law 73 of 1966 (insurance); and Complementary Law 126 of 2007 (reinsurance). Insurance contracts are governed by the Brazilian Civil Code, and the sale of insurance policies is regulated by the Consumer Defence Code. In addition to these laws, the market is governed by Resolutions of the National Council for Private Insurance (CNSP) and by circulars issued by the Private Insurance Superintendence (*Superintendência de Seguros Privados* – SUSEP).

Specialist health insurers also have to comply with specific statutory provisions and the rules of specific supervisory bodies, such as the National Supplementary Health Agency (ANS). In the event of a breach of the norms pertaining to solvency, SUSEP has powers to intervene in insurance companies and to order their winding-up. In terms of conduct, SUSEP has powers to impose administrative sanctions on companies or individuals (directors or officers) who are proven to have breached the applicable legal provisions, or to have participated in such a breach. Although SUSEP has comprehensive, adequate and rigorous legislation to punish administrative infractions, there is a consensus amongst practitioners that the regulatory body needs to be modernised and better equipped to fulfil its institutional mission.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

SUSEP authorisation is required to act as an insurer or reinsurer in the Brazilian market. SUSEP makes extensive analysis of the authorisation request, taking into account the capacity and suitability of the controlling group. SUSEP cannot deny the request if all legal and regulatory requirements are met. This analysis takes on average six months in ordinary circumstances.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Mandatory insurance covering risks in Brazil, taken out by individuals resident in Brazil or legal entities that are domiciled here, can only be issued in Brazil itself. The rule does not apply to insurance taken out by Brazilian citizens to cover risks abroad. In general terms, there are no additional requirements imposed on foreign insurers seeking authorisation to operate in Brazil. In relation to reinsurance, the legislation issued post-2007 ended the state monopoly on reinsurance and permitted the entry of new national and foreign reinsurers. A significant amount of risk is placed on the international market via reinsurers that have been authorised to operate in Brazil (i.e., foreign capital reinsurers that have a branch in Brazil and are subject to some additional requirements) and "eventual" reinsurers (i.e., foreign capital reinsurers that are not subject to additional requirements other than a minimum rating). Insurance brokers are the only intermediaries entitled to receive commission on the basis of insurance.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

In general terms, and according to consumer protection legislation, all contracts involving consumer relations – including insurance contracts – must be drafted in a clear and precise manner, especially the clauses that may impose limitation on consumer rights. Specifically, with regard to insurance contracts, the Law (Decree 73/1966) confers on the regulating and market supervision bodies, respectively, CNSP and SUSEP, the power to establish the general characteristics of insurance contracts and also the policy conditions to be mandatorily used.

1.5 Are companies permitted to indemnify directors and officers under local company law?

Although companies are allowed to indemnify directors and officers, they usually contract a D&O civil liability policy for them, in order to cover losses or defence costs incurred by the D&Os in exercising their legitimate corporate acts.

1.6 Are there any forms of compulsory insurance?

Brazil has several classes of compulsory insurance, which are set out in Decree 73/66 (article 20). That includes, for example: carrier liability insurance (for air, land, rail, sea and river transport); civil liability insurance for construction companies; cover for personal injury caused by boat/vessel owners; property damage insurance for building owners covering damage to apartments/units caused by external events; and insurance cover for credit provided for export operations. Whilst health insurance is not compulsory, the Regulatory Authorities stipulate mandatory cover for certain conditions.

The Draft Law on Insurance (PLC 29/2017) maintains provisions on compulsory insurance and states that any insurance contract that seeks to exclude mandatory cover is to be deemed null and void (article 123).

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

In general terms, substantive law is currently more favourable to insureds, but recent developments indicate a certain shift towards a more evenly balanced system. Insurance in Brazil is governed by the following statutory framework: (a) Decree-Law 73, of November 21, 1966; (b) Complementary Law 126, of January 2007; (c) the Brazilian Civil Code; and (d) the Brazilian Code for the Defense of Consumers. In terms of infra-statutory regulations, CNSP has powers to issue regulations, and SUSEP issues guidelines (circulars) and ordinances. This legal framework is consistent with the legal principles applicable to the operation of insurance and insurance contracts and is similar to the legislative framework and concepts applied to insurance in Latin America and Europe.

Consumer protection and regulatory agencies in Brazil have a significant influence on the rules and regulations applied to the insurance market. In general, they act on a correct technical basis which guarantees relative equilibrium in the market, contributing to the development of the activity.

The case law of the Superior Court of Justice (STJ) is particularly relevant in relation to insurance. The STJ is the highest court in the country for issues of federal law, which covers essentially all of the laws and regulations on insurance, and the regulatory activities of the Federal Government and regulatory agencies.

In the past, the Superior Court of Justice had a distinct tendency to find in favour of insured parties in relation to insurance issues, sometimes going so far as qualifying norms or establishing presumptions contrary to insurers in the interpretation of provisions of the Civil Code (particularly the interpretation of articles 763, 768 and 785). Recently, the STJ has taken a more technically sound approach applying the law in line with its technical basis. It is very likely that the court will take into account the rules edited by the CNSP and SUSEP as sources of interpretation and will adhere more to the actual wording of the law.

It is important to note that specific legislation (a Draft Law on Insurance – PLC 29/2017) is currently at an advanced stage of progress through Congress. If introduced, it will revoke several provisions of the Civil Code and CNSP and SUSEP rules. It is difficult to predict the repercussions of the law, but it is likely that it will lead to Brazilian courts reviewing the positions they took under the previous law in relation to the tenets and concepts of insurance and reinsurance law with a possible change of approach in relation to certain issues (e.g., the regime of aggravation of risk, expenditure on salvage, apportionment of payout, direct third-party actions, follow the fortunes, statutory limitation, etc.).

2.2 Can a third party bring a direct action against an insurer?

Brazilian law draws a distinction in this respect between optional civil liability insurance (article 787 of the Civil Code) and mandatory liability insurance (article 788 of the Civil Code). It is only in relation to mandatory liability insurance that a third party has a right to file a direct action against the insurer. The Superior Court of Justice has in the past held, in relation to non-mandatory liability insurance, that a third party cannot move against the insurer without the insured also being a party to the lawsuit (*Súmula* 529) and with joinder of the insurer being subject to an application to that effect by the insurer. Once the insurer has been joined, the third party can move for enforcement of an award directly against the insurer. More recently, the STJ has softened its stance, enabling a third party to move against the insured and insurer together, without a need for application for joinder (*Súmula* 537). The Draft Insurance Law referred to above (PLC 29/2017) makes legislative provision for the filing by the third party of an action against the insured and insurer as joint defendants (article 103).

2.3 Can an insured bring a direct action against a reinsurer?

The general rule is that the insured has no right of direct action against the reinsurer (article 14 Complementary Law 126/2007). The exceptions to the general rule are set out in the legislation: (a) in optional reinsurance, the right to direct action arises in the event of liquidation of the insurer (article 14, I); or (b) if there is a *cut through* provision in the reinsurance contract (article 14, II). CNSP Regulation 168, of December 17, 2017, uses the same wording as the statute, but extends the provision to retrocession contracts (article 34). The Draft Law of Insurance (PLC 29/2007) follows the same logic; however, also applying the possibility of direct action in the event of liquidation of an insurer to automatic reinsurance (article 66).

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

The Brazilian Civil Code (article 766) stipulates that the deliberate omission by the insured party of a circumstance of which they must have been aware, and that would have influenced the acceptance of the risk by the insurer, gives rise to loss of insurance cover. In the event of intentional omission, the insurer is entitled to withhold a proportionate part of the insurance compensation. The benefit of the withheld amount should, therefore, be passed on to the reinsurer.

Brazilian jurists and the courts are very clear as to the need for reduction of the information gap between the insured and insurer; i.e., that the insurer needs to be given as much information as possible as to the risk and, therefore, that it is very important for the insured to accurately fill out the risk questionnaire when entering into the contract (see, to this effect, the ruling of the Superior Court of Justice on Case AgRg in REsp 1484628/MS, Rapporteur Justice Moura Ribeiro, 3rd Bench published 16 November 2016). The Draft Law of Insurance (PLC 29/2017) has adopted the provisions of the current Civil Code on this issue. Moreover, the Draft Law correctly states that it is the person/entity that fills out the insurance questionnaire that is the contracting party to the insurance party, rather than the purported insured.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

Brazilian law requires the parties to an insurance contract to act in utmost good faith (articles 422 and 765 of the Civil Code) and there is a specific provision as to the need for the insured to correctly fill in the risk questionnaire, on pain of losing entitlement to cover (article 766 of the Civil Code).

Brazilian courts, and most notably the Superior Court of Justice, have upheld in full the requirement for good faith, and in the recent case of AgInt in REsp 1641348/SP (Rapporteur

Justice Moura Ribeiro, 3rd Bench, published in DJe 14 August 2017), the court held that the insured was under a duty to be proactive in relation to informing the insurer as to the risk involved and that the duty was not discharged merely by filling out the risk questionnaire. In relation to article 766 of the Civil Code, the position of the Superior Court of Justice is somewhat nuanced. In case REsp 1340100/GO, the Rapporteur Justice Ricardo Villas Bôas Cueva (3rd Bench, published DJe 08 September 2014) held that the key issue was whether or not the insured had acted in good faith in filling out the risk questionnaire. That ruling reflects the decision of the court in REsp 1210205/RS, Rapporteur Justice Luis Felipe Salomão, 4th Bench, published DJe 15 September 2011, and attenuates what might otherwise be considered a strict duty of accuracy in filling out the questionnaire, in accordance with article 766.

The Draft Law of Insurance currently before Congress (PLC 29/2017) reaffirms the duty of good faith in relations between insurer, insured and intervenient parties in insurance contracts (articles 6, 40 and 62). In relation to the initial duty to declare the state of risk, the Draft Law stipulates that the insured has a duty to provide all the information requested of them regarding the risk (article 47).

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

The right to subrogation is set out in article 786 of the Civil Code of 2002. Prior to that, the Federal Supreme Court had held (*Súmula* 188) that the insurer had an automatic right to subrogation, being legally considered an interested third party that acquired by subrogation the rights of the creditor/insured party.

In the case of subrogation following payment of the indemnity, the Superior Court of Justice has held that, whilst the insurer then exercises the subrogated rights in its own name, it acquires the legal position of the insured *vis-à-vis* the third party that caused the loss. (REsp 1651936/SP, Rapporteur Justice Nancy Andrighi, 3rd Bench, published DJe 13 October 2017.)

The Draft Law of Insurance currently before Congress (PLC 29/2017) introduces a fresh duty on the insured to cooperate with the exercise by the insurer of the subrogated rights (article 98).

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

Commercial insurance disputes are decided by the court of the insured's domicile. Small claims courts are available for matters involving up to 40 times the minimum wage (i.e., up to approximately £8,000). There is no jury trial in Brazil, except for criminal cases involving wilful homicide.

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

Small claims courts have no court fees. However, to initiate a commercial insurance litigation before a state court, the claimant will have to pay a percentage of the case value up to a limit established by the court. Both the percentage and the limit vary in accordance to the internal rules of each state court. In the State Court of São Paulo, for example, the court fee is equivalent to 1% of the case value up to a limit of R$82,830 (equivalent to £15,000). A claimant is exempted from payment of the court fees if he proves that such payment will jeopardise his basic financial needs.

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

In the State Court of São Paulo, for example, a case takes on average a total of 3.3 years to be judged by a civil court and a court of appeal. If the case then goes to the Superior Court of Justice or to the Federal Supreme Court, this timeframe can increase by another 1.1 years. In the State Court of São Paulo there are 25,366,780 cases – commercial and others – pending before 2,607 judges, which gives a ratio of one judge to 9,730 cases. One of the main initiatives of the new Brazilian Civil Procedure Code, enacted in 2015, was to speed up the trial timeline with the introduction of a more flexible system whereby the parties are allowed to enter into procedural agreements to define the number of submissions/pleadings, the deadlines and the type of evidence to be produced.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

The parties to litigation have the right, and the duty, to use all legal means available to them for proving the truth of the facts upon which they base their case. The 2015 Civil Procedure Code introduced certain innovations with regard to the gathering of evidence that provided the parties with wider powers to request court orders for discovery/disclosure even prior to the commencement of proceedings. In general terms, civil litigation in Brazil is more inquisitorial than adversarial and does not feature the extensive non-judicial discovery procedures that are common in US litigation. Brazilian judges have wide discretionary powers to order discovery, disclosure and inspection, but the use of these inherent powers for mandatory production of evidence by parties or third parties is relatively rare.

The parties to litigation are under a duty to cooperate with the judiciary in ascertaining the truth of the facts, subject to the caveat that a party cannot be compelled to produce evidence that is contrary to their own interests. A third party is under a duty to inform the court of the facts and circumstances of which they have knowledge and to produce or exhibit a document in their possession, if necessary.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

A party is entitled to withhold documents that are covered by legal professional privilege. Advice given by lawyers is protected by this attorney-client privilege and so, therefore, are documents relating to it, including documents prepared by or for the lawyer in preparation for litigation or otherwise in the exercise of the lawyer's professional practice of law. Legal professional privilege covers all information known by the lawyer that might be harmful to his client if publicly disclosed. The rules on attorney-client privilege also apply to in-house lawyers. Privilege extends to (a) information

given to a lawyer by their client, and (b) information obtained by a lawyer from other sources in connection with the lawyer's legal professional practice.

Moreover, a party cannot be compelled to testify or produce evidence against their own interests, but other than that is under a duty to respond to any summons to appear before the judge and answer any questions put to them and to otherwise cooperate with the court in any judicial measure deemed necessary to elucidate the facts and to comply with court directions regarding the production of evidence.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

The court can issue a witness summons and direct the witness to attend, failing which the witness may be fined or subjected to other coercive measures. However, a witness may not be compelled to testify on matters that are likely to cause significant prejudice to themselves, their spouse/partner, close relatives or the like. A witness can also not be compelled to testify on matters that are subject to privilege.

4.4 Is evidence from witnesses allowed even if they are not present?

In general, witnesses should be heard at the seat of the court. If the witness, due to illness or another relevant reason, is unable to appear, but able to give testimony, the judge will designate, according to the circumstances, day, time and place to inquire. However, the written testimony of the witness is not admitted, as the witness is required to testify in person.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

Parties have the right to file expert evidence together with their submissions and the judge may authorise a technical expert examination by an expert. The expert witness can be appointed either by the court or jointly by the parties, who may question the expert during the evidence production stage of the proceedings. Currently the most common practice is for the court to appoint a neutral expert to undertake the investigation and produce a report for the court. The parties are entitled to appoint their own experts as "assistants" to the court-appointed expert. The role of the assistants in practice is to provide relevant input to the expert examination and to assist in drafting questions to be put to the expert.

4.6 What sort of interim remedies are available from the courts?

Injunctive or conservatory relief may be awarded, e.g. to freeze bank accounts, seize a particular asset, or enjoin a defendant from performing a certain action. To obtain these preventive measures, plaintiffs are usually required to show a likelihood of success on the merits and a risk threat of irreparable harm.

One form of conservatory measure that can be of considerable use to parties is an order/direction from the court for the production of evidence prior to the filing of the lawsuit in circumstances in which: (a) there are reasonable concerns that a delay in producing the evidence pending the filing of a lawsuit might lead to said evidence being lost or to it becoming very difficult in the future to verify the facts in question during the course of the proceedings; (b) the evidence to be produced is likely to be capable of enabling the parties to reach settlement or other adequate means of resolving the conflict; and (c) prior knowledge of the facts in question might justify the commencement of proceedings or, alternatively, lead to it being unnecessary to proceed with the lawsuit.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

The defeated party at first instance has an automatic right of appeal against the awards. An appeal against a first instance award permits the appeal court to review issues of fact and law. Following the second instance appeal order, there is the possibility of a further appeal on an issue of Federal Law to the Superior Court of Justice (subject to the granting of leave to proceed) and/or an appeal to the Federal Supreme Court on a Constitutional issue (again, subject to the granting of leave to proceed). An appeal to the Superior Court of Justice or Federal Supreme Court is limited to the narrow issues of Federal or Constitutional Law asserted by the appellant and the court is not entitled to review the findings on the facts or evidence made by the lower courts.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Damages awards under Brazilian law are subject to monetary correction (adjustment for inflation applying an official index) and to the accrual of interest, which is normally calculated from the date of service of process on the defendant until the date of effective payment by the judgment debtor. Pre- and post-judgment interest is limited to 1% per month. Both interest and monetary correction are awarded automatically, as they are deemed an inherent part of claims for damages.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

During the course of the proceedings, the parties generally bear their own costs of the litigation and share the costs of, e.g., the fees of court-mandated evidence gathering and/or expert evidence.

At the award, costs normally follow the event, with the losing party being ordered to reimburse the expenditure incurred by the prevailing party on court fees, expert fees, etc. The losing party is also generally required to pay loss of suit fees (*sucumbência*) to the counsel of the prevailing party, which are fixed as a percentage value of the amount in issue stipulated by the parties (usually 10–20%) rather than on the actual fees charged by the legal professionals concerned. Unlike the US, there is no cost protection mechanism for parties who make an offer of settlement which is rejected and who then obtain a better result before the court.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

The New Civil Procedure Code makes it compulsory for parties to attend a conciliation and a mediation hearing. Considerable

efforts have been made in recent years to develop mediation in Brazil, including a drive to encourage judges to apply a range of solutions to conflicts, including mediation (Resolution 125/10 of the National Justice Council and the introduction of legislation to govern various aspects of mediation – including provisions in the Civil Procedure Code and Law 13.140/15). However, in practice, the development of mediation is hampered by the reluctance of the legal profession to fully engage in the procedure, and generally parties tend to view mediation hearings as merely a bureaucratic procedure rather than a genuine opportunity to settle the dispute.

4.11 If a party refuses to a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

Although the Civil Procedure Code obliges parties to attend a conciliation hearing and a mediation hearing, curiously enough it stipulates a penalty only for failure to appear at the conciliation hearing. This appears to have been an oversight by the legislative draftsman, as there are no reasonable grounds for stipulating a penalty with regard to conciliation only.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

Brazilian courts, and especially the Superior Court of Justice, fully uphold the principle of party autonomy enshrined in Brazilian legislation, so that parties have broad freedom to choose the manner and the procedure by which their dispute is to be resolved. The position of the Superior Court of Justice on this is very clear from its rulings in applications to recognise foreign awards, and on applications to set aside domestic awards.

Parties to arbitration proceedings are free to establish the procedure that best suits them, provided they comply with the requirements of due legal process and its corollaries (Law of Arbitration, article 21, paragraph 2). Brazilian courts apply the principle of *kompetenz-kompetenz* and, once an arbitral tribunal has been constituted, the parties can only resort to the courts after the arbitral award has been issued, other than in circumstances in which they need to enforce interim relief or another coercive measure granted by the tribunal during the course of the proceedings. Moreover, the arbitral award is considered to be an enforceable title, on a par with a court order (Law of Arbitration, article 31), but which can only be enforced by a court.

Parties to arbitration may apply to the courts for an order to vacate (set aside) the arbitral award if the award featured serious procedural defects. Courts are not allowed to review the merits of the award. Therefore, the challenges to arbitral awards only succeed in proved cases of serious procedural defects, which are rare in practice.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

Whilst there is no precise legal stipulation as to the form of words for an arbitration clause, such clauses are subject to specific provisions, particularly with regard to the requirements of consumer protection and legal protection for the signatories of standard form contracts.

Major risk insurance policies do not generally fall within the definition of "consumer relationship", but they are frequently deemed to be standard form policies in that many of the insurance conditions are standard terms previously established by the regulatory agencies.

In relation to standard form insurance contracts, the Brazilian legal system requires clear evidence that the signatory agreed to the arbitration clause. This consent is a pre-condition to the efficacy of an arbitral clause in a standard form insurance contract.

Article 4, paragraph 2 of the Brazilian Law of Arbitration establishes that "*in standard form contracts, an arbitration clause will only be effective if the signatory takes the initiative of commencing arbitration, or expressly agrees to its commencement, provided [such agreement is set out in a [separate] annexed document or in bold typeface, with specific signature or initialing of this clause*". SUSEP Circular 256, corroborating this view, establishes that: (a) it is up to the insured to decide whether or not to adhere to the arbitration clause and consent may be expressed by separate signature of the clause or by another means specified by the arbitration institution; and (b) in adhering to the clause, the insured is deemed to agree to resolve all disputes related to the insurance via arbitration, thereby avoiding the fractioning of the litigation between state and arbitral jurisdiction.

In practice, whilst most major risk policies in Brazil contain an arbitration clause, the insurers are not taking the necessary steps to ensure that the clause is effective. They frequently fail to obtain separate signature of the clause in the manner required by the Law of Arbitration and SUSEP Circular 256. That means that it is necessary to draw up another agreement to arbitration after a dispute has emerged, which generates legal insecurity for the insurer.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

As stated above, Brazilian Law consecrated the principle of *kompetenz-kompetenz* so that essentially it falls to the arbitral tribunal to decide on whether, and to what extent, it has jurisdiction to try the dispute. However, in cases where there is *prima facie* nullity of the arbitral clause (e.g. fraud, non-existence of consent, etc.), the judiciary has powers to prevent the commencement of arbitration. A party may seek to set aside an arbitral award issued on the basis of an arbitration clause that was null and void (Law of Arbitration, article 32, I).

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

An arbitrator may issue a formal request to the judiciary to perform or direct the performance of a given act within the respective territorial jurisdiction. This is commonly used; e.g., for summons of a witness. Further, in circumstances in which there is a valid clause but one of the parties is resisting the commencement of arbitration, an interested party may apply to court for a summons requiring the recalcitrant party to appear before the court at a special hearing to sign an agreement to arbitrate.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

All judicial and arbitral awards issued in Brazil must set out grounds for the ruling, failing which, the order is null and void. In this context, the Law of Arbitration determines that the arbitral award must contain: (a) a report setting out the names of the parties and a summary of the dispute; (b) the grounds for the ruling, analysing the issues of fact and stating whether the arbitration decided on the basis of equity; (c) the ruling, in which the arbitrators resolve the issues submitted to them and establish a time period for compliance with the ruling, if necessary; and (d) the date of the award and the place where it was issued.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

The arbitral award is not subject to appeal. It produces the same effects as a final and binding court ruling. However, within 90 days of the rendering of an award, a party may lodge an application to court to set it aside (motion to vacate). Judicial control of an arbitral award is limited to circumstances of serious procedural defects and re-examination of the merits is expressly prohibited.

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Tavares Advogados is a highly specialised boutique firm, founded by a group of partners with proven experience in complex litigation and arbitration proceedings, as well as loss adjustment procedures. They offer sophisticated assistance in insurance and reinsurance matters, including international work. The firm also provides regulatory, civil and corporate advice in support of clients within the sector.

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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

In Canada, responsibility for lawmaking is shared among the federal government and the governments of 10 provinces and three territories ("provinces"). Under Canada's constitution, there is a division of powers between the federal and provincial governments. The federal government makes laws for the whole of Canada in respect of matters assigned to it by the constitution. Likewise, a provincial legislature has legislative jurisdiction relative to the subject matters over which it has been assigned. In the context of insurance, this jurisdiction is shared but somewhat compartmentalised. The federal government has jurisdiction over the *prudential regulation* (e.g. solvency) of insurance companies and other entities that are authorised federally to provide insurance products ("insurers"), while the provinces have authority over the *market conduct* of insurers carrying on business in their jurisdictions. (Although, to be complete, insurers can be provincially incorporated, in which case the province in question regulates solvency as well.) Unlike the rest of the Canadian provinces, which are common law jurisdictions, Québec is a civil law jurisdiction. The general principles of Québec insurance law are contained in the *Civil Code of Québec*.

As a result of the shared constitutional jurisdiction, in Canada, there is a federal insurance regulator, the Office of the Superintendent of Financial Institutions ("OSFI"), and each province has its own insurance regulatory authority; for example, the Financial Services Authority in British Columbia (which replaced the Financial Institutions Commission in 2019), Alberta Treasury Board and Finance, the Financial Services Regulatory Authority of Ontario ("FSRA", which replaced the Financial Services Commission of Ontario in 2019), and *l'autorité des marchés financiers* ("AMF") in Québec. The provincial insurance regulators are typically government agencies that report to the Minister of Finance of the provincial government. FSRA is a new, independent regulatory agency established by statute. FSRA is governed by a board of directors appointed by the Lieutenant Governor in Council. In Canada, reinsurance is regulated in the same manner as insurance. There are no separate regulators, although different rules will apply given the nature of reinsurance, some of which are discussed below.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

Forms of insurance business

There are two main vehicles for establishing an insurance business in Canada federally: incorporation of a Canadian insurance company; and qualification of a Canadian branch of a foreign insurance company. Insurers may also carry on business in Canada in other forms, such as a fraternal benefit society or a reciprocal exchange, and may be incorporated under the laws of a province. For simplicity, this discussion is restricted to insurers carrying on business in Canada as a company or a branch and whose primary regulator is OSFI.

The information requirements and timing for incorporating a Canadian company and establishing a Canadian branch are very similar. Both involve an extensive application to OSFI. Since a branch is not a separate legal entity from the foreign insurer, one of the main differences between the two vehicles is that a Canadian insurance company involves incorporation of a new corporate entity and requires a board of directors and mandatory board committees. Canadian insurance companies are subject to the OSFI *Corporate Governance* guideline, which contains comprehensive requirements for board and committee oversight. Although a branch operation does not have a board, OSFI requires the Chief Agent of a branch to fulfil many of the corporate and risk governance functions required of a board of a Canadian-incorporated insurance company. Despite the legal distinction between a company and a branch, from an accounting perspective (e.g. financial and regulatory reporting), the branch is treated as a separate entity.

The requirements for incorporation or qualification of a reinsurer are no different than those applicable to a primary insurer, although the business plan, for example (discussed below), would be tailored appropriately if the insurer proposes to limit its activities to the business of reinsurance. In addition, reinsurers may apply to be exempted from certain consumer-related requirements, such as the requirement to establish procedures for dealing with consumer complaints if they do not deal directly with individuals.

Although there are a number of insurers that are incorporated under the laws of a Canadian province, most of the largest insurance companies in Canada are federally incorporated, and many companies that were originally incorporated provincially have migrated into federal jurisdiction where the legislation is comparatively modern and solvency regulation is more robust. One provincial insurance regulatory authority (Ontario) has previously considered putting a moratorium on the incorporation of insurance companies under its provincial laws, and requiring existing insurers incorporated in that province (other than reciprocal exchanges and farm mutuals) to transfer to federal jurisdiction or another jurisdiction where the insurer is subject to supervision that meets the solvency standards set by the International Association of Insurance Supervisors ("IAIS").

Focus of OSFI review – business plan

If an applicant wishes to incorporate a Canadian insurer federally, or establish a Canadian branch, the focus of much of OSFI's review will centre on the proposed business plan that is submitted with the application, including the actuarial calculations and proposed initial capital. The business plan must be comprehensive and include, among other things, descriptions of the proposed activities (by line of business), a complete market analysis/feasibility study, identification of sources of capital, as well as *pro forma* financial statements and solvency ratio calculations, in each case for three years following start up. The business plan must be stress-tested for the three-year period. OSFI, including its actuarial staff, will probe and assess the business plan, including in particular the actuarial calculations and stress testing. The amount of initial capital that OSFI will ultimately require will be determined based on the business plan's contents, stress testing and OSFI's own assessment. OSFI will generally require the amount of initial capital on "day one" to be sufficient to maintain, at all times, a solvency ratio of at least 300% MCT (property & casualty insurer) and 150% LICAT (life insurer) for the first three full years of operation.

Summary information for Federal Applications – incorporation and branch

The following chart contains a summary of the processes and requirements to incorporate a Canadian insurer federally and to qualify a Canadian branch, based on OSFI's issued guidance and instructions.

	Incorporation	Branch
Application timeframes	Approximately 12–18 months.	Approximately 12–18 months.
Application form	■ Letters Patent; and ■ Order to Commence and Carry on Business.	Order approving the Insuring in Canada of Risks by a foreign entity.
Minimum OSFI Fees	Cdn. $32,704 (subject to increase each April).	Cdn. $32,704 (subject to increase each April).
Estimated fees for provincial licences – all provinces	Cdn. $65,000.	Cdn. $65,000.
Minimum initial capital required	Company to have a minimum of Cdn. $5 million paid in capital (or such greater amount specified by the Minister, e.g. based on the proposed business plan). ■ Business plan to support a regulatory solvency ratio of the proposed company of at least 300% MCT (property & casualty) and 150% LICAT (life) for the first three full years of operation.	■ Life: applicant to have consolidated assets of Cdn. $1 billion; capital and surplus of 5%–10% of liabilities. ■ Non-life: applicant to have consolidated assets of Cdn. $200 million; capital and surplus of 20% of assets. ■ Branch to vest and maintain in trust account under the control of OSFI sufficient minimum initial capital to support a regulatory solvency ratio of the branch of at least 300% BAAT (property & casualty) and 150% LIMAT (life) for the first three full years of operation.
Information requirements	Regulatory information for applicant (details of ownership and financial strength; regulation in applicant's jurisdiction, etc.). ■ Financial information (financial statements for applicant, comprehensive business plan for the company – *pro forma* financial statements and solvency test calculations – planned reinsurance arrangements). ■ Criminal background checks for principals and senior officers. ■ Copies of governance, risk management and compliance policies and procedures to be submitted.	Regulatory information for applicant (details of ownership and financial strength; regulation in applicant's jurisdiction, etc.). ■ Financial information (financial statements for applicant, comprehensive business plan for the branch – *pro forma* financial statements and solvency test calculations – planned reinsurance arrangements). ■ Criminal background checks for Chief Agent and senior employees. ■ Copies of governance, risk management and compliance policies and procedures to be submitted.
Entity infrastructure/ advisors	Board of directors and statutory and regulatory governance committees (Audit, Conduct Review, Corporate Governance, Risk). ■ Management of Oversight Functions: Finance; Actuarial; Risk Management; Compliance; and Internal Audit. ■ Appointed Actuary. ■ Governance, risk management and compliance policies and procedures. ■ Information Technology. ■ External Auditor. ■ Peer Review Actuary.	■ Chief Agent. ■ Management of Oversight Functions: Finance; Actuarial; Risk Management; Compliance; and Internal Audit. ■ Appointed Actuary. ■ Governance, risk management and compliance policies and procedures. ■ Information Technology. ■ External Auditor. ■ Peer Review Actuary.

	Incorporation	Branch
Other	■ Pre-notification publication requirements. ■ Name clearance. ■ "Support principle" acknowledgment by controlling shareholder. ■ "Letter of commitment" regarding notification of material changes to business plan. ■ Membership in industry compensation association. ■ OSFI on-site review of operations. ■ Initial capital injection. ■ OSFI approval of any proposed reinsurance by the company with a non-Canadian licensed affiliate.	■ Pre-notification publication requirements. ■ Name clearance. ■ "Letter of commitment" from senior officer of applicant regarding notification of material changes to business plan. ■ Membership in industry compensation association. ■ OSFI on-site review of operations. ■ Establish branch trust account and trust agreement with OSFI, applicant and custodian. ■ OSFI approval of any proposed reinsurance by the branch with a non-Canadian licensed affiliate.

Provincial licensing

Once qualified as a federal insurance company or branch, the insurer will be required to obtain a licence in each province in which it intends to carry on business. Generally, to attract licensing requirements, the provincial legislation contemplates that the insurer has some kind of presence and/or carries on insuring activities in the province. However, at present, at least three provinces require licensing if the risk (e.g. person or property) or peril is located in the province. Although the legislation of each of the 13 provinces varies, the Canadian Council of Insurance Regulators ("CCIR"), which is an association made up of the insurance regulators of each province and a representative of OSFI, has put together a standardised application form which can be used for applying for a licence in all 13 jurisdictions. Although the CCIR form is standardised, each jurisdiction will conduct its own evaluation of the application and may require additional information and documentation. The depth of provincial review and analysis can vary widely. Accordingly, timeframes for issuance of provincial licences also vary (roughly ranging from one to six months or even longer) and certain provinces may not entertain the insurer's application until after the OSFI qualification process has been completed and the insurer has been fully capitalised.

Compliance with other statutes

If there is a foreign bank in the applicant's corporate group, there are restrictions under the *Bank Act* (Canada) with respect to having a financial establishment in Canada, so that the provisions contained in that statute will have to be reviewed for compliance. Where the applicant is not Canadian, the establishment of a new Canadian insurance business may require a notification filing under the *Investment Canada Act*.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

The extent to which an unlicensed foreign insurer can write direct business in Canada depends on certain factors. That said, "fronting" arrangements, where a foreign insurer reinsures the business underwritten by a Canadian-licensed direct writer that acts as a "fronter", are as common in Canada as in other jurisdictions. However, they are generally discouraged by OSFI (the Canadian federal insurance regulator).

OSFI Advisory on insuring risks

In 2009, OSFI finalised its Advisory entitled *Insurance in Canada of Risks*. The Advisory describes the circumstances in which a foreign insurer is required to be licensed by OSFI. The Advisory goes hand in hand with changes made to the *Insurance Companies Act* in 2007 (and implemented in 2010). It clarifies that OSFI's approach in determining whether licensing is required for particular insurance transactions is to concentrate on the *location of the insuring activities* rather than the *location of the risk*. As a result, from an OSFI perspective, depending on where the insuring activities (e.g. promoting, soliciting, underwriting, collection of premiums, etc.) take place, foreign insurers may not have to be licensed, and existing licensed branch operations in Canada may not be required to record on the books of their branch operations Canadian risks directly underwritten by them.

Provincial licensing requirements

On the other hand, most of the Canadian provinces and territories ("provinces") – which regulate insurance in their respective jurisdictions – require insurers to be licensed in circumstances where the insurer is *carrying on* or *transacting* insurance business in the jurisdiction, generally determined by enumerated activities that are somewhat similar from jurisdiction to jurisdiction. Typically, the insurer is caught by the licensing requirements if it has some presence or carries on some activity in the province. However, the legislation in British Columbia (which was amended following OSFI's issuance of the Advisory) and Alberta deem an insurer to be carrying on business in the province if the risk or subject matter of the insurance is property or a person *located in the province*. Manitoba's legislation contains a somewhat similar deeming provision.

Federal and provincial discrepancies and CCIR undertaking

The upshot of the Advisory, taken together with certain provincial legislative changes undertaken in reaction, resulted in discrepancies between OSFI's approach to licensing – that is, based on the location of the insuring activities in accordance with the Advisory – and the approach of some provincial legislation. It is possible for foreign insurers to insure risks in a manner that, under the Advisory, would not require OSFI licensing, but, for the same transaction, the foreign insurer could be caught by provincial licensing requirements. Ultimately, through the CCIR, provincial regulators requested foreign companies with existing branch operations in Canada to sign, on a voluntary basis, an undertaking stating that, to the extent they insure risks in a manner that would require licensing under provincial legislation, they agree to conduct their insurance activities such that the transaction would constitute *insuring in Canada a risk* under the federal *Insurance Companies Act* (i.e. under the Advisory). By signing the undertaking, foreign insurers with existing branches in Canada have obligated themselves to report the particular business on the books of their Canadian branches (and to maintain corresponding reserves vested in their Canadian branches'

trust accounts). Thus, provincial regulators have taken steps to ensure that assets are maintained in Canada in circumstances where foreign insurers are insuring risks or persons located in their jurisdictions.

Unlicensed insurance

In addition to each province's unique indices for carrying on business, most provincial jurisdictions have a regime for "unlicensed insurance". In many cases, an insurance broker with a special licence is required to be involved in the insurance transaction and there are various limitations and other requirements, including in particular reporting of transactions – either by the insured or, where required, by the special broker – for the purpose of the collection of premium taxes and/or application of penalties for unlicensed insurance, depending on the jurisdiction. For example, the charge exacted in Alberta for unlicensed insurance is between 10% and 50% of the premium, depending on whether the insurance is available from Alberta-licensed insurers. These provincial charges are in addition to the federal excise tax of 10% that applies to unlicensed insurance (other than reinsurance and life insurance, among other specified exceptions).

In some provinces, it is an offence for residents to enter into insurance contracts with unlicensed insurers without following the requirements for unlicensed insurance in their regimes. In a number of jurisdictions, the onus is on the unlicensed insurer to ensure that conditions are met before the insurance contract is concluded and losses are inspected and adjusted. In a few provinces, adjusting a loss in the province is one of the indices of carrying on business, and this activity is expressly permitted, without a licence, if the unlicensed insurance regime of that province is complied with. However, this important issue is not dealt with uniformly across the country. In the majority of provinces, prosecuting or maintaining an action in the province in respect of a contract of insurance is also one of the indices of carrying on business and requires licensing. But, unlike loss inspection and adjustment, there is no specified relief from this licensing requirement even if the unlicensed insurance regime is followed. Unlicensed insurers could face potential barriers to the enforcement of their rights under policies.

Unlicensed reinsurance

Certain provincial legislation exempts insurers from the licensing requirements in the province provided that, among other things, the insurer's business in the province is limited to reinsurance. This may present problems if, for example, a foreign insurer wishes to underwrite direct business, as well as reinsurance, in Canada on an unlicensed basis. Other provincial legislation permits provincially licensed insurers to reinsure risks in respect of a contract made in the province with an unlicensed reinsurer, provided the reinsurer's business is transacted outside the province. The lack of uniformity of provincial requirements poses issues for reinsurers wishing to ensure that their reinsurance activities are within legal boundaries in each provincial jurisdiction.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

As indicated above, the Canadian provinces have jurisdiction over marketplace regulation. Each province has an insurance statute that prescribes certain rights and obligations, mainly on the side of consumer protection, that are deemed to be included in contracts of insurance, depending upon the class of insurance. For example, in Ontario, the entire automobile insurance policy is prescribed by the *Insurance Act* (Ontario). Provincial legislation deals both with the form and the content of contracts of insurance, and includes rules regarding disclosure and misrepresentation in negotiations, entry into force, content of policies, notice and proof of loss, valuation of loss, third-party rights and termination of contracts, amongst others. The general principles of Québec insurance law are contained in Chapter XV of the Civil Code of Québec. For the most part, the rules governing insurance in Québec are similar to those elsewhere in Canada. Some of the Civil Code's articles under property insurance are devoted exclusively to fire insurance.

In addition to provincial statutory provisions, courts in the Canadian common law provinces recognise the principle of utmost good faith as a foundational element of insurance contracts, and contracts of insurance are interpreted accordingly. Although the duty of utmost good faith (or *uberrimae fidei*) as recognised in Canada was initially articulated as a duty on the part of the insured to disclose to the insurer all facts material to the risk, it has become an implied obligation in every insurance contract that the insurer will also deal with claims fairly and in good faith.

1.5 Are companies permitted to indemnify directors and officers under local company law?

It is a basic principle of Canadian corporate law that a company is permitted to indemnify its directors and officers. The *Insurance Companies Act* (Canada), being the federal statute that governs the vast majority of incorporated insurers, essentially provides for a broad indemnification of directors and officers in respect of any civil, criminal, administrative, investigative or other proceeding in which they are involved because of their association with the company. However, the right to indemnify is conditional upon the director or officer having:

(a) acted honestly and in good faith with a view to the best interests of the company; and

(b) had reasonable grounds for believing that their conduct was lawful, in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty.

In addition, a director or officer is entitled to be indemnified by the company if they:

(c) were not judged by the court to have committed any fault or omitted to do anything that they ought to have done; and

(d) fulfil the conditions in (a) and (b) above.

A company is also entitled to purchase and maintain insurance for the benefit of its directors and officers.

1.6 Are there any forms of compulsory insurance?

Compulsory insurance in Canada comes in many shapes and sizes, generally intended to provide an indemnity to innocent parties against liability or errors and omissions on the part of the person insured. Just a few examples include:

- minimum automobile liability insurance for drivers;
- minimum errors and omissions insurance for insurance intermediaries;
- minimum errors and omissions insurance for lawyers and other professionals; and
- medical liability insurance for physicians in private practice.

Canadian laws requiring compulsory insurance are expanding, possibly as a result of recent world events. For example, Transport Canada recently introduced regulations requiring owners and operators of commercial and public purpose vessels to carry mandatory liability insurance for passenger injuries or deaths.

Canada is distinct from some other countries in that it has a number of "compulsory" social insurance programmes. The National Health Insurance Program is designed to ensure that all insured persons (generally, permanent residents) have access to medically necessary hospital and physician services on a prepaid basis. Similar social insurance programmes include the Canada Pension Plan, which every Canadian (other than residents of Québec) contributes to and benefits from. In Québec, the Québec Pension Plan is a compulsory public insurance plan that provides persons who have worked in Québec with basic financial protection in the event of retirement, death or disability. The Canadian Employment Insurance ("EI") programme offers temporary financial assistance to Canadians who have lost their employment through no fault of their own. In certain cases, premiums for these insurance benefits are wholly or partially funded by the individual's employer.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

Canadian insurance law generally favours the protection of the insured. Both the common law and regulatory controls in this area are more likely to give the insured the benefit of the doubt, leaving it up to insurers to prove why a consumer's rights should be limited or denied.

For example, there is a general presumption that an insured has complied with its disclosure obligations during the negotiation of the insurance contract. The burden therefore always rests on the insurer to prove that the insured has breached its duty of disclosure. The insured benefits from the assumption at common law that he or she has acted in good faith.

Canadian insurance contracts are also subject to the *contra proferentem* rule, meaning that any ambiguities in a policy are to be interpreted in favour of the party who did not dictate its wording. In that insurers most often provide standard form contracts, this typically implies that insureds benefit from a reading of ambiguous clauses that favours their interests.

Furthermore, Canadian case law has indicated that insurance policies are to be interpreted broadly, with any limits to coverage construed narrowly. Again, this favours the insured by presuming the broadest level of coverage.

2.2 Can a third party bring a direct action against an insurer?

Generally speaking, the principle of privity of contract applies to insurance contracts. This means that only parties to the contract itself may either benefit from it or be bound by its obligations, and would typically exclude a third party from bringing a direct action against an insurer.

There are, however, some exceptions to the principle of privity of contract in the context of insurance law. Sometimes, third parties may join the contractual relationship by acquiring rights directly from the insured, thereby becoming assignees to the contract. Assignments may occur voluntarily, wherein the insured transfers or sells either the insured object (a house, for example), the insurance policy itself, or the insured's right to receive benefits under the policy to the third-party assignee. Assignments can also occur without the insured's consent or by operation of law; for example, upon the bankruptcy or death of the insured.

Sometimes a third party can also become a beneficiary to an insurance contract without actually joining the contractual relationship. Third-party beneficiaries are persons who are found to have been within the contemplation of the insurer and the insured when the contract was negotiated and who are therefore exceptions to the principle of privity. For example, an individual who can establish that the insured was acting as his or her trustee or agent when negotiating the insurance contract may be able to sue the insurer if the insured is also joined to the action.

2.3 Can an insured bring a direct action against a reinsurer?

Reinsurance is essentially insurance for insurers. The contractual relationship thus exists between the insurer and the reinsurer, and the individual insured is not a party to this contract. Absent any contractual provision establishing a relationship between them, the insured cannot bring a direct action against a reinsurer.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

Where the insurer can prove, on a balance of probabilities, both that an insured breached its duty of disclosure by intentionally not disclosing or misrepresenting a material fact, and that this non-disclosure prejudiced the insurer, the insurer has three options. Provided that the insurance contract and legislation do not state otherwise, the insurer may: (a) repudiate the contract and repay the premiums paid by the insured after the date of the breach; (b) treat the contract as valid and continuing despite the breach; or (c) treat the contract as valid but subsequently cancel it in accordance with statutory provisions authorising unilateral termination.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

A material fact is one which, if disclosed, would have adversely affected a reasonable insurer's decision to provide insurance coverage or to do so at that low of a premium. An insured's duty to disclose applies to all material facts within his or her knowledge, irrespective of whether the insurer specifically inquires about them. Conversely, Ontario courts have indicated that not all questions asked by an insurer on an insurance application form are automatically considered to be material.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

The right to subrogation exists independent of legislation and the terms of individual insurance policies. Under the common law, where the insured has an enforceable right against a third party to recover at least part of his or her losses, and the insured has been fully indemnified, the insurer has the right to subrogate. No separate clause in the insurance policy is required in order for this right to arise.

Legislation has expanded the common law right to subrogation to make it even more accessible by fire and marine insurers. In these instances, statutory provisions give insurers the right to subrogate even if the insurer has only partially indemnified the insured.

Conversely, Ontario's statutory "no fault" auto insurance scheme has considerably restricted the availability of subrogation by insisting that an insured who suffers property damage or personal injury must seek compensation from his or her own insurer irrespective of who is at fault for the damage. Any additional claims against other parties are seriously restricted by statute.

Finally, an individual insurance policy may contain clauses that expand or limit an insurer's common law subrogation rights. Where the right is limited, the clause must be clearly and specifically worded to that effect.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

In Ontario, commercial insurance disputes are generally commenced in a Superior Court. For claims under Cdn. $35,000, the Small Claims Court has jurisdiction. Claims in excess of Cdn. $35,000 but less than or equal to Cdn. $200,000 can be commenced under the Simplified Procedure, whereas claims in excess of Cdn. $200,000 are dealt with using the ordinary civil procedure. A party can opt for a jury at the time that it commences an action, although claims for declaratory relief or forfeiture cannot be heard by a jury. Most claims in Ontario are adjudicated by a judge as opposed to a jury.

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

The issuance of a statement of claim costs Cdn. $229 in the Superior Court of Ontario for all claims, including those commenced under the ordinary or Simplified Procedure.

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

The waiting time between the initiation of a commercial claim and the final date for trial depends on a number of factors, including the complexity of the legal issues to be argued, the availability of judges, the number of parties and experts involved, the anticipated length of the trial, whether any interlocutory steps are initiated, and the pace at which the parties advance the litigation.

Parties whose matters are being heard in the Superior Court should be prepared for a three- to five-year wait, while those proceeding under the Simplified Procedure may have a trial date within 18–24 months of the matter being set down for trial.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

In Ontario, parties to a proceeding have a two-part discovery obligation. First, parties have a continuing duty to disclose the existence of all documents that are relevant to the action, and to produce for inspection by the other parties all such documents over which it is not claiming privilege. Second, each party must be examined for discovery, meaning that he or she must submit to oral questioning under oath about the subject matter of the action before the trial.

A party must always disclose and produce any insurance policy under which an insurer may be liable to satisfy all or part of a judgment resulting from the action, although no information concerning that policy is admissible as evidence unless it is relevant to an issue in the action. This rule exists to promote settlement by enabling each party to know what coverage may be available to satisfy an order.

Where a party fails to disclose or produce a relevant document, the court may order any number of remedies, including that the document may not be used at trial, that a party may not participate in examinations for discovery, and even that an action or statement of defence be dismissed or struck out.

Non-parties may also be subject to court orders related to disclosure and discovery. A party may move for the production of a document in the possession of a non-party. The motion will be granted in rare cases where the document is relevant to a material issue in the action and when it would be unfair to require the moving party to proceed to trial without having had the opportunity to inspect that document.

Likewise, a party may move for leave from the court to examine for discovery a non-party who there is reason to believe has information relevant to a material issue in the action. A fairly stringent test must be satisfied before any such order will be granted.

A court may order a party to disclose relevant documents in the possession of the party's subsidiary or affiliated corporation, even if the latter is not party to the litigation.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

A party can object to the production of documents that it believes fall within any of these three classes of privilege. The party must nonetheless disclose the existence of these documents by listing and providing a brief description of each one, along with the date of the document and the type of privilege claimed, in a Schedule B to the Affidavit of Documents required as part of documentary discovery.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

A party who requires the attendance of a person in Ontario as a witness must serve the witness with a summons to attend the trial. A summons may also require a witness to produce, at trial, specific documents or other items in the witness's possession.

The courts have the power to enforce a summons and can find any witness who does not attend the trial and give evidence to be in contempt of court. In some circumstances, a witness who does not attend can be arrested and brought before the court to explain his or her absence and testify before potentially being fined or even incarcerated.

4.4 Is evidence from witnesses allowed even if they are not present?

When a witness is unable to attend the trial – for example, due to illness or because he or she lives outside of Ontario – a party may, with leave from the court or on consent of the parties, arrange for the evidence of a witness to be taken by examination

before the trial. The witness may be examined, cross-examined, and re-examined in the same manner as he or she would have been at trial. The transcript or video of that person's testimony can then be tendered as evidence at the trial.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

In Ontario, parties are limited to calling three expert witnesses, unless they successfully move for leave from the court to call additional experts.

Before an expert witness can testify at trial, the party who proposes that the expert witness testify must serve on all other parties a pre-trial report setting out the expert's findings, opinions and conclusions on the matter. This report must include a number of details, including the factual information, documents, data and assumptions used by the expert in reaching his or her conclusion(s), as well as his or her employment, education and qualifications.

In a motion by a party or on the judge's own initiative, a judge may appoint one or more experts to inquire into and report on any question of fact or opinion relevant to an issue in the action.

All experts – whether court- or party-appointed – have a duty to provide opinion evidence that is fair, objective, non-partisan, and related only to matters within that expert's area of expertise. Experts also have a duty to provide such additional assistance to the court as may be required to determine a matter. The duty of party-appointed experts to the court therefore prevails over any obligation owed by the expert to the party by whom he or she was hired.

4.6 What sort of interim remedies are available from the courts?

A variety of interlocutory or time-limited injunctions are available to litigants in Ontario. Parties may move for prohibitive injunctions, seeking to prevent the other party from doing something – for example, a *Mareva* injunction to restrain another party from disposing of its assets. Parties may also move for a mandatory injunction to force the other side to take a positive action – for example, an *Anton Piller* order requiring the other party to preserve specific evidence.

Interestingly, a potential litigant in Ontario who wants information from a third party before commencing litigation may move for what is known as a *Norwich* order. A *Norwich* order is a pre-action remedy that compels a third party to provide certain information or documents even in advance of an action being commenced.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

Generally, a litigant has the right to appeal a final decision of a court of first instance without requiring leave. Appeals in Ontario may be heard by the Superior Court, the Divisional Court, or the provincial Court of Appeal, depending on the level of court of first instance and, in certain cases, the amount of damages in issue. Appeals from decisions of the Ontario Court of Appeal may proceed, with leave, to be considered by the Supreme Court of Canada when a matter of national importance is involved.

Appeals from interlocutory orders may also be heard if the appropriate leave is obtained. Again, the court that hears the appeal will depend on the level of court of first instance and the amount of damages in issue.

Appeals are typically limited to issues of law and not of fact. Generally, the appellate court makes its decision on the basis of the record that was before the court below, and new trials are rarely ordered in civil matters.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Both pre- and post-judgment interest are recoverable in Ontario. The rates are posted quarterly on the Attorney General's website. The current rate for pre-judgment interest (for causes of action arising after October 23, 1989) is 2.0%, while the current post-judgment rate is 3.0%.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

When it comes to lawyers' fees and disbursements in litigation, Ontario is a "loser pays" jurisdiction. The general rule is that any party who loses a lawsuit (or a motion or other proceeding for that matter) must pay the winning party's legal fees and disbursements. Thus, under the normal operation of the "loser pays" rule, defendants will be ordered to pay the plaintiffs' costs if the plaintiffs are successful in recovering any damages at trial. Conversely, the plaintiffs will be ordered to pay the defendants' costs if the plaintiffs' case is dismissed.

The amount recovered under this costs rule is generally not 100% of the actual fees and disbursements incurred. Instead, the amount is determined according to a published scale. There is also a fair amount of discretion used by the court in fixing the quantum of costs to be recovered.

There are two cost scales that are used to determine the amount of recoverable costs: the "partial indemnity" scale; and the "substantial indemnity" scale. The partial indemnity scale is the one most often applied, and it will usually result in a recovery of 50 to 70% of the actual costs incurred by the winner. The substantial indemnity scale is applied only in special circumstances. That scale will usually result in a recovery of 70 to 80% of the actual costs incurred.

A defendant can alter the operation of the normal costs rule in its favour by serving a written offer to settle. If the plaintiffs were to establish defendants' liability at trial but were to obtain a judgment less favourable than the offer, the plaintiffs would recover costs on the partial indemnity scale only up to the date of the settlement offer. More importantly, the plaintiffs would have to pay the defendants' costs on the partial indemnity scale from the date of the offer to the end of trial. In other words, by failing to "beat" the defendants' offer, the plaintiffs would have to pay a substantial portion of the defendants' fees and disbursement even though the plaintiffs were technically the "winner" at trial.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

Mediation has become a significant feature of civil litigation in Ontario. Indeed, mediation is now mandatory for claims commenced in Ottawa, Toronto, Windsor and Essex County.

Mediation in these jurisdictions must take place within 180 days of the first defence being filed.

Per Ontario's *Insurance Act*, where a party alleges loss or damage from bodily injury or death as a result of the operation of a vehicle, any insurer defending the claim must submit to mediation at the request of either party. This mediation is therefore mandatory irrespective of where the claim is commenced.

There is no obligation to arbitrate unless the parties have agreed or consent to participate in an arbitration.

4.11 If a party refuses to a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

A party who refuses to submit to mediation or who mediates in bad faith can face cost consequences, including the quantum of costs being set on a substantial indemnity scale. For example, in 2010, an Ontario insurer who refused to participate in mandatory mediation in an automobile case faced a "remedial cost penalty" of an additional Cdn. $40,000 on top of being ordered to pay the plaintiff's legal costs on a partial indemnity scale.

In some exceptional cases, a claim may even be dismissed or a defence struck for failing to mediate where it is compulsory.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

Canadian courts have taken a relatively hands-off approach to a parties' individual arbitration agreements, favouring the parties' autonomy both in opting for arbitration and in designing the arbitration proceedings.

Where a jurisdictional question arises, Canadian courts are not quick to oust arbitration clauses in favour of adjudication. The general principle is that parties should be required to resolve their disputes by arbitration where they have agreed to do so.

This non-interventionist approach is further reflected by Ontario's *Arbitration Act*, which has introduced major limits to the ability of Ontario courts to intervene regarding the content of arbitration clauses. The courts may now only intervene: to ensure that arbitrations are conducted in accordance with the arbitration agreement; to prevent the unequal or unfair treatment of parties; or to enforce awards.

There are also limited circumstances in which a court may intervene to assist with the conduct of the arbitration. For example, where the parties cannot mutually agree on which arbitrator(s) should conduct the proceeding, a court may, on application by a party, intervene to appoint the arbitrator(s).

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

Parties can opt to engage in arbitration either by specifying it as the preferred or mandatory form of dispute resolution in their original agreement, or by jointly electing to submit to arbitration after a dispute has arisen. In Ontario, arbitration agreements may be made orally or in writing.

Much of the case law suggests that language reflecting the parties' intention for the dispute to be covered by arbitration is sufficient to make an arbitration clause enforceable. However, recent Ontario court decisions have signalled a need to reconsider the use of boilerplate or standard terms arbitration clauses. Courts are more closely scrutinising the scope of arbitration clauses and are increasingly more open to finding that a dispute is not covered by the wording of the clause. Care should be taken to draft an arbitration clause broadly enough to cover the intentions of both parties.

Arbitration clauses are typically treated as severable from the main agreement, such that the rest of the contract will stand even if the arbitration clause is found by a court to be unenforceable.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

A court can refuse to enforce an arbitration clause if: (a) a party entered into the agreement while under a legal incapacity; (b) the arbitration agreement is invalid; (c) the motion to stay proceedings was brought with undue delay; or (d) the matter is a proper one for default or summary judgment.

There are also some subject matters which are not capable of being arbitrated under Ontario law. Courts can refuse to enforce arbitration clauses in these instances. Arbitration clauses in insurance contracts, however, have generally been upheld and are not statute-barred.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

In appropriate circumstances, courts can support the arbitration process by granting any of the aforementioned interlocutory injunctions. Courts may also order an anti-suit injunction, compelling parties to submit to the arbitration process before being able to pursue civil litigation. Finally, courts are able to order security for costs or receiverships to ensure that there are sufficient funds to cover an award that may result from any ongoing arbitration.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

In Ontario, arbitrators must justify an award with written reasons, unless the award was made on consent of the parties. There is some recent case law to suggest that parties may be able to agree to dispense with the requirement for written reasons in their arbitration agreement; however, this has only been allowed, thus far, in the context of international arbitration.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

The court's respect of the principle of party autonomy also extends to the right of appeal. Parties are typically empowered to specify in the arbitration agreement what right of appeal, if any, exists.

Where the arbitration agreement is silent as to appeals, a party may appeal to the court, with leave, on a question of law. Leave will only be granted where the importance to the parties of the matters at stake justifies an appeal, and where a determination of the question of law would significantly affect the rights of the parties.

A party may also apply to the court to set aside an arbitrator's award. The court will grant the application and set aside the award if one of the 10 circumstances listed in the *Arbitration Act* exists. Examples include where the arbitration agreement is invalid, or where the applicant was not treated equally or fairly during the arbitration process. The court may also remit the award to the arbitrator and give directions about the conduct of the arbitration.

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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

Insurance (and reinsurance) companies in China are subject to the regulatory supervision of the China Banking and Insurance Regulatory Commission (CBIRC) as of 2018, after the combination and reorganisation of the former China Banking Regulatory Commission and China Insurance Regulatory Commission.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

The establishment of both foreign-invested insurance companies and Chinese domestic insurance companies requires the approval of the CBIRC, subject to different requirements.

As for foreign-invested insurance companies, the foreign insurance company applying for the establishment of a foreign investment insurance company in China shall meet the following conditions according to the newly revised *Administrative Regulations of the People's Republic of China on Foreign-funded Insurance Companies (Amended in 2019)*:

1) one year before applying for the establishment, the foreign insurance company must have had a total capital of no less than USD 5 billion by the end of the year;
2) the country or region to which the foreign insurance company belongs must have a complete system regarding the supervision and administration of insurance business, and the foreign insurance company must already be under the effective supervision and administration of the responsible authorities of the country or region;
3) the foreign insurance company must have met the criteria of possessing the capacity to indemnify as specified by the country or region to which the company belongs;
4) the foreign insurance company must have obtained the approval for the application from the country or region; and
5) the foreign insurance company must have met other precautionary conditions as stipulated by the insurance regulatory department of the State Council.

As for Chinese domestic insurance companies where the shareholdings of all foreign investors are no more than 25%, the following requirements should be satisfied according to the *Insurance Law (Amended in 2015)*:

1) the key shareholders shall have continuing profitability, good reputation, shall not have a record of major violation of law or regulation during the past three years, and shall have a net asset of not less than RMB 200 million;
2) the articles of association of the insurance company shall comply with the provisions of the *Insurance Law* and the *Company Law of China*;
3) the registered capital of the insurance company shall be no less than RMB 200 million;
4) the directors, supervisors and senior management personnel shall possess the professional knowledge and business and work experience for their appointment;
5) the insurance company shall have a proper organisational structure and management system;
6) the business premises and other facilities relating to business operations of the insurance company shall comply with the requirements; and
7) the insurance company shall satisfy any other criteria stipulated by laws, administrative regulations and the CBIRC.

Please note that pursuant to *the Administrative Measures on Equity of Insurance Companies (2018)*, shareholders of Chinese domestic insurance companies are classified into four categories: Finance Type I shareholders; Finance Type II shareholders; strategic shareholders; and controlling shareholders, each subject to further different requirements.

The procedures of approval by the CBIRC of both foreign-invested insurance companies and Chinese domestic insurance companies are similar, consisting of two phrases: preliminary review and formal review. In terms of the preliminary review, the CBIRC will decide whether or not to accept the application for the establishment of a proposed insurance company within six months from the date of receiving the completed application. Where the CBIRC decides to accept an application, it shall issue a formal application form to the applicant. The applicant shall complete the preparations within one (1) year from the date of receiving the formal application form. After the completion of preparations, the applicant shall submit to the CBIRC the completed application form together with other required documents for a formal review. The CBIRC will make a decision as to whether or not to approve the application within 60 days from the date of receiving the completed formal application documents. Where the CBIRC decides to give approval, it shall issue a permit for operating an insurance business, and the applicant shall use such permit to register with the market regulator and obtain a business licence.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

A foreign-invested insurance company that has not completed the registration process within China cannot write business directly in China. However, such foreign insurance company could write reinsurance of a Chinese domestic insurer.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

There are legal rules in China governing the terms of insurance contracts. According to Article 135 of the *Insurance Law* of China, the insurance clauses and premium rates of insurance policies which relate to social and public interests, insurance policies of mandatory insurance implemented pursuant to the law and newly developed insurance policies of life insurance, etc., shall be subject to approval of the CBIRC. The insurance clauses and premium rates of other types of insurance policies shall be filed with the insurance regulatory authorities for their records. Detailed rules include the *Guidelines on Development of Insurance Products by Property Insurance Companies (2016), the Administrative Methods on Insurance Contract Terms and Insurance Rates of Life Insurance Companies (Amended in 2015), etc.*

1.5 Are companies permitted to indemnify directors and officers under local company law?

There are no rules under the *Company Law* to prohibit companies from indemnifying directors and officers. Directors and officers could demand companies indemnify themselves on the basis of employment agreements or other arrangements such as D&O insurance policies in respect of their behaviour on behalf of the companies they duly serve.

1.6 Are there any forms of compulsory insurance?

Compulsory insurance in China includes social insurance and certain types of commercial insurance. In terms of social insurance, it covers basic pension insurance, basic medical insurance, work injury insurance, unemployment insurance, maternity insurance, etc. In terms of commercial insurance, it covers compulsory auto liability insurance, compulsory environmental liability insurance, compulsory travel agency liability insurance, etc.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

Generally speaking, substantive law in China relating to insurance is more favourable to the insureds. Article 32 of the *Insurance Law* stipulates that where there is a dispute over a contract clause between an insurer and the policyholder, and the insured party or the beneficiary of an insurance contract concluded by adopting the standard clauses provided by the insurer and there are two or more interpretations of the contract clause, the court or arbitration agency shall adopt the interpretation which is in the interest of the insured party and the beneficiary.

2.2 Can a third party bring a direct action against an insurer?

A third party that is not a contractual party to an insurance agreement is generally not entitled to bring a direct action against an insurer. However, in terms of liability insurance, Article 65 of the *Insurance Law* provides that an insurer shall, at the request of an insured party, make direct compensation of insurance monies to a third party for damages caused by the insured party of a liability insurance policy to the third party in the event that the compensation liability of the insured party towards the third party is determined. Where the insured party does not make the request, the third party shall have the right to directly request that the insurer make compensation of insurance monies in respect of the portion of the compensation it should receive.

2.3 Can an insured bring a direct action against a reinsurer?

According to Article 29 of the *Insurance Law*, the insured party or the beneficiary of the original insurance policy shall not directly make a claim for compensation or payment of insurance monies from the reinsurer.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

In terms of misrepresentation or non-disclosure by the insured, Article 16 of the *Insurance Law* provides the following remedies for the insurer:

Where the policyholder fails to perform the obligation of providing truthful information intentionally or due to gross negligence, thus affecting the insurer's decision on underwriting or increase of premium rate, the insurer shall have the right to rescind the contract.

The right to rescind the contract shall commence as of the date on which the insurer becomes aware of the trigger event for rescission and shall extinguish if the right is not exercised within 30 days. An insurer shall not rescind a contract if a two-year period has lapsed as of the conclusion of the contract.

Where a policyholder fails to perform the obligation of providing correct information intentionally, the insurer shall not be liable to make compensation or payment of insurance monies for an insured event which has occurred before rescission of the contract, and the premium shall not be refunded.

Where a policyholder fails to perform the obligation to provide correct information due to gross negligence which has a serious impact on the occurrence of an insured event, the insurer shall not be liable to make compensation or payment of insurance monies for the insured event which has occurred before rescission of the contract, but the premium shall be refunded.

Where an insurer is aware, at the time of conclusion of the contract, that the policyholder has not provided truthful information, the insurer may not be entitled to rescind the contract.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

The disclosure obligation of an insured is on enquiry basis. According to Article 16 of the *Insurance Law*, where an insurer makes enquiries on the subject matter of insurance or the relevant information of the insured party for the purpose of conclusion of an insurance contract, the policyholder shall provide truthful information. In addition, according to Article 6 of the *Interpretations of Supreme People's Court on Several Issues Pertaining to Application of the Insurance Law of the People's Republic of China (II)*, the notification obligation of a policyholder shall be limited to the scope and contents enquired by the insurer. Where the parties concerned have any dispute over the scope and contents of the enquiry, the insurer shall bear the burden of proof.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

There is an automatic right of subrogation of the insurer upon payment of an indemnity by the insurer. According to Article 60 and 62 of the *Insurance Law*, where the occurrence of an insured event is due to damages to the subject matter of insurance made by a third party, the insurer shall, with effect from the date of making compensation of insurance monies to the insured party, exercise subrogation rights within the scope of the compensation amount to claim for compensation from the third party. However, an insurer shall not exercise subrogation rights to claim for compensation from the family member of the insured party or its member, except for an insured event which is caused intentionally by a family member of the insured party or its member.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

Article 24 of the *PRC Civil Procedures Law* provides that any lawsuits arising from an insurance contract shall be subject to the jurisdiction of the courts of the Defendant's domicile or of the location of the subject-matter objects being insured.

In addition, the value of a dispute may impact the level of the trial court, meaning insurance lawsuits involving a disputed value less than a specified amount shall go to a lower court, whereas those greater shall go to a higher level court, for the first-instance trial. However, some localities practice the so-called "concentrated jurisdiction system". For example, in Beijing all insurance disputes shall, regardless of their disputed value, be governed by the Beijing Fourth Intermediate People's Court.

There is no jury trial in China as in a common law sense. However, there is a so-called "people's juror system" whereby lay persons are selected by the authorities to join in a three-people or five-people collegiate panel presided over by a professional judge.

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

The following court fees will be generally payable:

1) case acceptance fee;
2) application fees, e.g. fees to apply for an interim measure; and
3) fees such as traffic expenses, accommodation expenses, and other expenses which are incurred by witnesses, interpreters, etc.

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

The date at which the lawsuit will be filed with a court really depends on the claimant after the rejection of payment by the insurer; however, it will be restricted by the time limitation of action period, as below:

The limitation of action period in respect of a claim under a non-life insurance policy shall be three years as of the effectiveness of the *General Provisions of Civil Law effective as of Oct. 1, 2017* ("*Civil Law*"), and the limitation of action period in respect of a claim under a life insurance policy shall be five years.

The timelines for the first-instance court proceedings and appellate proceeding of insurance disputes are as follows:

(i) First-instance court proceedings: These may be conducted in either a so-called "common proceeding" or "summary proceeding".
   (a) Common proceedings: The common proceeding should be completed within six months following the registration. Such duration may be prolonged for another six months if the case is too thorny.
   (b) Summary proceeding: A summary proceeding should be completed in three months; otherwise, the proceeding should be converted into a common proceeding to wrap up the case.

(ii) For appellate proceedings: The time limit for filing an appeal is 15 days for a domestic party, and 30 days for a party from a foreign country. An appellate review should generally be completed and a final judgment be made in three months after the appeal. Said period may be prolonged for complicated appeals.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

The courts in China have powers to order the disclosure/discovery and inspection of documents. According to Article 60 of the *PRC Civil Procedure Law (As amended in 2017)*, where a litigant and his/her/its agent *ad litem* are unable to gather evidence on their own due to an objective reason, or in the case of evidence deemed by the People's Court to be necessary for trial of case, the People's Court shall investigate and gather the evidence. A People's Court shall examine and verify evidence comprehensively and objectively in accordance with statutory procedures.

In respect of parties to the action, according to Article 65 of the *PRC Civil Procedure Law (As amended in 2017)*, a People's Court shall determine the evidence to be provided by a litigant and the deadline thereof pursuant to the litigant's assertion and the status of trial of case.

In respect of non-parties to the action, according to Article 67 of the *PRC Civil Procedure Law (As amended in 2017)*, People's Courts shall have the right to investigate and gather evidence from the relevant organisations and individuals, who cannot refuse.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

(a) The law remains silent on this issue. However, under the *Attorneys Law*, an attorney may generally withhold from disclosing advice given to their clients unless it jeopardises national or public security or seriously endangers personal safety.

(b) Generally, the answer is no if the party bears the burden of proof thereof.

(c) Yes. According to Article 67 of *Several Provisions of the Supreme People's Court on Evidence for Civil Actions*, any recognition of case facts involved in the compromise made by the party concerned to reach a mediation agreement or reconciliation shall not be taken as evidence against such party in any subsequent litigation.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

Yes. According to Article 73 of the *PRC Civil Procedure Law (As amended in 2017)*, upon notification by a People's Court, a witness shall testify in court.

4.4 Is evidence from witnesses allowed even if they are not present?

Generally, witnesses shall be obliged to testify in court, and only in this way can evidence from them be allowed. However, according to Article 73 of the *PRC Civil Procedure Law (As amended in 2017)*, under any of the following circumstances and upon consent by the courts, a witness who is unable to be present in the court may testify by way of written testimony, audio-visual transmission or audio-visual materials, etc.: (1) due to health reasons; (2) due to inaccessibility or the need for a long journey; (3) due to *force majeure* such as natural disasters, etc.; or (4) due to any other proper reason.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

There are restrictions on calling expert witnesses. According to Article 76 of the *PRC Civil Procedure Law (As amended in 2017)*, it shall be generally subject to the application of a litigant to the People's Court for examination in respect of certain specialised issues pertaining to ascertainment of facts. However, where a litigant does not apply for examination, but the People's Court has deemed that examination of specialised issues is necessary, the People's Court shall entrust a qualified examiner to carry out examination.

It is common for a court to appoint experts for a technical assessment/appraisal of a difficult issue if the parties fail to agree on joint selection of such experts. According to Article 76 of the *PRC Civil Procedure Law* (As amended in 2017), where a litigant applies for technical examination, both parties to the action shall negotiate and appoint a qualified examiner; where the negotiation is unsuccessful, the People's Court shall appoint an examiner.

4.6 What sort of interim remedies are available from the courts?

There are generally three types of interim remedies available under the *PRC Civil Procedure Law (As amended in 2017)*:

i) property preservation, meaning a seizure or freezing of a property or bank account;
ii) behavioural injunction; and
iii) advance enforcement, meaning collection of judgment before the trial and the issuance of the judgment.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

Yes. Where a litigant disagrees with the decisions of the courts of first instance, he/she may file an appeal to a higher court, which must review the appeal. An appeal can be filed on the grounds of either factual or legal aspects that the appellate believes justifiable to the extent as permitted by applicable law.

Technically, there is only one stage of appeal, and thus the decision made by the appellate court is a final and enforceable one. However, the law provides for an extra petition proceeding (i.e., retrial) which is subject to the discretion of the court on the basis of statutory grounds.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

The statutes only state that "damages" are recoverable in case of contractual defaults. In practice, interest is generally deemed as "damages" and hence recoverable. In addition, pursuant to Article 253 of the *PRC Civil Procedure Law (As amended in 2017)*, where an enforcee does not perform the obligations for money payment within the period stipulated in a judgment, ruling or any other legal document, the enforcee shall pay an amount double the interest on the debts during the deferred performance period.

There is no statute on the rate of interest for defaults. In practice, some parties claim interest based on the concurrent interest rate of bank deposits, which is now about 2% per annum for a one-year deposit, while others may claim interest on the basis of the concurrent interest rate of bank loans, which is now about 4.35% per annum for one-year loans.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

Generally, the losing party should bear court fees upon conclusion of the case, and attorney fees are borne by each party respectively.

To encourage mediation/settlement, courts may collect only one half of the regular court fees and exempt payment of the other half in the event of a successful settlement both prior to or after a trial.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

No. Courts shall carry out mediation pursuant to the principles of voluntary participation and legality. However, pursuant to Article 122 of the *PRC Civil Procedure Law (As amended in 2017)*, where a civil dispute lawsuit lodged by a litigant with a People's Court is suitable for mediation, mediation shall be carried out first, except where the litigant refuses mediation. Indeed, throughout the entire proceedings, settlement or mediation efforts are generally encouraged.

4.11 If a party refuses to a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

If a party refuses mediation or other forms of ADR, the court will proceed with the trial proceeding to deliver a judgment.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

Generally, Chinese courts uphold a pro-arbitration policy.

Arbitration is conducted independently according to the law, not subject to interference by courts. Courts respect parties' autonomy as long as their selection of arbitration is in compliance with the law.

Generally, the courts are not able to intervene in the conduct of an arbitration unless and until a party brings a lawsuit before them. There are two occasions where a court may exercise jurisdiction over arbitration-related disputes:

i) a court may gain jurisdiction if the validity of an arbitration agreement/clause is contended and brought before the court under Article 5 of the *Arbitration Law (Amended in 2017)*; or

ii) a court may revoke an arbitral award under Article 58 of the *Arbitration Law (Amended in 2017)* if claimant shows proof that the award:
   a) is not supported by a valid arbitration clause/agreement;
   b) covers non-arbitrable issues;
   c) the composition of arbitral panel or the proceedings violate statutory arbitration procedures;
   d) the evidence underlining the award is falsified;
   e) the counterparty conceals evidence that can affect the impartial ruling of the arbitration; or
   f) the arbitrators were corrupted.

Where the People's Court decides that the arbitration award violates public interest, it shall order the cancellation of the award. However, in practice, there are few arbitral awards which were revoked by courts.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

Yes. In respect of the contract of (re)insurance which requests arbitration to be made prior to or following the occurrence of a dispute, an arbitration agreement shall, pursuant to Article 16 of the *Arbitration Law (Amended in 2017)*, be reached, which needs to include the following: (1) the expression of an application for arbitration; (2) issues for arbitration; and (3) the chosen arbitration commission.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

The courts may refuse to enforce an express arbitration clause if it is invalid. Pursuant to Articles 17 and 18 of the *Arbitration Law (Amended in 2017)*, an arbitration agreement shall be deemed invalid in any of the following circumstances: (1) items provided for the arbitration exceed the legally regulated scope of arbitration; (2) the arbitration agreement has been concluded by persons without civil capacity or with limited civil capacity; or (3) one party has forced conclusion of the arbitration agreement through coercive means. Where an arbitration agreement has not specified or has not specified clearly items for arbitration or the choice of an arbitration commission, the parties concerned may conclude a supplementary agreement. If a supplementary agreement cannot be reached, the arbitration agreement shall be void.

Additionally, where there has been an arbitration agreement but instead, one party files a litigation anyway, and the other party fails to raise objections prior to the beginning of the hearing, the arbitration agreement shall be regarded as having been forfeited and the court shall continue the hearing.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

Generally, two interim forms of relief are available from courts to support an arbitration under Articles 27 and 46 of the *Arbitration Law (Amended in 2017)*:

i) property preservation, where due to the actions of one party or for other reasons, a potential award is expected to be difficult or even impossible to be collected by a potential winning party; and

ii) evidence preservation, where evidence is vulnerable to destruction and difficult to recover.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

Yes. Pursuant to Article 54 of the *Arbitration Law (Amended in 2017)*, an arbitration award document shall clearly contain the request for arbitration, facts of the dispute, reasons for the award, the resulting award, arbitration costs, and the bearer of those costs and the date of the arbitration award. However, where the parties concerned wish that the facts of the dispute and reasons for the arbitration not be included, these may be left unwritten.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

Generally, an arbitral tribunal shall be final and binding. However, a court may revoke an arbitral award under Article 58 of the *Arbitration Law (Amended in 2017)* as stated in question 5.1. An application by a party for the cancellation of an arbitration award shall be made within six months of its receipt of the application award document.

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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

The Finance Superintendence, a state entity, is responsible for approving the establishment of insurance and reinsurance companies in Colombia, and for monitoring, surveying and controlling insurance activities in the country (Article 325 (1) of Decree 663/93 – Finance System Statute (EOSF)).

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

The establishment of an insurance or reinsurance company in Colombia requires prior authorisation from the regulator, i.e., the Finance Superintendence. To that end, the interested party is required to file an application that satisfies all requirements provided in Article 53 of the EOSF and in Legal Basic Circular (C.E. 029/14) of the Finance Superintendence (First Title, Chapter I, Section 1).

By the time of its incorporation and throughout its existence, an insurance company must demonstrate that it holds the minimum capital required by law, as well as assets required to conduct the intended insurance activities. Reinsurance and insurance companies that carry out reinsurance activities must demonstrate the availability of the minimum capital required, comprising assets needed to operate the various insurance sectors (Article 80 (1) of the EOSF, in line with Book 31, First Title, Chapter 1 of Decree 2555/2010).

Insurance companies must also maintain and demonstrate – as a solvency margin – availability of adequate technical assets equivalent, at the very least, to the amounts identified under the rules set forth in Legal Basic Circular (C.E. 029/14) (Article 2.1.1, Section 2, Title 4, Chapter 2). Likewise, they must create certain technical provisions that include, *inter alia*, ongoing risks, outstanding claims, and losses deviation (Article 186 of the EOSF and Chapter 1, Fourth Title, Book 31 of Decree 2555/2010).

Following the filing of the application and further to compliance with all legal requisites, upon issuance of a resolution that allows setting up the company, an incorporation deed must be granted within the term provided therefor. The company must operate as a stock company or as a cooperative partnership and, subsequently, must be recorded on the mercantile registry.

As provided in law – Article 53 (5) of the EOSF – the authorities have a four-month term to issue a decision. The stated legal term is stayed if the concerned authorities request further information.

Before using them, insurance companies must deliver to the Finance Superintendence the draft policies they will offer to the public, together with the annexes (Article 184 (1) of the EOSF).

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Before 15 July 2013, only insurance companies duly set up in Colombia with prior authorisation from the Finance Superintendence were allowed to conduct insurance activities in the country. Foreign insurers could only sell insurance business under special circumstances and in reliance on a prior authorisation granted by the Finance Superintendence on a case-by-case basis; such authorisation involved assessment for reasons of general interest.

On 15 July 2013, Articles 61-66 of Law 1328/2009 came into force, partially opening up the Colombian insurance market, as follows:

- Foreign insurance companies registered in the RAIMAT (the official register maintained by the Finance Superintendence) can offer coverage for MAT insurances; i.e., international maritime transport, international commercial aviation and space launching and transport, including satellites, but only for risks affecting the merchandise being transported, the vehicles used and the civil liability arising from them, as well as coverage for merchandise in international transit.
- Foreign insurance companies may operate in Colombia through branches.
- Any resident in Colombia is allowed to acquire any type of insurance outside Colombia's jurisdiction, except for insurances related to social security, compulsory insurances, insurances in which prior compulsory coverage is legally required, and insurances in which the policyholder, insured or beneficiary is a state entity, a constraint that the government may suppress in particular cases. This authorisation has raised a discussion about whether it implies that the Colombian resident must be physically located outside the country or can do it through means such as the internet, avoiding physical displacement. The Finance Superintendence has set forth that physical displacement is required (*Concept 2013046201-005 September 23, 2013*).

Nevertheless, except for the so-called MAT insurances, foreign insurance companies are not authorised to offer, promote or advertise insurance in the country.

On a reinsurance basis, insurance companies may cede 100 per cent of the written risks.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

Certain regulations of a mandatory nature prevent agreeing, under an insurance contract, conditions other than those provided therein; likewise, other provisions are included for the benefit of the weaker party of the contractual relation (i.e., policyholder, insured or beneficiary) and hence might only be amended for the benefit of said weaker party. These constraining provisions are set out under the Commercial Code rules, which are applicable to insurance contracts. Any clause which is inconsistent with the mentioned provisions shall be absolutely void under Article 899 of the Commercial Code, in view of the violation of a mandatory rule of law and order, and such voidance must be judicially adjudged. Moreover, Article 184 (2) of the EOSF further provides unenforceability of any provision that is contrary to the concerned rules.

1.5 Are companies permitted to indemnify directors and officers under local company law?

Provisions included in corporate deeds aimed at releasing the directors' or officers' liabilities or at circumscribing the same to the amount of sureties granted to perform their duties will be deemed non-written (Article 200 of the Commercial Code).

Furthermore, in the event of wilful misconduct by directors or officers, any covenant aiming to cover this conduct in benefit of such director or officer will have an unlawful object and, hence, will entail legal inefficacy insofar as the law prohibits a waiver thereof (Article 1522 of the Civil Code).

1.6 Are there any forms of compulsory insurance?

There are several types of compulsory insurance required in Colombia; some examples are:

(i) reinsurance brokers are obliged to take out insurance to cover civil liability derived from errors or omissions incurred by the company or its officers in the pursuance of corporate purposes. These include insurance policies to cover the corporation for losses which arise from fraudulent actions by corporate officers or employees, including loss of money and valuables (Article 4 of Decree 1866/1992 and Article 2.30.1.4.4 of Decree 2555/2010);

(ii) companies engaged in passenger's terrestrial public transport are obliged to hold civil contractual and extra-contractual liability insurance policies to cover risks inherent to transportation activities (Articles 2.2.1.4.3.3, 2.2.1.4.4.1, 2.2.1.3.3, 2.2.1.1.4.1, 2.2.1.3.2.4 and 2.2.1.3.3.1 of Decree 1079/2015 – Single Regulatory Decree of the Transport Sector);

(iii) domestic or international operators of multimodal transport of goods must hold civil contractual and extra-contractual liability insurance policies. Such coverage can be obtained from insurance companies or through services provided by mutual Protection & Indemnity Clubs (P&I) (Articles 2.4.4.1.3. of Decree 1079/2015 and Resolution 425/1996);

(iv) all vehicles circulating in the Colombian territory must hold Compulsory Insurance for Transit Casualties (SOAT), covering bodily injuries sustained by pedestrians, passengers or drivers in traffic accidents (EOSF, Part VI, Chapter IV and Article 42 of Law 769/2002 – National Mobility Code);

(v) the distribution chain of liquid fuels derived from petroleum (i.e., distributors, large consumers, carriers, etc.) must hold extra-contractual civil liability policies (Article 31 of Decree 4299/2005); and

(vi) Colombian Stock Exchange brokers must hold policies to cover, *inter alia*, civil liability of the company as a result of negligent acts or omissions by directors, managers or employees, as well as losses or damages caused to the company by reason of directors', managers' or employees' infidelity (Article 6.1.1.1 of the General Rules of the Colombian Stock Exchange).

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

Colombian insurance contract law protects policyholders, insureds, and beneficiaries, which are considered to be the weaker party in such contractual relation. There are mandatory rules – not amendable by mere covenant or agreement – that seek to concretise such protection. Article 1162 of the Commercial Code sets out a non-exhaustive list of legal provisions that the parties cannot amend, and a list of provisions amendable only in favour of the stated weaker parties.

The EOSF provides rules that aim for the defence of both insureds and beneficiaries, and restrict and prohibit insurance companies' practices that undermine insurance goals.

Moreover, in issuing external circulars of general application, the Finance Superintendence regulates specific aspects and general conditions of insurance contracts.

Law 1328/2009 on the protection of financial consumers sets forth a list of rights, and at the same time imposes obligations on entities in the sector, which include, among others, that every entity should have an office for the defence of the financial consumers' rights, prohibits the inclusion of abusive clauses in *pro forma* contracts and to develop abusive practices.

Law 1480/2011 – Consumer Statute – incorporates some rules expressly aimed at the protection of policyholders and beneficiaries.

2.2 Can a third party bring a direct action against an insurer?

Under civil liability insurance, damaged third parties are entitled to bring direct actions against insurance companies, as provided in Article 1133 of the Commercial Code, without the requirement of any wording.

2.3 Can an insured bring a direct action against a reinsurer?

Pursuant to Article 1135 of the Commercial Code, insureds are not entitled to bring direct actions against reinsurers and the latter have no obligations *vis-à-vis* the former. Accordingly, no action can be brought by insureds against reinsurers.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

As provided in Article 1058 of the Commercial Code, if the insured makes a statement about the risk in line with the questionnaire proposed by the insurer, any non-disclosure or inaccuracy relating to facts or circumstances that, if known to the

insurer, would have stopped it from entering the contract or induce the inclusion of more onerous conditions, entails relative nullity of the insurance contract and the insurer will be entitled to retain the entire premium as a legal penalty. If there is no questionnaire and the non-disclosure is due to the insured's negligence and also entails aggravation of the risk, such non-disclosure or inaccuracy will have the same effects. If the non-disclosure or inaccuracy derives from the insured's error, the contract is valid, but in the event of a casualty, the insurer will only be bound to pay an indemnity equivalent to the portion the premium charged accounts for, *vis-à-vis* the premium suitable to the actual risk.

These consequences are not enforceable if the insurer, prior to entering into the contract, has known, or should have known, facts or circumstances to which the non-disclosure or inaccuracy refers, or, if the insurer accepts such facts or circumstances, either expressly or tacitly, after entering the contract.

No covenant or agreement is required for the enforcement of the legal consequences.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

In principle, policyholders are obliged to openly disclose all facts or circumstances determinant for the risk status, regardless of the specific questions posed by the insurer, but an analysis of each particular case would be required (Article 1058 of the Commercial Code).

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

Article 1096 of the Commercial Code provides that an insurer who pays an indemnification shall subrogate, by virtue of the law and up to the amount paid, in the insured's rights against those liable for the casualty.

Article 1139 of the Commercial Code provides that subrogation is not applicable to personal insurance, except as to coverage involving monetary aspects – i.e., medical, clinical, surgical or pharmaceutical expenses – as provided in Article 1140 *ibid.*

Subrogation does not apply to events where the party liable for the loss is a relative of the insured in direct or co-lateral line within the second civil degree of blood relationship, adopting father, adopted son or non-divorced spouse; likewise, it does not apply to the cases of persons whose actions might trigger the insured's liability.

Under the subrogation, *in lieu* of the insured, insurers become entitled to claim against the third party liable for the loss; thus, strictly speaking, no cooperation is required.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

Claimants must bring their actions before the competent judicial body. There are no special tribunals to settle insurance-related disputes. When referring to commercial disputes between private parties, ordinary civil courts have jurisdiction to settle the case. In litigations involving a "public entity" or a private person that performs public duties, administrative courts have jurisdiction to settle the case. The value of the dispute is also a factor to identify the judge among the several categories within ordinary or administrative courts.

The appeal of a first trial ruling is conducted before the immediate superior judicial authority.

The Colombian legal system does not provide the mechanism of a "jury".

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

The justice administration is a constitutional essential public service under the principle of gratuitousness. Notwithstanding, commercial disputes (including those related to insurance) are a legal exception of the mentioned principle, requiring the payment of a judicial tariff.

This judicial tariff is established by the Superior Council of Judicature. In virtue of Article 362 of the General Procedure Code, the tariff must be updated by this Council every two years.

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

Currently, in the ordinary civil jurisdiction, a commercial proceeding takes nearly five years in the first trial and up to three years in the appeal trial, while the special recourse known as *casación* before the Supreme Court of Justice might take one year. Administrative jurisdiction proceedings are generally lengthier and consist of two trials only. The above are mere indications, as the development of the case depends on the incumbent court; i.e., some act rather expeditiously.

Nevertheless, a number of regulations have been enacted to accelerate the administration of justice, but their effects will only be seen in the future.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

Among the powers available to assess and clarify the factual subject matter of a case, the court may instruct, *ex officio* or upon request, disclosure/discovery and/or inspection of documents in the possession of parties or non-parties to the action.

The parties are obliged to disclose all documents for which inspection or discovery is ordered. Non-parties to the action are not obliged to disclose privileged documents enjoying legal reserve or the discovery of which might eventually jeopardise them.

Prior to the filing of the complaint or even before service thereof, parties or non-parties to the action may be judicially requested to disclose/discover documents, ledgers and movable properties, as well as the inspection of documents, objects, places or persons involved in the action.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

There is no regulation allowing a party to withhold disclosure of documents, except in cases in which a reserve is granted

by the Constitution or by the law. Such is the case regarding documents related to public order or national security or those covered as professional secrets.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

Throughout the evidentiary stage and until adoption of the final ruling, courts are entitled to summon witnesses. The court may call a witness *ex officio* only if his name is mentioned in other evidence or in any act of the parties. If the witness is reluctant to appear and fails to justify the reasons for his non-attendance, he shall be fined; should the court deem it convenient or if the interested party asks for it, the court may request the support of the police to compel the witness' appearance.

The Code of General Procedure – Law 1564/2012 – provides that for evidences to be presented abroad, the use of technical means – video conference – is authorised, provided that the opposite party has the right to cross-examination and the court has direct contact with the evidence.

In case the evidence cannot be presented through such technical means, procedural laws allow the court to submit a letter rogatory to the judicial authorities of the country where the examination is to take place or directly commission, by means of exhortation, the Consul or diplomatic agent of Colombia in the concerned country to conduct the examination.

4.4 Is evidence from witnesses allowed even if they are not present?

In general terms, a witness deposition involves his appearance before the court, in order to allow the other party's right of cross-examination as well as the court's direct contact *vis-à-vis* the evidence.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

Courts are empowered to order independent and impartial expert opinions *ex officio*. Additionally, either of the parties may submit their own expert opinions. The opposite party may request the expert to be summoned for cross-examination purposes and/or present another expert opinion. No more than one expert opinion may be submitted by each party in relation to the same matter.

The party who submits the evidence must cover all expenses and fees related to the expertise. Should the evidence be decreed *ex officio*, the parties must cover the costs thereof in identical proportions.

4.6 What sort of interim remedies are available from the courts?

In general terms, as to pre-action disclosure orders, no procedural mechanism has been provided *per se*, as court powers are only enforceable upon formal initiation of the proceedings; i.e., upon filing of the complaint. However, it is feasible that a party which intends to file a complaint or which is threatened to be sued requests the disclosure/discovery of documents prior to the formal initiation of the proceedings.

Any documents necessary for the proceedings and derived from the disclosure/discovery will be kept on record as an integral part of the court file.

Imposition of injunction measures aimed at "freezing" the assets is feasible.

Attachment is an injunction which prevents trading the properties, including alienation thereof; in the case of transactions made in breach of the seizure, these will have an unlawful purpose and will produce no effect whatsoever.

In turn, seizure involves physical confiscation of the concerned properties generally by either a third party (previously authorised to be part of a legal list of officers) or by the affected party itself depending on the decision of the court, who shall be responsible for the custody and management thereof.

These types of injunction measures are requested together with the complaint seeking that the court orders them prior to servicing the complaint upon the respondent; a claimant must grant a bond, i.e., money surety, insurance policy or bank guarantee to secure compensation of damages caused by the injunction measures in the event that the complaint does not succeed.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

As a general principle, rulings entered by first trial courts may be appealed.

In civil matters, appeals must be filed in writing at the court which adopted the concerned ruling and within three business days following its service or, if entered in a hearing, verbally thereat. Following the new Code of General Procedure, the alleged flaws in the judgment must be briefly explained. Should the appeal be admissible, the court will submit the case file to the superior court in order to process the appeal, and it has to be sustained thereat. Should the first trial court dismiss the appeal, the appealing party may file a remedy of complaint (*recurso de queja*) seeking that the superior court admits the appeal.

Second trial rulings may also be subject to the extraordinary remedy of *casación* filed before the Supreme Court of Justice on the basis of specific reasons and provided that the unfavourable ruling exceeds a certain amount which is annually indexed. Such remedy may be filed within five days following service of the ruling.

In administrative proceedings, the appeal must be filed and sustained before the first instance court within 10 days following service of the ruling. As well as in the civil jurisdiction, should the first trial court dismiss the appeal, the appealing party may file a remedy of complaint (*recurso de queja*) seeking that the superior court admits the appeal.

For this jurisdiction, the Colombian Administrative Procedure Code – Law 1437/2011 – establishes an extraordinary remedy against a single or second instance judgment taken by administrative tribunals, looking for the unification of the national jurisprudence, when such decisions are contrary to previous judgments issued by the State Council, the highest authority of the administrative jurisdiction. The appeal must be filed in writing before the administrative tribunal, within five days following finality of the ruling.

Both in civil and administrative matters and in rather restrictive circumstances, it is feasible to file an extraordinary revision remedy against final rulings, to the extent that the conditions provided in law are satisfied. In civil matters, the remedy may be filed within two years following finality of the ruling; in an administrative dispute, the general term is one year. However, in both proceedings, there are some exceptions as to the term counting.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Only if claimed is the court empowered to award interest in favour of the prevailing party. Amounts awarded in the ruling may be indexed to adjust them *vis-à-vis* currency losses. In commercial cases, it is feasible to award compensatory or default interest but these will not be subject to indexation. Compensatory interest matches bank current interests; that is, the average interest charged as general, consistent and public practice on common credits granted by banks (currently around 20 per cent). The maximum default interest permitted by law is the bank current interest plus one-half thereof; however, a lower percentage may be contractually agreed upon.

The ruling may be enforced on an executive basis and, therefore, non-payment of the award accrues default interest.

As to insurance, the law provides penalties against the insurers which delay payment of the indemnity. Penalties, consisting of the payment of default interest at the maximum permitted rate, are enforceable as from expiration of the legal deadline (one month), counted as from the demonstration of the loss and its value, without the insurer paying the claim (Article 1080 of the Commercial Code). In case of damages, where the insured is a legal entity and the amount insured under the policy exceeds 15,000 monthly minimum wages, the deadline to pay the indemnity may be extended by mutual agreement of the parties, to a term no longer than 60 business days (Article 185 (1) of the EOSF).

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

Civil procedural rules provide that the losing party in a judicial proceeding, incident or appeal is obliged to pay court costs incurred by its counterparty, provided the demonstration and usefulness thereof, as well as their consistency with the law. The court may refrain from awarding court costs, or may do it partially, in the case where the complaint is admitted in part.

However, in administrative proceedings involving public interest, there are no awards costs.

Court costs encompass expenditures such as notifications, copies, registrations, experts' fees and the like, as well as attorneys' fees; the latter are awarded by the court in favour of the prevailing party in line with criteria set out in procedural and administrative rules.

In connection with court costs, there are no benefits for the party that submits an offer for arrangement or settlement.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

In the civil, administrative and family jurisdictions, as a general rule, in disputes involving subjects that can be settled by the parties, extrajudicial mediation is a pre-requisite to file a claim (Law 640/2001, Article 35 and Law 1285/2009, Article 13). Nevertheless, some actions are excepted from this requirement. For some proceedings, there is also a mediation stage to be carried out within the process where the parties are encouraged to reconcile their differences. This also happens in arbitration proceedings (Law 1563/2012, Article 24).

If a party fails to attend the extrajudicial or judicial mediation hearing and does not justify its absence within the legal opportunity, he can be fined and such behaviour can be regarded as serious evidence against its claims or defences, depending on the case (Article 22 and 35 (paragraph 1) of Law 640/2001 and Article 372 (paragraph 4) of Law 1564/2012).

However, the possibility to settle a case is completely at the discretion of the parties and if an agreement is not reached, there are no legal consequences.

4.11 If a party refuses to a request to mediate (or engage with other forms of Alternative Dispute Resolution) what consequences may follow?

Please refer to our response to question 4.10 above.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

Arbitration, as a mechanism for dispute resolution, is well established under the Constitution and, therefore, must be acknowledged by tribunals and courts. In general terms, courts do not get involved in arbitration proceedings. The only exceptions relate to the event where the parties fail to reach an agreement as to designation of the arbitrators, in which case a civil court shall make the relevant designation (Law 1563/2012, Article 14). A judicial intervention is also feasible in view of the challenge of all of the arbitrators (Law 1563/2012, Articles 15 and 17). Likewise, courts are in charge of resolving any voidance appeal filed against an arbitral award (Law 1563/2012, Article 46).

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

Recourse to arbitration to submit disputes to an arbitral tribunal requires the existence of a prior arbitral agreement between the parties, which may be part of a contract or included in a separate document. In the latter case, the document shall state the name of the parties and the contract to which it refers. Likewise, it is also possible to enter into a "*compromiso*" (submission agreement), whereby in the case of a current controversy, the parties commit to settle the same through arbitration. Such "*compromiso*" shall state the parties' names, the disagreements submitted to arbitration and the ongoing proceeding, if applicable without the need to use a pre-stated form.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

Explicit arbitration clauses are effective without the need of the parties' restatement of their consent subsequent to the dispute. However, according to the law, when a party files a complaint before ordinary or administrative courts, and within the deadlines provided, the defendant does not invoke the arbitration clause as defence; it is understood that the arbitral jurisdiction has been waived and the ordinary courts will be competent to settle the case (Law 1563/2012, Article 21).

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

Arbitrators have the same judicial powers as courts during the arbitral proceeding and, therefore, are entitled to order, practise and assess evidence, instruct judicial inspections and discoveries, and decree injunction measures.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

Pursuant to Article 279 of the General Procedure Code, arbitral awards must set out the reasons supporting the decision.

Should the Arbitral Tribunal fail to support its decision or if it is ambiguous, the parties may request, within five days following its adoption, clarification, correction and/or supplementation of the award (Law 1563/2012, Article 39), but a change in the merits of the decision is not allowed.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

Arbitral awards may be appealed through the extraordinary voidance remedy, the bases of which are specifically limited to formal aspects, without affecting the merits of the decision (Law 1563/2012, Article 41). The remedy must be filed within five days following service of the award or the decision correcting, clarifying or supplementing the award. However, there are some isolated cases where, alleging formal reasons, awards have been voided as a consequence of an in-depth review of the merits of the decision; strictly speaking, this is not permitted by law.

Both the award and the court decision on annulment are subject to extraordinary revision remedies, when exceptional circumstances listed in the General Procedure Code are verified (Law 1563/2012, Article 45).

Some arbitration awards have been challenged by means of constitutional action known as "*Acción de Tutela*", which protects constitutional fundamental rights whenever they are harmed or threatened by the act or omission of any public authority. This kind of action proceeds only if it fulfils certain requirements established by the jurisprudence of the Constitutional Court.

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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

The main statute for regulating the Danish insurance market is the Danish Financial Business Act. The Danish Financial Services Authority (FSA) supervises, monitors and regulates the financial market, including (re)insurance companies, in Denmark. The FSA can issue orders and report issues to the police if (re)insurance companies do not comply with the rules laid down in the Danish Financial Business Act.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

The FSA issues licences to conduct (re)insurance business in Denmark, based on the (re)insurer's plan of operation. The information that should be included in the plan is established by the FSA.

Certain requirements to the (re)insurer's capital and solvency are laid down in the Danish Financial Business Act. The requirements are based on the EU Solvency II Directive as implemented in Danish law. The requirements depend on whether the company belongs to the group of companies classified according to, *inter alia*, their gross annual premium (group 1), or all other companies (group 2).

Group 2 companies must, as a minimum, have a capital base equivalent to the highest value of the individual solvency requirements and, furthermore, the board must make sure that there are sufficient provisions at all times to cover all insurance obligations under the insurance contract.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

(Re)insurance companies from outside the European Union (EU) and the European Economic Area (EEA) may only carry out insurance business in Denmark if they set up a company or a branch in Denmark and apply for a licence from the FSA.

(Re)insurance companies who have been granted a licence to carry out insurance business in another Member State in the EU or EEA may carry out insurance business in Denmark without obtaining a licence from the FSA on the basis of the principles of freedom of establishment and freedom of services. Danish rules on good insurance practice, insurance contract rules and consumer protection must be observed. The company may operate on the Danish insurance market, either immediately after the FSA has been notified by the supervisory authorities of the (re)insurer's home country, or through a branch two months after the notification has been given to the FSA.

Furthermore, the requirements described under question 1.2 above also apply to foreign insurers.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

If the contract is a consumer contract, protective mandatory rules in the Danish Insurance Contracts Act and other consumer statutes cannot be derogated from to the benefit of the insurer. Provisions in consumer insurance contracts that derogate from these protective mandatory provisions will therefore in most cases have no legal validity.

Insurance contracts, including reinsurance contracts, are in general interpreted in accordance with the strict meaning of the wording seen in connection with the other terms of the contract and the intention of the parties at the time of conclusion of the contract. If the wording leaves doubt about the content of a provision, the interpretation may include the circumstances under which the contract was entered into and the purpose of the contract, and ambiguities may be detrimental to the insurer having written the contract (the ambiguity rule, *contra preferentem rule*). All contracts must be interpreted with consideration to legislation, case law, trade usage, other legal standards and rules on interpretation.

1.5 Are companies permitted to indemnify directors and officers under local company law?

There are no provisions under Danish company law regulating whether companies are permitted to indemnify directors and officers.

Companies can take out a liability insurance for their directors' and officers' liability incurred in the capacity of the management of the business, and it is generally assumed, albeit not without controversy, that companies may indemnify directors and officers as well.

1.6 Are there any forms of compulsory insurance?

There are several forms of insurance which, according to Danish statutes, *must* be taken out (compulsory insurances). The compulsory insurances include the following:

a) third-party motor liability insurance;
b) professional liability insurance for some advisors, including lawyers and accountants;
c) industrial injury insurance;
d) occupational disease insurance;
e) dog and horse liability insurance;
f) fire insurance, if owning real estate;
g) railway liability insurance;
h) aviation liability insurance;
i) oil pollution insurance;
j) maritime claims insurance for Danish ships with a gross tonnage of 300 or more;
k) drones insurance, excluding microdrones; and
l) personal watercraft and speedboat liability insurance.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

Danish insurance law is in general more favourable to the insured. This is particularly the case when the matter concerns an insurance contract rather than a reinsurance contract.

Insurance contracts must comply with the rules laid down in the Danish Insurance Contracts Act. The Act contains some protective mandatory rules on, e.g., cancellation of insurance contracts, etc. Other insurance regulation, e.g. the Danish Consumer Marketing Practice Act, also applies to insurance contracts. The insured to an insurance contract can complain to the Danish Insurance Complaints Board and to the Danish Consumer Complaints Board.

When the matter concerns a reinsurance contract, the parties to the contract may rely on general Danish contract law, which generally means that they may rely on the agreed terms in the reinsurance contract. No special rules apply to reinsurance contracts. Complaints regarding reinsurance contracts may be filed with the Danish trade organisation Insurance & Pension, whose assessment of the complaint, however, is not binding on either of the parties.

2.2 Can a third party bring a direct action against an insurer?

A third party who has suffered damage or loss can bring a liability claim directly against the insurer, as long as the insured's liability and the size of the damages have been established. Hence, the third party is subrogated into the insured's claim against the insurer.

Furthermore, in certain situations the insurer will be directly liable to the third party (e.g. under the third-party motor vehicle liability insurance).

2.3 Can an insured bring a direct action against a reinsurer?

There is no statutory right for the insured under the underlying insurance contract to subrogate the first insurer's claims against the reinsurer. Hence, the insured cannot bring a direct action against the reinsurer, unless there exists an agreement between the insured and the reinsurer making the insured either a party or a beneficiary to the reinsurance contract.

The insured under the reinsurance contract can bring a direct action against the reinsurer.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

The remedies in case of the insured's misrepresentation or non-disclosure follow from the Danish Insurance Contracts Act.

According to this act, the insurer will not be bound by an insurance contract if the insured has fraudulently provided false information or has failed to disclose information which the insured must have realised was material to the insurer.

Where the insured has negligently provided false information (without it being fraudulent), the insurer will be exempt from liability to the extent it can be presumed that the insurer would have refused the insurance on the agreed terms if correct information had been disclosed.

If the insured has given a false statement without having known or they ought to have known that it was in fact false, the insurer is bound by the insurance contract. Indemnity insurance contracts can, in this case, be terminated with a week's notice by the insurer.

It should be noted that the insurer, without undue delay after becoming aware of the insured having given false information, shall inform the insured that the insurer wishes to rely on the above-mentioned rights. Consequently, the rights in the Insurance Contracts Act are dependent on the insurer's (i) informing the insured, and (ii) without undue delay. These obligations do not apply if the insured has acted fraudulently.

In the case of reinsurance contracts, the Danish Contracts Act provides that fraudulent misrepresentation or non-disclosure will render the reinsurance contract void. The Danish Insurance Contracts Act does not apply to reinsurance contracts.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

It is generally assumed that the insured has a duty to truthfully answer all questions put forward by the insurer, but that the insured does not have a general duty to disclose all material facts. If, however, an answer appears complete without being so, the incompleteness will be seen as constituting false information.

However, if the insured knew or ought to have known that a fact was material to the insurer, and the insured fraudulently fails to disclose this fact, the insurance contract will be rendered void.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

It follows directly from the Danish Act on the Liability to Pay Compensation that the insurer will be subrogated to the insured's claim against the person liable to pay compensation for a loss covered by an indemnity insurance. Subrogation is,

however, not possible if the insurance is a personal insurance, including life, accident or sickness insurance.

Additionally, the insurer will only have a recourse claim if it is shown that the tortfeasor is liable according to the general Danish law of damages, including there being a causal and foreseeable financial loss.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

There are no courts specialised in insurance disputes. Consequently, the 24 district courts, the Maritime and Commercial Court, the High Courts of Eastern and Western Denmark, and (if certain conditions are fulfilled) the Supreme Court can hear disputes regarding commercial insurance.

Whether a court can hear a commercial insurance dispute does not depend on the value of the claim.

There is no right to a hearing before a jury in commercial disputes. In the district courts, high courts and Maritime and Commercial Court, it is, however, possible for the legal judges to be joined by expert lay assessors under certain circumstances. The expert lay assessors will hand down the judgment together with the legal judges.

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

The commencing of commercial proceedings, including commercial insurance disputes, is subject to a court fee of DKK 500. An additional fee of DKK 250 plus 1.2% of the value of the claim applies if the value of the claim exceeds DKK 50,000. The court fee cannot exceed DKK 75,000.

If the value of the claim exceeds DKK 50,000, an additional fee for the final hearing (or the written proceedings that may replace the hearing) must be paid on top of the court fee. The hearing fee will generally be the same amount as the fee for commencing the proceedings.

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

The time passing between the institution of proceedings and the final hearing varies according to different factors, including the complexity of the case, the need of instructing experts or obtaining evidence, etc. In commercial cases heard by the district courts, the average time passing between the institution of proceedings and the court deciding the case with a judgment, or with the parties settling after the final hearing, was 533 days (17.2 months) in 2019. A total of 36% of the cases were concluded by judgment or settlement after the final hearing within a year from the commencement of the proceedings.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

Each party generally decides which documents to include in the action, and the opposing party is not entitled to see what other documents the party possesses.

If, however, a party wishes to rely on documents in the opposing party's possession, the court may order disclosure of these documents if the party is able to explain for which issues the documents are needed. If a party does not comply with the court's disclosure order, the court may draw adverse inference from the failure to produce the documents.

If a party wishes to rely on documents in a non-party's possession, the court may order disclosure if the documents are of relevance to the case, unless the non-party would be exempt from giving testimony about the information in the documents as a witness. Failure to comply with the court's order may be sanctioned in the same way as failure to attend court as a witness, e.g. with a fine or by being taken into custody.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

Under Danish law, confidentiality is the right of the client. This means that there is no right (legal privilege) for the lawyer to withhold information if the client consents to disclosure.

A party is not obliged to disclose documents if the party would not be compelled to give testimony regarding the information contained in the documents as a witness. Hence, if the party's lawyer cannot be compelled to disclose or give testimony about the information, nor can the party.

Only information which has a connection to the client and is obtained as a part of the lawyer's professional activity is covered by confidentiality and is thus exempt from disclosure. Generally, this means that documents relating to advice given by a lawyer, prepared in contemplation of litigation, or produced in the course of settlement negotiations, are all covered by confidentiality as they contain information obtained as a part of the lawyer's professional activity.

Under Danish law, a document purely containing a legal opinion is not considered evidence and, for this reason, cannot be ordered disclosed.

Consequently, the party (client) himself may withhold the documents from disclosure.

Nonetheless, the court may order disclosure of documents, including legal opinions, which contain information covered by a lawyer's duty of confidentiality if the information is deemed to be essential to the outcome of the case, and the merits of the case and its importance to the party concerned or society as a whole are found to justify such an order.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

The Danish courts may order anyone to give evidence as a witness at any stage of the proceedings, unless a statutory exception applies. If the court orders a witness to give evidence, the witness must, as a main rule, be physically present at the final hearing.

Certain exceptions apply to persons who are bound by professional secrecy, e.g. doctors and lawyers, if the giving of evidence would be against the wishes of the person who has a right of confidentiality, and to editors and editorial staff falling within the scope of the Danish Media Liability Act if the evidence regards certain information, e.g. the identity of sources. The court may, under certain circumstances, order that evidence is to be given nonetheless, e.g. if the evidence is deemed to be

essential to the outcome of the case, and the merits and importance of the case and to the party or society as a whole are found to justify such order. Such order in civil proceedings cannot be given to defence counsel in criminal proceedings and cannot be extended to include information which a lawyer has obtained during legal proceedings in which the lawyer has been entrusted or whose advice has been sought.

Furthermore, exceptions apply to related persons of a party, and to evidence which is deemed likely to expose the witness or the witness' related persons to the penalty of law, harm to their safety or welfare, or otherwise inflict significant harm on the witness or the witness' related persons. The court may derogate from some of these exceptions if the evidence is deemed to be essential to the outcome of the case, and the merits of the case and its importance to the party or to society as a whole are found to justify such order.

If a witness fails to attend court without a lawful excuse or without having given notice of absence, the court may sanction the witness, e.g. by imposing fines, having the police bring the witness to court, or by taking the witness into custody.

4.4 Is evidence from witnesses allowed even if they are not present?

As a main rule, evidence must be given before the court hearing the case. However, the Danish Administration of Justice Act provides the possibility of giving evidence by use of video or voice communications, e.g. by Skype, etc., if deemed appropriate and adequate.

In regard to foreign witnesses, it should be noted that Denmark is a signatory to multiple conventions on legal assistance, including the Hague Convention on the Taking of Evidence in Civil or Commercial Matters of 1970. Danish courts may thus request the competent authority of another contracting state to obtain evidence in accordance with the provisions laid down in such conventions. For example, according to the Agreement on Mutual Legal Assistance between the USA and the Kingdom of Denmark, the use of video transmission technology is available between the USA and Denmark for taking testimony in a proceeding.

Furthermore, if it is deemed unobjectionable, the court may allow a written statement from a party or a witness who could have been called to give oral evidence before the court hearing the case.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

As a general rule, the parties decide which evidence and legal issues should be examined in the case. The court may, however, either at its own motion or at the request of one of the parties, bar unnecessary evidence, although it is reluctant to do so.

The most common type of expert evidence in Denmark is the expert survey, i.e. an expert report based on an appraisal by one or more court-appointed experts. Expert statements and expert witnesses are not widely used.

In an expert survey, the court will appoint one or more experts who will often give both a written statement and an explanation in court, based on questions submitted by the parties. If the parties do not agree on the questions to be submitted to the expert(s), the court will decide on the necessity of the questions in its judgment, and unnecessary questions may be reflected in the decision on legal costs.

Expert statements obtained by one of the parties are, as a general rule, only admissible if the statement was obtained *before* the commencement of the proceedings. In this case, the opposing party may obtain a statement under the same conditions after the commencement of the proceedings.

With the permission of the court, and when both parties consent to it, each party may obtain their own expert statement (party-appointed experts). This can be done instead of, or in addition to, an expert survey. However, if an expert survey is obtained regarding the same issue, the evidential value of the party-appointed experts' statements will usually be limited.

4.6 What sort of interim remedies are available from the courts?

A party may request the court to levy an attachment in order to secure a monetary claim. The claimant may be ordered to provide security for the attachment, and a confirmatory action must be brought within one week of the attachment. The claimant may also apply for a freezing order or preservation of evidence in the case of infringement of intellectual property, etc.

Furthermore, a party may obtain a court order for a preliminary injunction in a matter with a private defendant, or suspensory effect regarding compliance with a decision made by a public authority. It is a requirement for granting an injunction that the court is satisfied that there is a risk of causing irreparable damage by awaiting a decision in the original proceedings. If an injunction has been ordered, the bailiff's court may seize any movable property if there is reason to believe that the injunction will be, or already has been, breached.

At the request of a party, the court may require that a claimant from outside the EU and EEA provides security for any legal costs that the claimant may be ordered to pay to the defendant.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

Denmark has a two-tier principle which means that a case, as a main rule, can be heard by (at least) two courts.

If a case is heard by a district court, or the Maritime and Commercial Court as the court of first instance, it can, thus, be appealed to one of the two high courts, without having to obtain any special permission.

If a case is heard by one of the high courts as the court of first instance, e.g. because it is deemed to be a matter of principle, it can be appealed to the Supreme Court.

A dispute which has been heard by a high court as the court of second instance cannot be appealed to the Supreme Court unless a third instance leave of appeal is granted by the Appeals Permission Board.

Cases regarding claims with a value under DKK 20,000 can only be appealed if the Appeals Permission Board grants a leave of appeal.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

The rules on interest follow from the Danish Interest Act. The parties may also include interest provisions in their agreements.

The court's order on legal costs bears interest from the date of the court's decision.

The annual interest rate, if the parties have not agreed on a different rate, is the Danish National Bank's lending rate plus 8%, currently amounting to a rate of 8.05%.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

The Danish courts rule on legal costs according to the rules laid down in the Danish Administration of Justice Act.

Unless otherwise agreed by the parties, the court will order the unsuccessful party to compensate the opposing party for the costs incurred as a result of the proceedings.

If each party partly loses and partly wins the case, the court will order one of the parties to pay partial costs to the other party, or direct that neither party is to pay costs to the other party. The same applies if the proceedings are withdrawn.

The costs which have been necessary for the adequate conduct of the case are deemed to constitute recoverable costs. Legal representation is not recoverable in full but by a reasonable amount primarily depending on the financial value of the claim and the need for experts during the proceedings. Other costs, including court fees and, as a main rule, costs for expert assistance, are recoverable in full.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

The Danish courts cannot compel the parties to engage with mediation or negotiation, nor can the court enforce the parties' agreement to mediate or negotiate a dispute.

The courts can offer the parties to chance to participate in a court-based mediation. Such participation is on a voluntary basis, and the parties can end the mediation at any point in the process.

A valid arbitration agreement will be enforced by Danish courts.

4.11 If a party refuses to a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

The Danish courts cannot compel a party to engage with any forms of Alternative Dispute Resolution and, therefore, there are no consequences for a party to refuse to do so.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

If the parties have agreed validly to arbitration, Danish courts will dismiss a case at a party's request.

Generally, Danish courts cannot intervene in disputes which are to be solved by arbitration. The exhaustive grounds on which a court *can* intervene in an arbitration follows from the Danish Arbitration Act. Accordingly, under certain circumstances, a court can:

i) decide on a challenged arbitrator;
ii) grant interim measures;
iii) appoint arbitrators at the request of a party if the arbitral tribunal has not been successfully constituted;
iv) decide on the termination of an arbitrator's mandate;
v) decide on the arbitral tribunal's jurisdiction, unless the request is brought after the submission of the statement of defence, in which case the court may only rule on the arbitral tribunal's jurisdiction in respect of whether the dispute is capable of settlement by arbitration;
vi) assist the tribunal or a party in taking evidence;
vii) request the Court of Justice of the European Union to give a ruling, if the arbitral tribunal requests so;
viii) review the determination of the costs of the arbitral tribunal;
ix) set aside an arbitral award for certain specific reasons; and
x) recognise and enforce national and foreign arbitral awards, unless certain specific exceptions apply.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

Both written and oral arbitration agreements are valid under Danish law as long as they have the necessary clarity. The Danish Institute of Arbitration suggests using the following wording for a standard arbitration clause in a contract:

"Any dispute arising out of or in connection with this contract, including any disputes regarding the existence, validity or termination thereof, shall be settled by arbitration administrated by The Danish Institute of Arbitration in accordance with the rules of arbitration procedure adopted by The Danish Institute of Arbitration and in force at the time when such proceedings are commenced."

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

The Danish courts will refuse to enforce an arbitration clause if the subject-matter of the dispute is not capable of settlement by arbitration.

Furthermore, if court proceedings are commenced before the arbitration proceedings, the court can, on the request of a party, decide on the validity of the arbitration agreement, and whether the dispute is within the scope of the agreement. Consequently, if the agreement is null and void, inoperative or incapable of being performed, the court will refuse to enforce the arbitration clause.

Arbitration agreements can be entered into either before or after the dispute has arisen, unless the contract in dispute is a consumer contract, in which case the consumer is only bound by the arbitration agreement if it was concluded before the dispute arose.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

The courts can grant all the forms of interim relief that are available to the court itself by virtue of the Danish Administration of Justice Act. These include prohibitory injunctions, levying an attachment, orders for preservation or obtaining evidence, and ordering a party to fulfil a specific obligation.

As an example, a party may, with the approval of the arbitral tribunal, request the court's assistance in taking evidence in accordance with the rules of the Danish Administration of Justice Act. If the evidence in question was a witness statement, the court could issue a witness summons and sanction the witness, if he/she failed to appear.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

The arbitral tribunal has to state the reasons for its award in the written award unless the parties have agreed otherwise, or the parties have settled the dispute and requested that the settlement should be recorded in the form of an arbitral award on agreed terms.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

There is no right of appeal, unless the parties have agreed otherwise. Consequently, the arbitration award is final.

An arbitration award can, however, be set aside or refused recognition and enforcement by the Danish courts if a refusal ground applies. The refusal grounds include (not exhaustive) public policy grounds, that the subject-matter was not capable of settlement by arbitration, that one of the parties lacked legal capacity, or that the award falls outside the terms of the submission to arbitration.

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With a total staff of almost 700, Poul Schmith has grown to be the largest law firm in Denmark.
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With specialists covering practically all legal areas, we have extensive experience in both the corporate and public sectors. In recent years, we have increased our focus on the private sector in Denmark and the international market, and, consequently, now have multiple corperate clients, including banks, insurance companies and private equity funds.
Our insurance team is instructed by Danish and international insurers and by Danish public authorities, including the National Indemnity in cases across multiple lines of business. Our team has recently been joined by several attorneys with a past in the insurance industry, making the team highly specialised.

We litigate insurance disputes before the Danish courts and arbitral tribunals and advise both Danish and international clients on any insurance matter with a Danish law aspect.

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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

A new regulatory regime was introduced in the UK on 1 April 2013. The Financial Services Authority (**FSA**), previously the centralised regulator for all financial services, was replaced as regulator by two new regulatory bodies:

- the Prudential Regulatory Authority (**PRA**); and
- the Financial Conduct Authority (**FCA**).

The PRA is responsible for the prudential regulation and supervision of insurers, deposit-takers and major investment firms in the UK. The PRA has three statutory objectives:

- a general objective of promoting the safety and soundness of the firms it regulates;
- a specific insurance objective of contributing to the securing of an appropriate degree of protection for those who are, or may, become policyholders; and
- a further objective to facilitate effective competition.

The FCA is responsible for the conduct of business regulation for all financial institutions (as well as the prudential regulation of companies not regulated by the PRA). The FCA has a strategic objective, to ensure that relevant markets function well, supported by three operational objectives:

- to secure an appropriate degree of protection for consumers;
- to protect and enhance the integrity of the UK financial system; and
- to promote effective competition in the interests of consumers.

(Re)insurance companies and Lloyd's entities are 'dual-regulated' firms. They are authorised and prudentially regulated and supervised by the PRA, as well as being regulated by the FCA for conduct purposes. (Re)insurance intermediaries, on the other hand, are regulated solely by the FCA.

The PRA and the FCA have a statutory duty to coordinate the exercise of their respective functions under the Financial Services and Markets Act 2000 (**FSMA**). As required by the FSMA, the PRA and FCA have entered into a Memorandum of Understanding setting out their respective roles and how they intend to comply with the obligation to coordinate the exercise of their functions.

Authorisation from the PRA is required under the FSMA to carry out 'regulated activities' in the course of a business. The key insurance-related regulated activities are the 'effecting' (i.e. entering into) and 'carrying out' (i.e. performing) of contracts of insurance.

For regulatory purposes, insurance business is divided into 10 classes of long-term (life and related) business and 18 classes of general (property, liability, guarantee, etc.) business. Separate permissions from the PRA must be obtained for each class of business being underwritten.

Lloyd's (a specialist insurance market) is also subject to prudential regulation by the PRA and conduct regulation by the FCA, as are Lloyd's managing agents. Lloyd's members' agents and Lloyd's brokers, as well as other insurance brokers, are regulated by the FCA alone.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

To establish a new (re)insurance company, an authorisation application must be made to the PRA for permission to carry out regulated activities under Part 4A of the FSMA. This must include: a regulatory business plan; financial projections; details of financial resources; details of systems, controls and compliance arrangements; and details of personnel, including key individuals who will be performing 'controlled functions', and of the controllers of the applicant. It must also contain an address in the UK for service of any notice or other document under the FSMA. The PRA leads and manages the application process, coordinating with the FCA.

The PRA assesses applicants from a prudential perspective, and the FCA from a conduct perspective. In either case, the relevant regulator will assess whether, if authorised, the applicant would meet the relevant Threshold Conditions at authorisation and on a continuing basis.

The Threshold Conditions constitute the minimum requirements for becoming and remaining authorised. The Threshold Conditions that applied under the old regime have been changed and responsibility for them allocated between the PRA and the FCA.

The Threshold Conditions relevant to (re)insurers include requirements as to: legal status (being a body corporate, a registered friendly society or a member of Lloyd's); location of offices; conduct of business in a prudent manner, ensuring among other things that appropriate financial and non-financial resources are held; suitability, involving an assessment of whether the applicant is fit and proper to be an authorised person, including being generally cooperative in the provision of information to the regulators and ensuring that those who manage the applicant's affairs have the requisite skills and experience and have acted and may be expected to act with probity; ensuring that there is no impediment to effective supervision because of the nature or complexity of business undertaken, products offered and business organisation; and having a business model suitable for its regulated activities.

Insurers must be able to demonstrate adequate financial resources pursuant to the capital requirements set out in the FSMA and the PRA Handbook.

The EU Solvency II project, which involved a major reform to the regulatory solvency requirements for EU (re)insurers, resulted in UK (re)insurers becoming subject to new, risk-based capital requirements based on three pillars effective from 1 January 2016. Pillar I covers quantitative requirements and sets out a market consistent framework for valuing assets and liabilities. Pillar II requires (re)insurers to meet minimum standards for their corporate governance and for their risk and capital management, including regular completion of an Own Risk and Solvency Assessment. Pillar III contains requirements for disclosures to supervisors and the public. The project was subject to some delay, but has now been implemented in the UK as of 1 January 2016.

Solvency II has also changed the regulation of individuals who run insurance companies with the new Senior Insurance Managers Regime (**SIMR**) having come into force on 7 March 2016. Individuals carrying out certain functions in relation to a (re)insurer must be approved by either the PRA or the FCA, depending on whether the function is designated to the PRA or the FCA. Functions covered by the SIMR include the chief executive, other senior executive functions, the chairman, and, in the case of a life insurer, the head of the actuarial function or with-profits actuary functions. The PRA will assess the individual's probity, reputation, competence, capability and financial soundness. Interviews form a core part of the approval process. There is, in addition, a number of FCA-controlled significant influence functions (**SIFS**), which cover directors not otherwise approved by the PRA in respect of certain compliance functions.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Under section 19 of the FSMA, it is an offence for a firm to carry out a regulated activity in the UK without authorisation. It is possible to cover a risk in the UK without authorisation, provided insurance business is not carried out from within the UK.

Foreign insurance companies whose head office is elsewhere in the European Economic Area (**EEA**) are currently permitted to conduct insurance business in the UK directly on the strength of an authorisation in their Home State (under the so-called 'passport regime'). This position is likely to change after the UK has left the European Union. The PRA receives notice from the EEA Home State regulator that it has given consent to the EEA firm to establish a branch or provide services in the UK, comprising permitted activities and in accordance with the insurance Directives. These arrangements have now been extended to reinsurers. The PRA leads on applications by (re)insurance companies to passport into, or out of, the UK. For insurance intermediaries seeking to use the passporting regime, however, an application must be made to the FCA. The regulators are entitled to impose additional requirements on (re)insurers passporting into the UK where these are required in the interests of the general good.

A foreign (re)insurer whose head office is outside the EEA would not be able to carry on insurance activities from within the UK (or through an agent in the UK) without authorisation (unless their home country benefits from a relevant bilateral treaty with the EU). This can be achieved by setting up a branch of the (re) insurer, or establishing a subsidiary. In each case, permission under Part 4A of the FSMA will be required. In the case of a branch, in order to obtain authorisation, in addition to the usual requirements for authorisation, the (re)insurer must be a body corporate formed under the law of the country where its head office is situated and appoint an authorised UK representative. In the case of an applicant who is not a pure reinsurer, it must have admissible assets localised in the UK and in the EEA to a value specified in the Prudential Sourcebook for Insurers (**INSPRU**).

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

As with any contract, terms may be unfair in contracts concluded between an insurer and a consumer by virtue of the Unfair Terms in Consumer Contracts Regulations 1999. Terms which are unfair for the purposes of the Regulations will be deemed to be void. Particular care must be taken when contracts are formed on standard terms of business because such terms will not have been individually negotiated and will therefore be regarded as unfair if they cause a significant imbalance in the parties' rights and obligations, to the detriment of the consumer. Further provisions were introduced by the Consumer Rights Act 2015, which came into effect on 1 October 2015. For example, exclusions must be transparent and prominent and cancellation fees should not be disproportionately high.

In addition, the FCA's Insurance Conduct of Business Sourcebook (**ICOBS**) details information which must be provided to consumers in writing before the policy is concluded. The FCA's Responsibilities of Providers and Distributors for the Fair Treatment of Customers Guide (**RPPD**) includes guidance on product design and governance.

Courts and Parliament are prepared to intervene in limited circumstances to correct perceived unfairness. The Enterprise Act 2016 added to the Insurance Act 2015 a section (which became effective on 4 May 2017) that made it an implied term of every insurance contract that the insured will pay valid claims within a reasonable time. It will be possible to contract out of this provision, to a limited degree, in non-consumer contracts.

It has been suggested that a stipulation in a policy may be so capricious or unreasonable as to be unenforceable. However, this would be inconsistent with the basic English concept of freedom of contract. A condition in an insurance policy which is contrary to public policy is unenforceable, and a stipulation which is impossible to perform is a nullity.

1.5 Are companies permitted to indemnify directors and officers under local company law?

Pursuant to the Companies Act 2006, a company may not indemnify a director against any liability arising from negligence, default, breach of duty or breach of trust in relation to the company of which (s)he is a director. However, a company is permitted to take out and maintain insurance against such liabilities. A company may indemnify directors against: liabilities incurred to third parties, including in respect of proceedings brought by third parties (covering both legal costs and damages) and may take out Directors' & Officers' Insurance to this end; and liabilities incurred in connection with the director's role as trustee of an occupational pension scheme. The only exceptions are criminal penalties, penalties imposed by regulatory bodies (such as the FCA), and liabilities incurred in unsuccessful defence of criminal or civil proceedings (or unsuccessful applications for relief from liability).

1.6 Are there any forms of compulsory insurance?

An employer carrying on any business in Great Britain must maintain insurance against liability for bodily injury or disease sustained by his employees arising out of, and in the course of, their employment (Section 1(1) Employers' Liability (Compulsory Insurance) Act 1969).

Motor insurance is also mandatory, pursuant to Section 143(1) of the Road Traffic Act 1988.

Under Section 19 of the Nuclear Installations Act 1965, a licensee of a nuclear reactor must carry liability insurance or otherwise make suitable provision for compensation claims.

Section 1(4A)(d) of the Riding Establishments Act 1964 requires owners of horse-riding establishments to insure against liability for injuries resulting from the hire or use of their horses.

Section 1(6)(a)(iv) of the Dangerous Wild Animals Act 1976 requires a keeper of a dangerous wild animal to maintain insurance against liability for any damage caused by the animal.

Section 37 of the Solicitors Act 1974 and the Solicitors Indemnity Insurance Rules 2002 require solicitors to insure against professional liabilities.

Sections 163 and 163A of the Merchant Shipping Act 1995 require owners of ships carrying more than 2,000 tonnes of oil and entering or leaving a UK port or terminal, and owners of UK-registered ships entering or leaving a port or terminal in any other country, to be insured against liability for pollution.

Aviation insurance for liability in respect of passengers, baggage, cargo and third parties is now compulsory under Regulation 785/04 of the European Parliament and Council (21 April 2004 OJ L/138), as supplemented by the Civil Aviation (Insurance) Regulations 2005 (SI 2005/1089).

Certain medical professionals are also required to have liability insurance, as are insurance and home finance intermediaries and certain investment firms.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

English law has traditionally been perceived to be fairly pro-insurer, since courts will enforce the bargain between the parties. The law relating to non-disclosure/misrepresentation, breach of conditions precedent and breach of warranties was generally felt to be advantageous to insurers.

There is some protection for consumers by virtue of the Unfair Terms in Consumer Contracts Regulations 1999 and the Consumer Rights Act 2015 (see question 1.4 above).

Additionally, in response to criticism that the law was weighted too heavily in favour of insurers, reform recently took place in the form of two Acts of Parliament: the Consumer Insurance (Disclosure and Representations) Act 2012 and the Insurance Act 2015. The 2012 Act replaced the duty of the consumer to volunteer material information with a duty to take reasonable care not to make a misrepresentation during pre-contractual negotiations relating to a consumer insurance contract and altered the remedies available for material misrepresentations by consumers. The Act came into force on 6 April 2013. The Insurance Act 2015 came into force on 12 August 2016 for contracts written or renewed after that date which are subject to the law of England and Wales or Scotland. This Act also brought in reforms in respect of a business insured's duty to disclose all material facts and altered the law relating to warranties and conditions precedent, to redress the perceived advantage to insurers. Rules concerning consequential damages in respect of late payment of claims came into force in May 2017 (see question 1.4 above).

2.2 Can a third party bring a direct action against an insurer?

The Third Parties (Rights against Insurers) Act 1930 enabled a third party who has a claim against an insured to bring a direct action against insurers in the event of the insured's insolvency. It is not possible for the parties to contract out of this provision. Certain problems were, however, identified in relation to how the 1930 Act operated in practice.

The Third Parties (Rights against Insurers) Act 2010 was brought into force on 1 August 2016. It simplifies the procedure by which a third party who has suffered loss as a result of the actions of an insolvent insured can claim against the insurer, and improves the third party's rights to access information about the insurance policy. Neither the 1930 Act nor the 2010 Act applies to reinsurance contracts.

2.3 Can an insured bring a direct action against a reinsurer?

There is no privity of contract between an insured and a reinsurer. Accordingly, if the reinsured becomes insolvent, the insured has no direct cause of action against the reinsurer. However, some reinsurance contracts contain clauses which purport to confer a benefit on the insured, and such clauses are now enforceable under the Contracts (Rights of Third Parties) Act 1999, subject to the rules of preference in insolvency. In such cases, the insured can enforce the contract against the reinsurer.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

The remedies for misrepresentation and non-disclosure changed for consumer insureds after the implementation of the Consumer Insurance (Disclosure and Representations) Act 2012 (see above). Broadly, if a consumer makes a careless misrepresentation, the insurer's remedy will be based on what it would have done had the consumer not breached his/her duty. That may result in the insurer being able to avoid the contract or to impose different terms or to reduce proportionately the payment to the consumer (because a higher premium would have been charged). If a consumer makes a reckless or deliberate misrepresentation, the insurer can avoid the policy and keep the premium "except to the extent (if any) that it would be unfair to the consumer" to retain it. This proviso is not explained further in the Act.

For non-consumer insureds, the Insurance Act 2015 introduced materially the same changes to remedies as those already in place for consumer insureds when it came into force on 12 August 2016. It is possible for insurers to contract out of the changes for non-consumer insureds (subject to certain conditions), but not for consumer insureds.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

There is a positive duty on a non-consumer insured (but not a consumer insured) to disclose all matters material to a risk irrespective of whether the insurer has specifically asked. The non-consumer insured's duty extends from his actual knowledge to material facts which he ought to know because they would have been revealed by a reasonable search of information available to the insured. Information held by any other person with relevant information (even those outside the company, such as agents) will be imputed to the insured if a reasonable search would have revealed that information (although there is an exception for confidential information acquired by the agent through a business relationship with someone other than the insured).

However, the insured is not required to disclose facts: which diminish the risk; which were known, or ought to have been

known, or are presumed to be known by the insurers; which were waived by the insurers; or which were covered by an express policy term. For consumer insureds, there is no longer any duty to volunteer material information; although, if a consumer insured chooses to do so, he must take reasonable care.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

There is an automatic right of subrogation which applies to all contracts of insurance which are contracts of indemnity, once the insurer has fully indemnified the insured. The doctrine of subrogation does not, therefore, apply to contracts of life insurance and personal accident insurance. The insurer acquires the right to use the insured's name to proceed against any third party responsible for the loss and claim from the insured any sums received by way of compensation from that third party.

The principle of subrogation may be excluded or amended by the terms of the policy.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

The claimant is, in theory, free to choose whether to issue proceedings in the High Court or a County Court. However, courts may, of their own initiative or following application by either party, transfer cases between the two courts.

Claims for £100,000 or less (or personal injury claims of less than £50,000) must be commenced in a County Court. In practice, claims worth less than £100,000 will generally be transferred to a County Court. However, a claim which falls within the County Court financial thresholds may nevertheless be commenced in the High Court if there is reason to believe it should be dealt with by a High Court judge. Relevant factors include: the financial value of the claim; the amount in dispute; the complexity of the facts; legal issues, remedies or procedures involved; and the importance of the outcome of the claim to the public in general.

An insurance dispute is a 'commercial claim' and is, therefore, likely to be brought in the Commercial Court, a specialist court in the Queen's Bench Division of the High Court.

Judges will allocate claims to one of three procedural 'tracks' (the multi-track, fast track or small claims track) at an early stage in the proceedings. In determining the track, judges will take into account: the financial value of the case; the amount in dispute; the complexity of the issues; the number of witnesses likely to be called; whether expert evidence is needed; intended applications; costs estimates; trial time estimates; settlement proposals; and pre-action exchanges. This information will be obtained from the parties through a directions questionnaire. The fast track is suitable for any case worth between £10,000 and £25,000, where the trial is estimated to last not more than a day and where oral expert evidence at trial will be limited to one expert per party per field and expert evidence in two fields. The multi-track is suitable for any case worth more than £25,000, where the trial is estimated to last more than a day and each party will need to adduce oral expert evidence from more than two fields or more than one expert in a particular field.

There is no right to a hearing before a jury, except in (rare) cases where an allegation of fraud has been made against the party making the application.

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

On 9 March 2015, the fees payable in order to commence a claim in the Commercial Court increased significantly. Claims between £10,000 and £200,000 now incur a court fee of 5% of the amount claimed, while any claim over £200,000, or where the claimant does not indicate the value of the claim, incurs a fixed court fee of £10,000.

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

It takes 12 to 24 months, depending on the complexity of the case and the number of witnesses involved, among other factors.

Two pilot schemes, the Shorter Trials Scheme and the Flexible Trials Scheme, were introduced in the Business and Property Courts and became permanent on 1 October 2018. The aim of both schemes is to achieve shorter and earlier trials for business-related litigation, at a reasonable and proportionate cost. Under the Shorter Trials Scheme, cases are case-managed by docketed judges with the aim of reaching trial within approximately 10 months of the issue of proceedings, and judgment within six weeks thereafter. The Flexible Trials Scheme is designed to encourage parties to limit disclosure and to confine oral evidence at trial to the minimum necessary for the fair resolution of their disputes. Its aims are to: reduce costs; reduce the time required for trial; and enable earlier trial dates to be obtained.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

Most commonly, the courts have ordered standard disclosure. This requires a party to carry out a reasonable search for documents and disclose all the documents on which it relies, or which adversely affect its own case, adversely affect another party's case or support another party's case. For all (non-personal injury) multi-track cases where the first Case Management Conference takes place on, or after, 16 April 2013, the court will decide, having regard to the overriding objective and the need to limit disclosure to what is necessary and just, which order from a 'menu' of options to make. These include: the possibility of an order dispensing with disclosure; disclosure on an issue-by-issue basis; disclosure of documents which lead to a 'train of inquiry'; disclosure of documents on which a party relies plus any specific disclosure from another party; or any order which the court considers appropriate (it has been suggested that this could even include a 'keys to the warehouse'-type order, allowing the other side to inspect all of a party's documents). However, it appears that, in practice, courts are continuing to order standard disclosure in most cases.

The parties are subject to an ongoing duty to preserve disclosable documents. Pursuant to Practice Direction 31B, documents should be preserved as soon as litigation is contemplated. If documents are not preserved, this may result in costs penalties, adverse inferences of fact may be drawn, the court may order the client to forensically retrieve deleted data, and there is even the risk of a strike out or criminal penalties. A solicitor is under a duty to advise clients of their obligations on disclosure and about the preservation of documents.

The duty of disclosure is limited to documents that are, or have been, in a party's 'control'. This includes documents for which a party has a right to call. The courts also have the power to order a non-party to disclose documents in its possession.

Disclosure usually takes place after statements of a case have been served. However, before proceedings have commenced, disclosure may be ordered between likely parties to the proceedings and in very limited circumstances against non-parties.

The Civil Procedure Rule Committee has approved the launch of a compulsory two-year Disclosure Pilot Scheme starting on 1 January 2019 in the Business and Property Courts (which include the Commercial Court, the Admiralty Court and the Technology and Construction Court). Under the scheme, standard disclosure will no longer be the default form of disclosure. The court may choose from five "Extended Disclosure" models for each issue in the case. These range from disclosure of known adverse documents only, to disclosure of documents which may lead to a train of enquiry.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

Parties are entitled to withhold privileged documents from production to a third party or the court. Legal advice privilege attaches to communications between a client and his or her lawyer for the purpose of giving and receiving legal advice. Litigation privilege attaches to communications between client and lawyer, or between either of them and a third party, for the dominant purpose of giving or receiving legal advice or collecting evidence for use in litigation, while litigation is pending or in the reasonable contemplation of the communicating parties.

Written or oral communications between the parties which constitute genuine attempts to resolve the dispute attract 'without prejudice' privilege. Privilege will attach to such communications regardless of whether or not the documents are marked 'without prejudice'. Mediation communications are protected by the 'without prejudice' rule, but the use of a document in mediation will not give it 'without prejudice' status if it otherwise lacked that status (for example, because it was produced for another purpose). However, the 'without prejudice' rule is not absolute and can be overridden where the justice of the case requires this.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

The court has the power to issue a witness summons requiring a witness to attend court to give evidence or produce documents on such a date as the court may direct. If a witness fails to comply, he risks being found in contempt of court. The court can require a witness to attend the trial and any other pre-trial hearing, but a party must obtain the court's permission to have a summons issued for a witness to attend court on any date except the trial date and for any hearing except the trial. A witness summons must be served at least seven days before the witness is required to attend for it to be binding.

A witness abroad cannot be compelled to attend a trial. Therefore, if the court is satisfied that the witness is unwilling or unable to be present, the application is made *bona fide* and not so as to cause unreasonable delay and the witness can give substantial evidence that will be material to the case, an order for a deposition can be made. Part 34 of the Civil Procedure Rules 1998 permits a witness to be cross-examined at a hearing and then for a written record of that cross-examination to be submissible as evidence before a court in England.

Where a witness is resident or located in another EU Member State (except Denmark), the court may, upon application by a party, issue a letter of request to the relevant foreign court. The foreign court may refuse the request only in very limited circumstances, such as when the witness exercises a right not to give evidence that exists under the law of either the English courts or the relevant foreign court. Where a witness is resident or located in Denmark or outside the EU, a party can take a deposition from the witness by applying for an order for the High Court to issue a letter of request to the judicial authority of the country where the witness is.

4.4 Is evidence from witnesses allowed even if they are not present?

It may be possible to obtain an order for the examination of a witness under deposition if a witness cannot attend trial. This involves the witness giving evidence to the examiner as if the examination were the trial itself. There is, therefore, full opportunity for cross-examination. The evidence is then reduced to writing and the document is received into evidence at the trial.

Alternatively, it is possible to rely on a witness statement without calling the witness in person. Generally, the witness must be called to give oral evidence, unless the court orders otherwise, or the statement is entered as hearsay evidence. If the statement is to be entered as hearsay evidence, all other parties to the proceedings must be notified of this. Notice is given by serving a witness statement, informing the other parties that the witness will not be called and providing reasons for this. However, the party against whom the evidence in the statement is adduced can apply to the court for permission to call the statement-maker for cross-examination.

In addition, the court has the power to allow a witness to give evidence through a video link or by other means.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

The court's permission is required in order to call an expert witness. The expert's primary duty is to the court and this overrides any obligation to the instructing party. The expert must, therefore, remain independent of the instructing party. The court has the power to restrict expert evidence to what is reasonably required to resolve the proceedings. Accordingly, the court has the power under the Civil Procedure Rules 1998 to direct that evidence to be given by a single joint expert where the parties wish to submit expert evidence on a particular issue. It is, however, far more common to have party-appointed experts only.

If the court directs that evidence is to be given by a single joint expert, the court will usually expect the parties to agree on the identity of the expert. If the parties cannot agree, the court will select an expert from the list drawn up by the parties or direct some other method for the selection of an expert.

Unless the court has given directions or the parties have agreed otherwise, all of the instructing parties are jointly and severally liable for paying the joint expert's fees and expenses.

4.6 What sort of interim remedies are available from the courts?

The court may make an order in favour of pre-action disclosure before a claim has been made if the matter is urgent, or it is otherwise necessary to make the order in the interests of justice,

if certain conditions are satisfied. This is possible where: the respondent and the applicant are likely to be parties to subsequent proceedings; the documents sought would fall within the respondent's standard duty of disclosure if proceedings had started; and the pre-action disclosure is desirable because it will dispose fairly of the anticipated proceedings, will assist the dispute to be resolved without proceedings, or will save costs.

An injunction is an order of the court that requires a party to do, or to refrain from doing, a specific act, and may be sought, for example, to prevent a claimant pursuing legal proceedings or restrain a breach of contract. Injunctions may be granted where it appears to the court to be just, convenient and proportionate to do so. If an injunction is disobeyed, that party will be in contempt of court.

A prohibitory interim injunction, requiring a party to refrain from doing a specific act, can be sought at any time. It can be used, for example, to protect confidential information or to enforce a restrictive covenant.

It is possible to apply for a freezing injunction at any stage of the proceedings. It must be proved that: the applicant has a good arguable case; the defendant has assets in the jurisdiction; there is a real risk of dissipation of the assets (judged from an objective perspective); and the order is just and convenient in all the circumstances. The remedy is *in personam*. The applicant is not provided with security for his claim and has no proprietary rights in the assets in question. English courts will usually make orders relating only to property within the jurisdiction.

A search order in respect of documents will be granted only if there is a real possibility that the defendants will destroy the relevant evidence. There are four essential pre-conditions for making the order: first, there must be an extremely strong *prima facie* case on the merits; secondly, the respondent's activities must cause very serious potential or actual harm to the applicant's interests; thirdly, there must be clear evidence that highly material documents or materials are in the respondent's possession; and fourthly, there must be a real possibility that such material may be destroyed before any application can be made with notice. The terms of the order should be limited to no more than is necessary to achieve the legitimate object of the order. If entry is not granted, the respondent will be in contempt of court.

The court has the power to order the preservation or delivery up of property, pursuant to rule 25.1 of the Civil Procedure Rules 1998. This type of order requires: the defendant to make the item available to the claimant or some other person and includes orders for the detention, custody or preservation of relevant property; the inspection of relevant property; the taking of a sample of relevant property; the carrying out of an experiment on, or with, relevant property; the sale of property where it is desirable to sell quickly; and the payment of income until a claim is decided. An application can be made at any time and the procedure to be used is the same as for an injunction.

A *Norwich Pharmacal* order can be obtained at any time and requires a respondent to disclose certain documents or information to the applicant. The respondent must be either involved or mixed up in a wrongdoing, whether innocently or not, (although some case law has suggested that the only requirement is that the respondent should not be a 'mere witness') and there must be a need for an order to enable an action to be brought against the ultimate wrongdoer. The order will be granted only where it is necessary and in the interests of justice.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

Permission to appeal must be obtained either from the lower court at the hearing at which the decision to be appealed was made, or from the appeal court itself. Permission will be given only where the court considers that the appeal would have a real prospect of success, or there is some other compelling reason why the appeal should be heard. The appeal court will refuse to allow an appeal unless it considers that the decision of the lower court was wrong, or the decision of the lower court was unjust because of a serious procedural or other irregularity. The appeal is generally limited to a review of the lower decision and is not a re-hearing.

The Court of Appeal has jurisdiction to hear and determine appeals from any judgment or order of the High Court. If an application for permission to appeal made in the High Court is refused, a party can still apply to the Court of Appeal. In very limited circumstances, there may be an appeal directly from the High Court to the Supreme Court.

A party may apply for leave to appeal a Court of Appeal decision to the Supreme Court. An application must first be made to the Court of Appeal and an application may be made to the Supreme Court only after the Court of Appeal has refused to grant permission to appeal. If the application is not made at the judgment hearing, a written submission must be made within 28 days of the date of the order or judgment given by the Court of Appeal. Permission to appeal will be refused by the Supreme Court if it does not raise an arguable point of law of general public importance. The court's decision on the application will usually be made within eight weeks, and the appellant must then file notice of its intention to proceed within 14 days.

Parties to an appeal cannot agree between themselves to extend any date or time limit set by statute, but it is possible to make an application to the appeal court to vary the time limit for filing an appeal notice.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

When a court awards damages, it also has discretion to award simple interest for such periods and at such rates as it sees fit, pursuant to section 35A of the Senior Courts Act 1981 and section 69 of the County Courts Act 1984. The court's discretion is limited to awards of interest starting no earlier than the day on which the cause of action arose and ending no later than judgment or sooner payment. The court's powers do not override any contractual provision on interest or interest due under the Late Payment of Commercial Debts (Interest) Act 1998.

In the past, the interest rate in respect of commercial disputes before the Commercial Court was presumed to be 1 per cent above base rate. However, there has been case law supporting the view that this rate of interest is now appropriate only up until 5 February 2009 (when the base rate dropped from 1.5 per cent to 1 per cent). That reflects a provision in the current Commercial Court Guide that there should no longer be a presumption that base rate plus 1 per cent represents the appropriate measure of a commercial rate of interest.

At the point of judgment, interest ceases to run on the principal sum but begins to run on the judgment debt (currently at 8 per cent) until it is satisfied. The court has flexibility in determining the periods by reference to which interest on awards is to be calculated and paid, and has flexibility in relation to the rate of interest on the judgment debt if judgment is in a foreign currency.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

The starting point is that the loser pays the winner's costs.

However, the court has complete discretion as to costs, except in limited specific circumstances when they follow automatically. In exercising its discretion, the court should have regard to factors such as the conduct of the parties and the extent to which the parties have followed any pre-action protocol. The court may award a percentage of costs to reflect partial success, or costs may be awarded each way.

Special rules apply where an offer to settle is made in accordance with Part 36 of the Civil Procedure Rules 1998. A party can make and accept a Part 36 offer before or after litigation has commenced. If a claimant declines to accept a defendant's offer and then fails to obtain judgment for an amount greater than the offer, the court will, unless it considers it unjust, order the claimant to pay any costs incurred by the defendant from the date on which the relevant period expired, plus interest on those costs.

If a defendant fails to accept a Part 36 offer and the claimant then obtains a judgment which is equal to, or more advantageous than, its offer, the court will, unless it considers it unjust, order the defendant to pay the claimant's costs on the indemnity basis for the period starting from the date on which the relevant period expired, with interest on those costs at up to 10 per cent above the base rate and interest on the whole or part of the sum awarded to the claimant at a rate not exceeding 10 per cent above the base rate, for some or all of the period starting from the date on which the relevant period expired. The defendant will also be ordered to pay the claimant's costs on the standard basis (with interest on those costs) from the beginning of the matter to the date on which the indemnity costs and enhanced interest started running. For Part 36 offers made on or after 1 April 2013, an additional uplift on all damages where a defendant rejects a claimant's offer and then fails to equal or beat it is now available (the uplift is 10 per cent on the first £500,000 awarded by the court, then an additional 5 per cent on any amount above that figure, subject to a total cap of £75,000). However, this is subject to the proviso that the judge does not consider it unjust to make the award.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

The courts will generally enforce a clear and express agreement to mediate and will grant a stay of litigation proceedings in order to ensure that such mediation takes place. If there is no enforceable agreement to mediate, the courts currently do not compel the parties to mediate. However, mediation is generally supported by the courts and there are schemes in the County Courts and Court of Appeal aimed at encouraging parties to mediate.

4.11 If a party refuses to a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

If a party unreasonably refuses to mediate, the court can order costs sanctions, even if that party is successful. The leading case is *Halsey v Milton Keynes General NHS Trust* (2004). The Court of Appeal held that an unreasonable refusal to mediate could result in a costs sanction, and set out a non-exhaustive list of factors which might lead to a conclusion that a party had unreasonably refused to mediate.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

The English courts support arbitration as a dispute resolution mechanism. Under the Arbitration Act 1996, the role of the court is supportive rather than supervisory. The general approach of the courts is of intervention in arbitration only where the tribunal is unable to act effectively. The cases which have involved significant court intervention tend to have been *ad hoc* arbitrations in which the parties are unwilling or unable to agree a basic procedure for arbitration.

Pursuant to the Arbitration Act 1996, the court can aid arbitration by securing the attendance of witnesses. The court also has powers relating to: the taking of evidence of witnesses; the preservation of evidence; orders for the inspection and detention of property; orders for samples to be taken; the sale of any goods subject to the proceedings; and the granting of an interim injunction or the appointment of a receiver. If the case is urgent, the court can make such orders as it thinks is necessary for the purpose of preserving evidence or assets. Otherwise, application to the court is permitted only if the other parties consent in writing or the tribunal allows it.

The court also has the power to determine preliminary issues of law, remove arbitrators or fill a vacancy, and hear appeals from the arbitrators' award.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

A right to arbitrate will arise only if there is an arbitration agreement. However, there is no specific form of words required to ensure that an arbitration clause will be enforceable. Arbitration clauses will therefore be construed in accordance with common law principles.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

Express arbitration clauses are enforceable, but must use clear, unambiguous and mandatory language to avoid giving rise to disputes. It is not necessary for the parties to agree to arbitration after a dispute has arisen, and it is common for arbitration agreements to be concluded as part of the original contract.

A court will not stay litigation proceedings in favour of arbitration if it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed. Under the doctrine of separability, an arbitration clause is regarded as a separate agreement, independent of the rest of the contract. Accordingly, the invalidity of the contract as a whole will not necessarily result in the arbitration clause also being invalid.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

The court has the same powers in supporting arbitral proceedings that it has in court proceedings and can make orders for the taking of evidence, the preservation of evidence, ordering the inspection and preservation of property, and the granting of an interim injunction or the appointment of a receiver (section 44(1) of the Arbitration Act 1996). In practice, however, the English courts are reluctant to intervene in arbitral proceedings (see question 5.1 above).

The courts are not empowered to grant pre-action disclosure in respect of disputes which are to be referred to arbitration.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

Pursuant to section 52 of the Arbitration Act 1996, arbitration awards must contain reasons for the award unless it is an agreed award or the parties have agreed to dispense with reasons.

If the award does not include reasons, or the reasons are ambiguous, the parties can apply to correct the award. Under the Arbitration Act 1996, the parties are free to agree on the power of the tribunal to correct the award or make an additional award. Applications must be made within 28 days of the date of the award, or within any longer period which the parties may agree. If the tribunal dismisses the application, the applicant may consider an application to the court. If the tribunal grants the application, it will issue corrections or clarifications to the award and these will take effect as part of the original award.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

Pursuant to the Arbitration Act 1996, a party may appeal an award on the basis that the tribunal lacked substantive jurisdiction or there was a serious irregularity affecting the tribunal, the proceedings or the award; or, if the parties have not agreed to waive the right, on a question of English law.

Any challenge or appeal must be made within 28 days of the date of the award, although this time limit may be extended in exceptional circumstances.

It is very difficult to challenge an award on the basis that the tribunal exceeded its jurisdiction and successful applications tend to be limited to situations where there was no valid arbitration clause at all. Similarly, it has become very difficult to satisfy the test for serious irregularity.

Note

This chapter addresses the law as at 31 December 2019.

Jon Turnbull has been at Clyde & Co since 1994, and became a partner in May 2001 and a consultant in September 2016. He specialises in insurance and reinsurance (principally non-marine) litigation.
Jon has been recommended in *The Legal 500* in the field of insurance and reinsurance. He has particular expertise in the Bermuda Form (usually involving New York substantive law and English or Bermudian arbitration) and has been involved with numerous cases in this field, including representing Reinsurers successfully in the first Bermuda Form case to come before the English Courts on issues of policy construction.
Jon is a CEDR-accredited Mediator and has written and spoken extensively on the subject, and has participated in numerous Mediations. He has also completed the CEDR Certificate in Advanced Negotiation and Leadership.

Recent Experience

- Acts for Lloyd's Syndicates and London and international insurance companies on a wide range of issues, including personal accident, product liability, and property/casualty.
- Involved in advising with respect to competition issues relating to the aviation and aerospace insurance and reinsurance market.
- Has been involved in a number of large claims subject to the "Bermuda Form" wording. Most of these cases are arbitrated, but the recent case of *AZICO v XL Insurance (Bermuda) Ltd. and ACE Bermuda Insurance Ltd* was heard in the English Commercial Court and Court of Appeal ([2013] EWHC 349 (Comm) and [2013] EWCA Civ 1660).
- Contributor to "Insurance Disputes" (edited by Mance J) in respect of subrogation.
- Lectures on insurance topics, including the Insurance Act 2015 and related changes to insurance law, subrogation, the development of excess of loss reinsurance, the "Bermuda Form", and contract interpretation.

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We are distinguished by our focus on insurance, with over 200 specialist insurance partners and over 1,000 insurance-focused qualified lawyers. The firm offers insurers and reinsurers the opportunity to source legal advice from one law firm across many jurisdictions and across a wide spectrum of business lines, including: aviation & aerospace; construction & engineering; corporate insurance services; employment practices liability; energy; financial institutions and D&O; marine; mining, industrials & power; personal injury (including disease, EL/PL, motor, clinical negligence, catastrophic loss, and fraud); product liability & recall; professional indemnity; property; reinsurance; and specialty (including accident & health, bloodstock, contingency, cyber, fine art, kidnap & ransom, political risk & trade credit, product recall, specie & jewellers' block and surety).

We are frequently recognised for our leading insurance expertise. For example, we are ranked Band One for *Insurance: Contentious Claims* in *Chambers Global*; we were named "Insurance Law Firm of the Year" at the Reactions London Market Awards for the years 2011, 2012 and 2013; and we have been recognised as "Insurance & Reinsurance Law Firm of the Year" by *Who's Who Legal* for the years 2012, 2013, 2014, 2015 and 2019, and "UK Insurance Firm of the Year 2015" by *The Legal 500*. The firm was named "Firm of the Year" in 2016 by *The Lawyer*, "Transatlantic Law Firm of the Year" in 2017 by Transatlantic Legal Awards, and "International Law Firm of the Year" at the Global Financial Services Awards in 2019.

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Railas Attorneys Ltd.

Dr. Lauri Railas

1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

The Act on Supervision of Financial and Insurance Conglomerates (699/2004) regulates the supervision of insurance business in Finland, setting up the regulatory authority, the Financial Supervisory Authority. The Act on Financial Inspection (878/2008) provides the rules for the authority's organisation and powers. The Financial Supervisory Authority can issue binding instructions or standards concerning insurance activity. The most important are the Finnish Conditions on the General Good (2003:1).

General consumer protection authorities have authority within the field of consumer insurance, and anti-trust officials have authority when a competition issue is involved.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

Both insurance and reinsurance providers operating in Finland must be authorised. Authorisation can be granted by the:

- Finnish authorities.
- Authorities of another state.

In the latter case, an undertaking established in the EEA can carry on business under the principle of freedom to provide services. Undertakings established outside the EEA must operate through a branch, the establishment of which requires authorisation. The *Act on Foreign Insurance Companies (398/1995)*, however, requires that authorisation must be granted, subject to the criteria set out in that Act being met.

A licence from the Financial Supervisory Authority is needed to establish a new insurance undertaking in Finland. An application for a licence must:

- Refer to the particular insurance classes to be provided.
- Be accompanied with documentation, including:
  - an action plan, with details on the:
    - intended business;
    - estimated premium income;
    - administrative structure and its costs;
    - reinsurance strategy; and
    - other aspects possibly requested by the Financial Supervisory Authority (its guidelines and prerogatives may contain more details);
  - documents providing information about the management of the company and its shareholders;
  - evidence about payment of the founding capital; the share capital requirement varies depending on the nature of the insurance business: for life insurance and specified forms of non-life insurance, the minimum is EUR 3,000,000 and for other forms of non-life insurance, EUR 2,000,000; for reinsurance companies, the minimum capital required is either EUR 1,000,000 (captive reinsurance companies) or EUR 3,000,000 (other reinsurance companies); and
  - an account of potential conflicts of interest.

The licence applies within the EEA or, on the request of the applicant, beyond the EEA depending on agreements entered into by the Finnish or the EU authorities with other states.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Pursuant to the Act on Foreign Insurance Companies (398/1995), insurers domiciled within the European Economic Area ("EEA") may undertake insurance business in Finland either on the basis of freedom of establishment or the free provision of services. The procedures for the commencement of undertaking insurance business are spelled out in the Act and are based on EU legislation. The domestic supervisory authority must have notified the Financial Supervisory Authority of the commencement of said underwriting activities.

An insurance company domiciled outside the EEA has to apply for a licence before commencement of undertaking insurance business in Finland. Such licence must be granted if the preconditions imposed by law are fulfilled. For the conduct of its business in Finland, such a company must open an agency here headed by a general agent approved by the Insurance Supervision Authority.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

Insurance contracts are governed by the Insurance Contracts Act (543/1994), which is mandatorily applicable if the policyholder or assured is a consumer or an enterprise comparable to a consumer as to the nature or size of the business. Insurance contract terms concluded with said parties may not deviate from the minimum terms/protection granted under the Insurance Contracts Act. The so-called large risks as defined in EU legislation are, however, outside the scope of mandatory cover. Foreign insurers must, more generally, abide by the Finnish general good provisions (see the Commission Interpretative Communication – Freedom to provide services and the general good in the insurance sector, OJ C 43, 16.2.2000, p. 5) except when insuring large risks.

Reinsurance is not subject to the Insurance Contracts Act. In reinsurance, therefore, freedom of contract prevails. As reinsurance contracts are concluded between business entities, the risk that the contract terms would be regarded as unbalanced and subject to setting aside or adjusted is practically non-existent.

1.5 Are companies permitted to indemnify directors and officers under local company law?

Indemnification of directors and officers is partially possible under Finnish company law, but depends on the legal form of the company. In a limited liability company, the CEO and board members may become liable to the company or its shareholders, but not to third parties. As regards other directors and officers, who are under a normal contract of employment, the company is liable to third parties under the principles of vicarious liability. The company may have recourse to its employee if the damage was caused wilfully or by gross misconduct. In practice, companies procure liability insurance covering the liability of their CEOs and board members.

1.6 Are there any forms of compulsory insurance?

One can distinguish between compulsory or mandatory and voluntary insurance. Mandatory insurance, which can be statutory or not, concerns insurance policies that must be obtained, such as motor liability insurance, pension insurance, and work accident insurance. Additional laws apply to statutory insurance, such as the Act on Pension Insurance Companies (354/1997), the Motor Liability Insurance Act (279/59), the Patient Injuries Act (585/86), the Environmental Impairment Liability Insurance Act (81/1998) and the Nuclear Liability Act (484/1972). There are compulsory insurance requirements, e.g. for attorneys and insurance brokers.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

We can assume at the outset that laws are drafted with the aim of being impartial. The legislator has, however, a tendency to recognise that in situations where the insurer and the assured are not negotiating at arm's length, the weaker party needs protection. The provisions of the Insurance Contracts Act (543/1994) are therefore mandatory in the relationships between the insurer and consumer or any natural or legal person comparable to a consumer in terms of the size or nature of the business activity.

The role of insurance mediation between the insurer and the policyholder or insured (in life assurance the assured) calls for attention. The marketing and selling of insurance products often take place through insurance intermediaries, who are divided into 1) insurance brokers, and 2) insurance agents tied to a certain insurance company or companies so that these cannot be required to be impartial in their activities. Directive 2016/97/EU on insurance distribution has been implemented by the Act on Insurance Distribution (234/2018), which entered into force on 1 October 2018. The Finnish implementing provisions addressing insurance companies are placed in the Insurance Contracts Act. The implementation of the IPID requirements spelling out standardised information requirements for insurance products, as established by Article 20 of the Directive, has been laid down in two governmental regulations.

The insurance intermediary must disclose and be able to advise the client in several matters relating to the product and the relationship between the intermediary and the insurance company. When it comes to an insurance broker, the requirements and ambitions are much higher. The new law regulates the broker giving his or her recommendation as to the preferred insurance option whereas the old law only required the broker to propose one or more solutions that meet the needs of the insured. In Finland, insurance brokers are prohibited from receiving remuneration from insurance companies. The new legislation lays emphasis on the distribution of investment insurances such as unit-linked life assurance policies. The suitability of an insurance product for a given customer must be verified by the intermediary.

Probably the most important requirements in the new legislation are the product oversight and governance requirements for both insurance companies and distributors.

Insurance undertakings, as well as intermediaries which manufacture any insurance product for sale to customers, shall maintain, operate and review a process for the approval of each insurance product, or significant adaptations of an existing insurance product, before it is marketed or distributed to customers.

The product approval process shall be proportionate and appropriate to the nature of the insurance product.

The product approval process shall specify an identified target market for each product, ensure that all relevant risks to such identified target market are assessed and that the intended distribution strategy is consistent with the identified target market, and take reasonable steps to ensure that the insurance product is distributed to the identified target market.

The insurance undertaking shall understand and regularly review the insurance products it offers or markets, taking into account any event that could materially affect the potential risk to the identified target market, to assess at least whether the product remains consistent with the needs of the identified target market and whether the intended distribution strategy remains appropriate.

Insurance undertakings, as well as intermediaries which manufacture insurance products, shall make available to distributors all appropriate information on the insurance product and the product approval process, including the identified target market of the insurance product.

Where an insurance distributor advises on or proposes insurance products which it does not manufacture, it shall have in place adequate arrangements to obtain the information referred to above and to understand the characteristics and identified target market of each insurance product.

The Commission Delegated Regulation (EU) 2358/2017 on the above subject spells out more detailed provisions on the above requirements.

2.2 Can a third party bring a direct action against an insurer?

Yes, a person that has suffered bodily injury, property damage or financial loss under general liability insurance can claim compensation under the insurance contract directly from the insurer if (*section 67, Insurance Contracts Act*):

- the insurance policy has been taken out under laws or regulations issued by the authorities;
- the insured has been declared bankrupt or is otherwise insolvent; or
- the general liability insurance has been mentioned in marketing efforts launched to promote the insured's business.

2.3 Can an insured bring a direct action against a reinsurer?

This matter is not provided in law as the Insurance Contracts Act does not apply to reinsurance, and neither is there any practice on the subject. Legally, a reinsurance contract is an independent contract with both rights and duties concerning solely the parties to it. Based on the terms and conditions of a specific reinsurance contract, it could nevertheless be argued that the terms and conditions of said contract would follow the terms and conditions of the primary insurance contract ("follow the fortune" principle). However, I would think that the civil law equivalent of the doctrine of privity of contract would bar such action. Only very exceptionally has case law allowed exceptions to the rule.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

If the insured has acted in bad faith (giving misrepresentations with a view to gaining benefits), the insurer is free from liability and can retain the premiums paid. This rule applies both in non-life insurance and the insurance of the person. Where the insured makes a misrepresentation or non-disclosure wilfully or with negligence that cannot be considered slight, but not amounting to bad faith, the compensation may be reduced or refused in the case of non-life insurance. In the case of the insurance of the person, the insurer may consider, whether it would have granted insurance had it known the true state of the misrepresented or non-disclosed, and if it had, on what terms, and adjust the payment accordingly. There are also detailed rules as to the right to terminate the insurance contract on the basis of misrepresentation or non-disclosure.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

Pursuant to section 22 of the Insurance Contracts Act, the policyholder and the insured shall give true and complete answers to the insurer's questions which may be of importance for the assessment of the liability of the insurer before the issuance of an insurance contract. Moreover, throughout the insurance period, the policyholder and the insured shall without undue delay rectify any errors or deficiencies that they may discover in the information given to the insurer. However, the insured is not required to disclose information the insurer has not specifically asked about. The requirement of completeness of information may in borderline cases create such a duty.

Reinsurance contracts differ in this respect and to a greater extent follow the requirements imposed on parties under general contract law. The mutual loyalty duties between the insured and insurer may therefore have more significance. Accordingly, in legal literature it has been argued that in reinsurance contracts the insured would have a positive duty to disclose matters material to risk, albeit not necessarily all relevant information, irrespective of whether the insurer had specifically asked about them. Reinsurance largely follows international practices which may be invoked.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

According to section 75 of the Insurance Contracts Act, the right of subrogation upon payment by the insurer is transferred to the insurer only if the third person has intentionally caused the insured event; or through gross negligence; or if the third person is liable for indemnification based on law irrespective of negligence. In practice, a separate clause entitling subrogation is common. There are limitations as to the possibility to contract for subrogation in cases of a private individual or an employee, civil servant or another person comparable to these, for whom another party would be liable under vicarious liability.

There are special provisions of subrogation as regards product liability, motor liability and insurance of the person.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

Such disputes are resolved in the local District Courts, regardless of the value of the dispute. There are special procedures as regards marine insurance disputes. There is no right to a hearing before a jury under the Finnish law of civil procedure. There is also an Insurance Board, which is a form of out-of-court dispute settlement.

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

The court fee for commencing a civil matter in general courts is EUR 510. This amount may be subject to change annually. Should the case exceptionally relate to market issues such as competition or unfair marketing practices, the fees of seizing the Market Court are EUR 510 for an individual and EUR 2050 for a company.

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

The average length varies district by district and depending on the circumstances of the case, but even a simple case in the first instance court would most likely take around one year.

At a party's request, a District Court may order a matter to be considered as urgent. However, this is an exception and there are strict conditions which must be satisfied.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

According to the Finnish Code of Procedure, courts may order a party to produce a document that may bear relevance to the case following a request of another party to the proceedings. The Code contains details of such a request.

Parties can also request an order from the court to persons, not being parties to the proceedings, to produce documents in their possession.

In both the above situations, courts use latent sanctions to force the subject to comply with the production order.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

Yes, a party can withhold from disclosure such documents being subject to legal privilege.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

Yes, courts have such a right. The Finnish civil procedure consists of written preparations, i.e. exchange of affidavits, preparatory hearings and the main hearing. Witnesses are heard at the main hearing. Witnesses are named by the parties and may be summoned to appear. There are sanctions available if the witness fails to appear or testify.

The Code of Procedure exempts certain persons such as family members of the parties from the duty to testify. There are also issues on which a witness may decline to testify. Nobody is required to incriminate oneself by testifying. Business secrets may also be concealed unless there are reasons to deviate from the principle. Doctors, lawyers or priests of a party are not allowed to testify on matters relating to their professional relationships with the party.

There is an international dimension of this question based on the treaties concluded by Finland, and so a person domiciled in another country may or shall in certain cases be heard as a witness.

4.4 Is evidence from witnesses allowed even if they are not present?

Only in exceptional circumstances will Finnish courts allow the production of written witness statements. Giving evidence may, however, be allowed through video or phone conference, if the court considers it appropriate, and other conditions are satisfied. For example, a witness residing 700 kilometres from the court was allowed to testify by conference call in my practice.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

The restrictions as regards court-appointed expert witnesses relate to the possible impartiality of the expert witness. A person who has a relationship with the parties or a connection with the case so as the call in question to his or her impartiality may not serve as an expert witness. Courts seldom appoint expert witnesses in civil cases but if they do, this happens at the expense of the parties.

The parties can also appoint expert witnesses, who are heard according to the provisions applicable to witnesses. A legal expert is not considered an expert, but a legal advisor.

4.6 What sort of interim remedies are available from the courts?

The Code of Procedure provides for attachment of real or movable property. The applicant must demonstrate that they hold a debt or another type of right and there is a danger that the other party may hide, destroy or convey its property or take another action which endangers the fulfilment of that right in order to cause a court to order the attachment of the real or movable property of the other party in the amount covering the (claimed) right of the applicant.

Under certain conditions, a court may also prohibit a party, sanctioned by a conditional fine, from performing or refraining from performing an act, to prevent the foreclosure or undermining of the applicant's right, or the value or effect of such a right.

Where an interim measure has been granted before the initiation of legal proceedings, the applicant must, within one month of issue of the order, bring an action on the main issue before a court. Should the applicant fail to do this, the measures ordered cease to have effect.

The applicant is required to deposit a security with the bailiff to compensate the person subjected to the measure for the loss that may be suffered. Only after this may the court order be executed with binding effect. The court may, on application, grant the applicant a relief from providing the security if the applicant is found unable to do so and if his or her right is deemed manifestly well-founded.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

In order to have a case tried at the Court of Appeal, a party must first state its discontent at the latest on the seventh day after the day when the decision of the District Court was handed down or made available to the parties. The deadline for filing the actual appeal is 30 days from the date of the judgment. Leave to appeal to the Court of Appeal is required in the case of monetary claims where the value of the claim is less than EUR 10,000.

A judgment of the Court of Appeal may be further appealed to the Supreme Court. In order to have a case tried before the Supreme Court, however, leave to appeal is generally required in all civil matters, except in marine insurance disputes between the underwriter and the assured. Leave may only be granted if it is important to obtain a precedent with regard to the application of the law, or to constitute uniformity of legal practice. Leave to appeal may also be granted in a manifest procedural error so that the judgment can otherwise be reversed or annulled; or if there is another important reason for granting leave to appeal. The time limit for requesting leave and filing an appeal is 60 days calculated from the date on which the Court of Appeal's decision was made available to the parties.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Yes, interest is generally recoverable but must be claimed by a party. In cases where a claim with a fixed due date is not paid in time, interest runs from the due date.

There is a statutory interest rate which consists of a reference rate (from 1 July to 31 January 2018, this is 0 per cent). In commercial contracts, the interest rate is 8 per cent above this reference rate.

Also, legal expenses can be ordered to accrue an annual interest. The interest begins to accrue one month from the date when the court orders the party to compensate such expenses. The interest rate in the second half of 2018 is 7 per cent above the reference rate of 0 per cent.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

Litigation costs in the district courts comprise court fees paid by each plaintiff (claim/counterclaim), which are minimal and

the parties' costs, in particular the fees and expenses of their counsel. The main principle is "costs follow the event" and the losing party is ordered to pay the winner's reasonable costs. If a party succeeds only partially, costs are normally allocated in proportion to the parties' degree of success. A settlement offer made prior to the proceedings can be taken into consideration when determining liability for legal expenses.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

The courts cannot compel the parties to mediate disputes, but in cases which can be settled out of court, the court is required to encourage the parties to settle the matter. Courts are not involved with other forms of Alternative Dispute Resolution, but could in principle give some weight to the parties' agreement to engage in ADR.

4.11 If a party refuses to a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

There are no sanctions, but the court may infer from the parties' conduct conclusions under the free evidence theory. Alternative Dispute Resolution with a specific content normally follows from an explicit agreement and non-compliance with such an agreement would be regarded as a breach, which might as such give rise to inferences and allow the filing of claims before a court or arbitral tribunal as the case may be.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

The Finnish Act on Arbitration (967/1992) builds largely on the UNCITRAL Model Law on International Commercial Arbitration, the principles of which are generally recognised in many countries. A Finnish court cannot hear a matter, which is the subject of an arbitration agreement, and shall refer the matter to arbitration, provided that the opposing party invokes the arbitration agreement before he states his case on the merits in court. If the arbitration agreement is invoked in time, the arbitral tribunal is free to continue to hear the case.

Courts may also appoint arbitrators in given situations. In *ad hoc* arbitration, a party may request the court to appoint an arbitrator if the opposing party has failed to nominate an arbitrator, if an appointed arbitrator is no longer available or if the parties have not been able to reach an agreement on a sole arbitrator. The court may also dismiss an arbitrator if he or she neglects his or her tasks or delays the proceedings without justifiable cause.

An arbitration agreement or even pending arbitration proceedings neither prevent a court from granting interim measures nor from granting evidentiary assistance/provisional relief in support of the arbitration.

During 2018, there has been discussion to revise the Finnish Arbitration Act in light of international developments in the field, such as the right of the arbitral tribunal to grant interim measures as provided for by the 2006 revision of the UNCITRAL Model Law for International Commercial Arbitration. The Ministry of Justice is currently considering the issue.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

An arbitration agreement must be concluded in writing, usually including any electronic form that can create a record. No specific form of words is required, however. An arbitration agreement must concern either an existing dispute or future disputes which may arise from a particular legal relationship specified in the agreement.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

Commercial insurance and reinsurance disputes are arbitrable. A valid arbitration agreement invoked before responding to the pleadings in the matter of substance excludes the jurisdiction of the courts. However, disputes on the validity and scope of the arbitration agreement may be examined by courts at the time of a request to enforce or set aside an arbitration agreement.

A party may bring its action before a court despite a valid arbitration agreement if the other party: (i) refuses to refer the subject-matter to arbitration; (ii) fails to appoint his arbitrator in time despite a request by the party; or (iii) fails to pay his share of the advance or security for the compensation due to the arbitrators within a reasonable time.

An unreasonable arbitration agreement can be set aside by the court in limited circumstances. An arbitration agreement between an entrepreneur and a consumer concluded before a dispute arises is not binding on the consumer.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

A court may, before or during the arbitral proceedings, grant interim measures within its powers on application by a party or the arbitral tribunal. An arbitral tribunal may also order interim measures if the parties have so agreed. Interim measures ordered by an arbitral tribunal are not enforceable.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

The Arbitration Act does not impose an obligation on an arbitral tribunal to give reasons for its award or decision. In practice, awards normally include reasoning, but detailed reasons are sometimes excluded where there is a need for an expedited award. There is a set of rules of expedited arbitration under the Finnish Arbitration Institute.

The parties can also agree that a reasoned award is required but this should be agreed during the constitution of the arbitral tribunal.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

Arbitral awards cannot be appealed on merits but may be challenged on the grounds established in the New York Convention. Consequently, an arbitral award may be declared null and void; for example, if the issue ruled is not arbitrable or is against the public policy of Finland as the seat. Moreover, an award may be set aside, e.g. if the arbitral tribunal has exceeded its authority or the arbitral tribunal has not given a party a sufficient opportunity to present his case.

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The insurance law practice includes non-life (property, car, liability, etc.) and life insurance, marine insurance, primary and reinsurance, captives, compliance, establishment, insurance claims and dispute resolution.

During its few years of existence, the firm has had clients in over a dozen countries as well as clients in the public sector.

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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

The French regulatory body which regulates the insurance sector (including reinsurance and intermediation/distribution) is the "*Autorité de Contrôle Prudentiel et de Résolution*" (**ACPR**).

The ACPR is attached to the French Central Bank and is responsible for ensuring the preservation of the stability of the financial system as well as the protection of insureds, policyholders and customers.

As a result, the ACPR is principally responsible for (i) issuing licences and authorisations of regulated entities (insurers and reinsurers), (ii) conducting on-going supervision of the financial soundness and operating conditions of insurers/reinsurers, and (iii) ensuring that such regulated entities comply with all regulations and conduct of business rules applicable to amongst other, insurance contracts, protection of customers, mergers and acquisitions and equity investments.

Note that whilst the ACCR also supervises the business of intermediaries, it does not issue licences for these entities, which are subject to a specific registration regime (which is not *per se* a licensing regime).

In order to carry out its mission, the ACPR has a right to access all relevant information needed concerning the regulated entities under its supervision (notably through document-based and on-site inspections) and may impose safeguarding measures and/or disciplinary sanctions (including fines).

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

French (re)insurance companies must obtain a licence ("*agrément*") from the ACPR before undertaking any (re)insurance business in France. The licence is granted for specific classes of insurance activities. Unlike insurance companies, reinsurers may write both life and non-life reinsurance business.

Licence applications are submitted to the ACPR which has an overall period of six months from the date of receipt of the complete application to decide whether the licence will be granted to the applicant. In the context of Brexit, streamlined procedures have been put in place for the licensing of UK insurance companies in France.

The application form to be filed with the ACPR deals mainly with legal and financial aspects and must, in particular, include: (i) a description of the insurance/reinsurance business the company intends to carry out; (ii) the evidence of the incorporation of the company; (iii) the minutes of a meeting of the decision-making body seeking a licensing decision; (iv) a certificate of fully paid-up share capital ((re)insurance companies must comply with minimum capital and solvency requirements); (v) the governance structure and related information on the persons empowered to conduct the company's business (fit and proper requirements); (vi) a business plan; and (vii) relevant documents pertaining to the financial, operational and human resources of the company.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

French regulations prohibit the conclusion of a direct insurance contract in relation to a person, a property or liability located in France with an insurance company that is not authorised to conduct insurance business in France.

Hence, in order to be able to underwrite risks located in France, a company must either be authorised by the ACPR or by its EEA home-country regulator in order to benefit from the European passporting right pursuant to the freedom of services and/or establishment regimes.

There are, however, certain exceptions to this principle and derogations may be requested from the ACPR in specific cases. In addition, inwards reinsurance activities carried out by an insurer are exempt from licensing obligations.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

French contract law is governed by the French Civil Code for general considerations applicable to all contracts and by the French Insurance Code (**FIC**) for specific requirements applicable to insurance contracts (both as to formal requirements, mandatory provisions and respective duties of the insured and insurer).

The provisions of the FIC regarding insurance contracts are generally imperative and are, therefore, applicable to the insurance contract even if not expressly stipulated. For example, the insured may not benefit from coverage if it voluntarily caused the harmful event covered under the insurance contract, irrespective of the provisions of the contract.

On the contrary, reinsurance agreements are less regulated and almost exclusively rest on contractual freedom.

1.5 Are companies permitted to indemnify directors and officers under local company law?

Companies are permitted to indemnify their own corporate officers for acts (errors, omissions, etc.) that are not separable from the corporate officer's duties ("*faute non séparable des fonctions*"). If such acts can be separated from his/her duties ("*faute séparable des fonctions*"), then such corporate officer must bear the costs of his/her own defence and potentially of any liability arising out of such actions or omissions.

Companies may also enter into indemnification agreements with their corporate officers, provided that they comply with the above. However, indemnification by the company of any criminal or administrative fine is prohibited under French law.

Directors and officers insurance may be taken out by the company – or the parent company at a group level – which will bear the premium in relation thereto.

1.6 Are there any forms of compulsory insurance?

French regulations provide for *ca.* 200 compulsory insurances, which are partly codified under the FIC, "Compulsory Insurances" ("*Assurances Obligatoires*"). The FIC covers a vast spectrum of sectors and activities such as: (i) MTPL insurance, covering the damages caused by vehicles to third parties; (ii) household insurance for the lessee; (iii) construction works insurance, subscribed both by the owner and builders/constructors respectively before commencing any construction works; and (iv) medical malpractice insurance, covering healthcare professionals carrying out their activity on an independent basis.

Additional compulsory insurances are provided by other French regulations. For instance, most of the regulated professional activities are subject to the subscription of a professional indemnity insurance (such as insurance intermediaries, architects, etc.). Likewise, subscription by hunters of an insurance covering their third party liability is also compulsory.

With respect to certain compulsory insurances, the "*Bureau Central de Tarification*" is empowered to determine the premium to be paid by a person seeking an insurance cover after such person has been denied the requested cover by an insurance company.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

The law relating to insurance contracts is more favourable to insureds as it follows two principles: (i) consumer's protection; and (ii) setting out of obligations binding upon professionals.

For instance, the FIC contains two general requirements for exclusions to be enforceable against the insured; namely, exclusions must (i) be set out in the policy in very clear print; and (ii) be precise and limited. In addition, French regulations provide that, in case of doubt, a contract is interpreted against the party who is committed to the performance of an obligation (i.e., the insurer) and in favour of the party who is the creditor/beneficiary of the performance of this obligation (i.e., the insured).

From a consumer/non-professional protection perspective, French regulations set out a standard legal regime which is pro-consumer. As an example, consumers will be able to terminate certain insurance contracts at any time during the coverage period (rather than at the annual anniversary date only) or cancel (cool-off) certain types of insurance contracts (notably where entered into at a distance) for a longer period. In addition, contractual terms found to be unfair are not enforceable against consumers and ambiguous or unclear terms are interpreted in the consumer's favour.

2.2 Can a third party bring a direct action against an insurer?

In relation to liability insurance policies, third parties who have incurred a loss for which the insured would be liable have a cause of action against the insurer ("*action directe*"). The insurer may, however, raise against the third party limitations of cover, deductible (unless provided otherwise by the law), exclusions or the statute of limitation provided for under the policy that it would have invoked against the insured.

In relation to property insurance policies, insurance proceeds are, in principle, allocated, without the need for express delegation, to preferred or mortgage creditors, according to their rank.

Case law also recognises the right of a third party to bring a civil liability claim against an insurer if the insurer failed to comply with its obligations under the insurance policy and thus committed a fault which caused a loss to the third party (for instance, a late payment to the insured).

2.3 Can an insured bring a direct action against a reinsurer?

In accordance with the principle of privity of contracts, the insured cannot bring a contractual action or enforce the insurance contract against the reinsurer and *vice versa*. Pursuant to French regulations, even if the insurance company reinsures itself, it remains solely liable to the insured.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

Non-disclosure or misrepresentation of a risk at the time of the conclusion of the insurance contract by the insured whose bad faith is not established does not render the insurance contract null and void. Should such an omission or false declaration be discovered before the occurrence of a loss, the insurer has the right either to maintain the contract, in consideration of an increased premium accepted by the insured, or to terminate the contract 10 days after notifying the insured, by returning the portion of the premium paid for the period when the insurance no longer runs. If such a discovery has been made after a loss, the indemnity will be reduced in proportion to the rate of the premium paid in relation to the rate of the premium that would have been payable had the risks been accurately declared.

Conversely, the insurance contract will be null and void in case of intentional misrepresentation or non-disclosure, on the part of the insured, when such omission or intentional false declaration changes the object of the risk or diminishes the insurer's opinion thereof, even if the risk omitted or misrepresented by

the insured has had no influence on the loss. As a consequence (for non-life insurance contracts only), the insurer is entitled to keep all paid premiums and he is entitled to the payment of all outstanding and due premiums as damages.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

Any contract governed by French law must be negotiated, entered into and performed in good faith.

As a consequence, loyalty of both the insured and the insurer is an absolute necessity. More specifically, French insurance law provides that upon entering into the policy, the insured must answer the insurer's questions accurately. However, such obligation is limited to answering the questions asked by the insurer in the underwriting questionnaire and, as an example, the bad faith of the insured cannot be established if such questionnaire was insufficiently clear or precise. The insured may, however, make spontaneous (true and accurate) statements.

During the policy period, the insured must declare any new circumstances likely to increase the risk or to give rise to new risks, or rendering the answers made to the insurer inaccurate or outdated (within 15 days of the insured acquiring such knowledge). Should an increase in risk occur, then the insurer will have, under certain conditions, the right to opt between terminating the policy or offering an increased policy premium.

In case of a decrease in risk during the policy period, the insured will have the right to request a premium reduction. Should the insurer reject such a request, then the insured will be entitled to cancel the policy and the insurer must refund to the insured the premium corresponding to the period following the termination of the policy.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

Upon payment of an indemnity to the insured, the insurer would be automatically subrogated by "operation of law" in the rights and actions of the insured against third parties who, by their acts, caused the loss that gave rise to the insurer's liability. As such, there is no need to "support" the right to subrogation after such payment by any specific document or separate clause setting out a subrogation wording. Nevertheless, French insurers almost systematically use discharge and subrogation wordings in their release documentation.

Once indemnified, the insured loses his right to bring an action against the liable third party but only in proportion to the indemnification he received. For instance, if the insurer only partially indemnifies the insured, the latter remains authorised to bring an action against the liable third party so as to recover what has not been indemnified by its insurer.

The insurer may also be partially or fully discharged of its liability against the insured when the subrogation cannot operate in favour of the insurer because of the insured.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

Commercial insurance disputes are heard either before commercial courts, which are composed of non-professional judges (usually skilled businessmen), or before civil courts ("*Tribunal judiciaire*"), staffed with professional judges. The appropriate court will depend on a number of factors such as the identity of the parties or the contractual provisions on jurisdiction. The Paris and Nanterre civil and commercial courts, as well as the French Supreme Court ("*Cour de cassation*"), have a recognised experience of dealing with complex commercial insurance disputes.

For example, disputes relating to the payment of sums owed under an insurance contract should be brought before the court of the domicile or head office of the insured, with the exception of (i) disputes relating to insurances covering property-related risks, for which the competent court is the court of the place where the insured property is located, and (ii) disputes relating to casualties of any nature, for which the insurer may be brought before the court of the place where the insured event occurred.

The right to a trial by jury is available in France in criminal cases only and is therefore not possible for commercial insurance disputes.

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

There are no court fees payable to commence a commercial insurance dispute.

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

First instance proceedings in a commercial insurance case usually last between approximately 12 to 15 months. Appeal proceedings before the competent *Court d'appel* usually last between 15 to 18 months. A possible, ultimate appeal ("*pourvoi*") before the *Cour de cassation* (which can only be based on issues of law and not of fact) would add at least 18 months.

"Fast-track" proceedings, such as summary proceedings for interim relief and fixed-date proceedings, also exist. Such proceedings can last several days to several months.

In any case, these periods will vary depending on, *inter alia*, the complexity of the case, the number of parties involved or whether technical experts are appointed by the Court.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

French law does not provide for general discovery processes similar to the ones existing in common law jurisdictions.

In the context of pending proceedings, the principle is that each party bears the burden of proof with respect to its arguments and position and decides which documents will be disclosed to support such arguments and position. If a party relies upon a document in its submissions, it will be obliged to disclose it to the other party spontaneously. This is an application of the principle of "party disposition" ("*principe dispositif*") under which the parties exercise, in principle, sole control over legal proceedings.

The limit to this principle is the judge's mission to ensure that the proceedings are conducted properly and within a reasonable timeframe. For instance, if disclosure is not done spontaneously, the other party has the right to apply to the court for a disclosure order. The court would then indicate the time limit and methods of disclosure, if necessary on penalty of a daily fine.

In addition, Article 145 of the French Civil Procedure Code (FCPC) provides that a person can request from court measures in order to preserve the evidence necessary for the outcome of a possible dispute. These proceedings can be used to obtain the appointment of a bailiff who will have the power to collect the information that is held or accessible in the premises of a person.

The evidence collection pursuant to this Article 145 is initiated as part of summary proceedings ("*référé*"), which can be conducted *inter partes* or, under certain conditions, *ex partes* (i.e., on the sole basis of the applicant's request before the judge).

For the purpose of obtaining an order based on Article 145, the applicant must, prior to any proceedings on the merits, demonstrate that the measure sought is (i) justified by legitimate reasons for the purpose of a possible dispute, and (ii) necessary to evidence the facts of the matter or to avoid the loss of evidence. The measure is, however, limited to evidence that is sufficiently identified and defined by the applicant, i.e. the judge will not grant the disclosure of "*all documents*".

There is no condition linked to the possession or control of the information by the possible defendant to a future trial. The measures can be obtained against assets in the hands of third parties.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

Any documentation containing communication between lawyers qualified as members of one of the French Bars ("*avocats*") and their clients, regardless of its medium or form, is privileged and confidential. However, only the *avocat* is subject to an obligation of absolute professional secrecy, as the clients may decide to disclose such documentation to third parties or to the court if they wish to. By contrast, confidentiality does not attach to correspondence with or between in-house lawyers.

Communications between *avocats* are also confidential, unless marked "official". Therefore, any documents exchanged between *avocats* in contemplation of litigation cannot be disclosed. As a result, statements made while attempting to settle a dispute are privileged if the negotiations were handled by the parties' *avocats*, unless specifically provided otherwise.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

The parties usually argue their cases on the basis of written documentation supporting their submissions (including written witness statements). The parties, however, rarely resort to oral witness statements, although a court can take into consideration both oral and written evidence.

Upon a party's request, a court may, however, require a witness to testify. The witness must comply with this legal obligation, unless he/she has a legitimate reason to oppose it, such as a violation of professional secrecy (medical or bank secrecy) or privacy (if, for instance, the witness and one of the parties are family members).

4.4 Is evidence from witnesses allowed even if they are not present?

French courts rarely require or allow witnesses to provide evidence or make admissions in pleadings in civil proceedings. However, the courts may rely on sworn statements setting out facts or circumstances that a witness wishes to provide as testimony (although often with a light probative value). Evidence obtained from witnesses is therefore allowed even if they are not present.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

Technical experts are usually appointed by the court at the request of a party or on the judge's initiative in cases/matters where technical input is required for the purposes of a decision on the merits of a case (examples: accident involving industrial equipment, aircraft crash, calculation of financial losses). The expert will usually be chosen by the court from a pre-established list of experts, and appointed in a preliminary decision which sets out the scope of its mission. It would not be unusual for such expert proceedings in a construction or insurance context to last from one to two or more years, at the end of which the expert would remit his final report to the court.

Although the judge is never bound by the expert's report, the court usually relies on/follows the technical conclusions of the court expert's report in deciding upon the technical liabilities as well as the calculation of the financial loss.

In addition to, but separate from, the court-appointed expert system, it is also common practice in France for an expert to be appointed by one of the parties, often by the insurance company of the principal plaintiff. In such "amicable" context, the expert could not reliably be described as being independent, having been appointed by one of the parties to support its own position.

4.6 What sort of interim remedies are available from the courts?

Interim remedies can be sought by a party before trial in order to gather and/or protect evidence ("*référé probatoire*" – Article 145 of the FCPC). The request must be submitted before any trial, and if the party provides a legitimate reason (for instance, if the fact at stake could determine the outcome of the future trial and is at risk of disappearance/alteration). In some cases, it is possible to obtain such interim remedies without prior notice to the defendant ("*ordonnance sur requête*"). Please also refer to question 4.1 above.

Interim remedies may also be granted during trial in various cases, including where the matter is urgent, (i) to avoid imminent damage, (ii) to cease manifestly illegal conduct, or (iii) to order the payment of compensation or specific performance of an obligation which cannot seriously be challenged. The competent judge is the interim relief judge ("*juge des référés*").

Conservatory measures such as precautionary seizure/attachment ("*saisies conservatoires*") may also be awarded under specific circumstances. Those measures can only be granted if the party (i) provides evidence that its claim is grounded, (ii) specifies the amount of the requested seizure, and (iii) demonstrates circumstances likely to threaten the recovery of the amount claimed. The precautionary attachment may apply to almost any properties, shares, stocks or business owned by the other party, provided that such asset is clearly identified and located. Proceedings on the merits should be initiated within one month; otherwise, the conservative measure would lapse.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

A party has the right to appeal for final decisions to a court of appeal ("*Cour d'appel*") for all claims above EUR 5,000. The

court of appeal will be required to re-examine the entire case discussed in the first instance.

There is one stage of "ordinary" appeal in French civil and commercial proceedings.

In addition, the parties may, under certain circumstances, "appeal" ("*pourvoi*") to the French Supreme Court ("*Cour de cassation*"). This appeal consists of an extraordinary legal remedy which can only be made against court of appeal decisions and judgments pronounced by a first instance court when the claim is below EUR 5,000.

The role of the Supreme Court is to review lower courts' rulings on the grounds of legal and procedural errors only, but not factual aspects. Should the French Supreme Court quash a decision issued by a lower court, the case will generally be referred for a rehearing of both fact and law, before a jurisdiction of the same level but different from the one which issued the quashed decision.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Interest is recoverable in respect of claims. It applies to any sum owed by a person as a result of a court decision. Interest generally runs from the date of the decision (or any other date set by the court – for example, the date of loss or date of claim) and applies on the amount awarded by the court decision.

The calculation of interest may vary depending on the conditions set out in the decision, the date of actual payment of the amount due, and the parties at stake. For example, legal interest will be higher for individuals (i.e., any natural person who is not acting in a professional capacity) than for professionals. As of the first semester of 2020, the legal interest rate is 3.15% for individuals and 0.87% for professionals.

The calculation of the interest is as follows: (amount due x number of late days x rate) / 365 x 100. The result constitutes the total interest, which is then added to the amount awarded by the court decision.

The legal interest rate may be increased when an amount due in respect of a court decision is not paid within two months following the day on which the decision has become enforceable. The legal interest rate is in such case increased by five points.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

There is a distinction between "*dépens*" and "*frais irrépétibles*" in French civil procedure as regards standard rules regarding costs.

The "*dépens*" consist of the costs and disbursements incurred throughout the proceedings, and as such include, *inter alia*, (i) the fees and pecuniary entitlements charged notably by the court registry offices, (ii) the cost of translating documents, when such translation is required by the law or an international act, (iii) court experts' fees, (iv) pecuniary entitlements of public officers, or (v) expenses incurred by the notification/servicing of an act abroad. These costs are borne by the unsuccessful party, unless the judge decides by a discretionary but reasoned decision that all or part of these costs will be borne by another party.

The "*frais irrépétibles*" mostly cover the fees not included in the "*dépens*", such as lawyers' fees, travel expenses incurred for the need of the trial or fees incurred for amicable expertise. Article 700 of the FCPC allows the judge, at the request of a party, to order the unsuccessful party to pay a lump sum intended to cover these costs. The courts have discretionary powers to set the amount of legal costs to be paid by the unsuccessful party and the sums ordered are rarely the full amount of lawyers' fees charged. The court may take into consideration equity and the financial situation of each party when awarding costs.

If a settlement agreement is reached before trial, the parties will avoid paying the above-mentioned "*dépens*", which remain, however, reasonable and limited.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

Parties must specify the steps they have taken to reach an amicable resolution when referring a matter to a court. If the parties fail to demonstrate such an attempt, the judge can propose that the parties attempt an amicable dispute resolution procedure such as mediation or conciliation, although it has no power to compel mediation or conciliation (except for some restricted matters, such as family or employment or insolvency matters).

Despite the foregoing, the parties may have agreed on contractual clauses requiring them to initiate an Alternative Dispute Resolution procedure before going to court. In such case, these clauses are binding upon the court. If the opposing party raises a breach of such clause, the court will refuse to consider the claim ("*fin de non-recevoir*").

Specific to the insurance sector, potential disputes or claims may also be brought before the Ombudsman of the French Federation of Insurance ("*Médiateur de l'Assurance*").

4.11 If a party refuses to a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

While courts always encourage mediation and/or conciliation, they have no power to compel mediation or conciliation. French regulations provide that the writ of summons must indicate all the diligences performed to resolve the claim. However, in practice, in the absence of such diligences, the parties face no sanctions. In any case, a party can always refuse to mediate or conciliate (except where bound by a pre-existing contractual obligation requesting the parties to attempt an amicable settlement or where such procedure is required in certain matters by law).

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

The French legal framework governing arbitration strictly limits state courts' involvement in arbitration proceedings. Thus, a state court must decline jurisdiction if it is requested to rule on a dispute arising under a contract containing an arbitration clause, unless the arbitral tribunal has not yet been constituted and the arbitration clause is manifestly void or manifestly inapplicable. The court cannot raise its lack of jurisdiction *sua sponte* and the defendant must raise this objection prior to discussing the merits of the case.

However, if the arbitral tribunal has not yet been constituted, either party may seize a state court with a view to obtaining interim measures (please refer to question 5.4 below).

Furthermore, parties to an arbitration agreement can turn to a state judge ("*juge d'appui*") to support the conduct of an arbitration, essentially for procedural issues. During the phase of constitution of the arbitral tribunal, such judge can appoint the arbitral tribunal where the parties fail to reach an agreement and no arbitral institution has been selected (which would solve the issue). In the course of the arbitration proceedings, the judge has the power to (i) deal with all issues pertaining to the revocation of an arbitrator, (ii) extend the duration of the arbitral proceedings where parties fail to reach an agreement in this respect, and (iii) deal with issues in relation to documents held by third parties to the arbitral proceedings, subject to prior authorisation by the arbitral tribunal.

With respect to domestic arbitrations, the *juge d'appui* is generally the President of the *Tribunal de Grande Instance* of the seat of the arbitration. For international arbitrations, the *juge d'appui* is the President of the *Tribunal de Grande Instance* of Paris in specific circumstances, including when the arbitration is seated in France or is governed by French procedural law.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

The FCPC regulates domestic arbitration and international arbitration. Arbitration is deemed international when it involves international commerce. It benefits from the application of more liberal principles.

In domestic arbitration, arbitration clauses must be in writing, failing which they shall be void. Arbitration agreements may also result from an exchange of written documents or from a document to which the principal (re)insurance agreement refers. In such case, consent of the parties to the arbitration must be certain and effective.

In international arbitration, arbitration agreements are not subject to any formal requirements. So long as the parties clearly express their intention to arbitrate their disputes, the clause will be valid. A written document can be used to prove the existence of such clause.

In any case, the best way to avoid potential issues is to draft an arbitration clause which is clear and specific. Therefore, it is advisable to address the following in the arbitration agreement: (i) the number of arbitrators and the modalities of their appointment; (ii) the seat and language of the arbitration; (iii) the procedural rules applicable to the arbitration; and, where necessary (iv) the governing law. It is also recommended to state whether the arbitral tribunal may disregard strict rules of law and decide on an equitable basis ("*amiable compositeur*") and which remedies are available against the award.

International arbitration proceedings are not confidential by default. Therefore, the parties may wish to include a confidentiality agreement in their arbitration agreement.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

If a dispute arising under an express arbitration clause inserted in a (re)insurance agreement is brought before a state court, such court should decline jurisdiction, unless the arbitral tribunal has not yet been seized and the arbitration clause is manifestly void or manifestly inapplicable.

Enforceability of an express arbitration clause may also be denied when such clause would apply to matters that are not arbitrable by law. Arbitration of certain matters is prohibited, including, *inter alia*, family law matters, criminal law matters and more broadly, matters relating to public order.

More specifically, although insurance and reinsurance are deemed arbitrable matters, an arbitration clause provided in an insurance contract entered into between an insurance company and a consumer/non-professional will be deemed unfair, as restricting the consumer's right to initiate a legal action. Therefore, in such case, the courts will refuse to enforce such a clause.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

If the arbitral tribunal has not yet been constituted, either party may apply to a state court for interim measures. Such measures include conservatory measures, provisional measures and investigative measures.

In addition, urgent measures may be granted by state courts, where justified by the circumstances and in the absence of serious challenge by the other party. Even if there is a serious challenge by the other party, state courts may order urgent conservatory measures to prevent imminent harm or to remedy manifestly illegal situations.

Once the arbitral tribunal is constituted, arbitrators may order provisional measures. Arbitrators may compel parties to execute those measures by including a cumulative daily penalty ("*astreinte*") in the event of non-compliance.

State courts retain exclusive jurisdiction to order conservatory seizures and registration of judicial mortgages.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

The arbitral award must briefly outline the parties' respective claims and their arguments.

In domestic arbitration, it must state the reasons upon which the decision of the tribunal is based, failing which it will be subject to annulment.

In international arbitration, the parties may waive this requirement.

Many arbitration institutions, such as the French Reinsurance and Insurance Arbitration Centre ("*Centre Français d'Arbitrage de Réassurance et d'Assurance*" – CEFAREA), expressly provide in their arbitration rules that the award must state the reasons upon which it is based.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

In domestic arbitration, a decision of an arbitral tribunal cannot be appealed on the merits unless the parties have agreed otherwise. The arbitral award may always be subject to annulment/setting aside proceedings ("*recours en annulation*"). Appeal and setting aside proceedings are initiated before the Court of appeal of the seat of the arbitration within one month of the notification of the arbitral award.

In international arbitration, a decision of an arbitral tribunal can only be subject to annulment by the competent Court of

Appeal on limited grounds. Setting aside proceedings must be initiated within one month of the notification of the arbitral award (a two-month extension applies if the notified party is located abroad). The right to initiate setting aside proceedings may be waived by the parties by means of an express and specific agreement. Parties can always appeal enforcement orders.

In both domestic and international arbitration, grounds for annulment are strictly limited. An arbitral award will only be set aside to the extent one of the following conditions is met: (i) the arbitral tribunal wrongly upheld or declined jurisdiction; (ii) the arbitral tribunal was improperly constituted; (iii) the arbitral tribunal ruled in violation of its mandate; (iv) due process was not complied with; (v) the arbitral award is contrary to public order (international public order in an international arbitration framework); and (vi) for domestic arbitration only, the arbitral award is not grounded or does not state the date on which it was rendered or the name of the arbitrator(s), or does not include the required signature(s) or was not rendered by a majority vote of the members of the tribunal.

In addition, in the event fraud is uncovered after the arbitral award is rendered, the party alleging the existence of a fraud can, in both domestic and international arbitration proceedings, seek a review of the award ("*recours en révision*"). Such review is undertaken by the arbitral tribunal itself, unless it is no longer possible for the same arbitral tribunal to be constituted. In such case, in domestic arbitration, state courts (Court of Appeal) rule on the issue.

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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

All private and public insurance undertakings which carry on private insurance and reinsurance business within the scope of the Insurance Supervision Act (*Versicherungsaufsichtsgesetz*, VAG) and have their registered office in Germany are subject to supervision either by the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*, BaFin) or by the supervisory authorities of the Federal States. Insurance undertakings having their registered office in another EU Member State or in a state party to the Agreement on the European Economic Area (EEA) which conduct business in Germany under the freedom to provide service are primarily subject to supervision by their home country. BaFin does, however, consult the foreign supervisory authority if it identifies breaches of general German legal principles.

BaFin is an independent public law institution established in 2002 and is subject to legal and technical oversight by the Federal Ministry of Finance.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

Setting up a new (re)insurance company requires – subject to exceptions: first, under the EU's single passport regime; and second, in case of the equivalence of a foreign legal supervisory regime – the company to obtain authorisation with BaFin pursuant to Section 8 VAG. According to Section 9 VAG, the company has to attach an operating plan to its application, disclose the purpose and structure of the business, the region in which business is to be conducted and, in particular, clearly state the conditions which shall secure that the future liabilities of the undertaking may be fulfilled at any time.

The operating plan shall include, *inter alia*, the articles of association as well as information about the classes of insurance which the insurer tends to carry on and which risks of a class of insurance are to be covered. Further, the operating plan shall give evidence of the existence of own funds in the amount of the minimum guarantee fund and provide estimates for the first three financial years with respect to the expenses for commissions and other current operating expenses, expected premiums, expected charges for claims incurred and the expected liquidity situation. Additional information is required for health insurance and coverage of certain risks, about the intended reinsurance arrangements, on estimated expenses for setting up administration and the sales network, as well as on the managers' and directors' reliability and qualification.

Authorisation may only be granted to stock corporations, mutual societies and corporations and institutions under public law. The head office must be located in Germany.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

In order to write German insurance and reinsurance business, foreign insurers and reinsurers need to comply with preconditions of German insurance regulatory law. Under the EU single passport regime, EEA-insurers and reinsurers are permitted to write German (re)insurance business either via a domestic branch or under the freedom to provide cross-border services without requiring separate authorisation in Germany. In contrast, primary insurers and reinsurers from third countries, i.e. countries that are not EU Member States or signatories to the Agreement on the EEA, are subject to authorisation by BaFin and must, as a general rule, establish a German branch office if they wish to carry on primary insurance or reinsurance business in Germany.

With regard to reinsurance business, the legal situation changed when the Act to Modernise Financial Supervision of Insurance Undertakings (*Gesetz zur Modernisierung der Finanzaufsicht über Versicherungen, 10. VAG Novelle*) came into force on 1 January 2016. First, an exception to the licence agreement applies if the reinsurer is domiciled in a country whose solvency regime is deemed to be equivalent to that of the EU. In other cases, a third-country reinsurer may conduct reinsurance business in Germany only by way of correspondence as explained in BaFin's interpretative decision of 31 August 2016. In summary, insurance by correspondence applies to reinsurance business if, at the instigation of an undertaking domiciled in Germany, a reinsurance contract is concluded by correspondence with an insurer domiciled abroad without one of the parties being

assisted by a professional intermediary in Germany or abroad but acting as an intermediary in Germany.

Further, on September 22, 2017, the EU and the USA signed an agreement addressing the US lack of equivalency concerning the Solvency II directive, which entered into force on April 4, 2018. This agreement is aimed at making it possible for contracts to be concluded between a US reinsurer and an EU (re)insurer without the US reinsurer being required to establish a branch in the respective EU Member State. Moreover, the agreement streamlines group supervision requirements for insurers and reinsurers operating in both jurisdictions. US reinsurers must fulfil certain capital and local risk-based capital requirements and are obligated to submit certain declarations to the supervisory authority responsible for the EU insurance undertaking. The provisions of the agreement are not self-implementing but require further legislation. Full implementation is expected in 2022.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

The Insurance Contract Act (*Versicherungsvertragsgesetz*, VVG) provides for a number of so-called semi-mandatory provisions, meaning that such provisions can neither be contractually precluded nor modified to the insured's disadvantage. However, Section 210 of the Insurance Contract Act provides that such restriction of the freedom of contract shall not apply to so-called large risks or to open policies. In line with European law, such large risks include certain transport, liability and credit insurances, as well as certain property, liability and other indemnity insurances if the policyholder exceeds at least two of the following characteristics:

(i) EUR 6.2 million balance sheet total;
(ii) EUR 2.8 million net turnover; and
(iii) an average of 250 employees per fiscal year. If the policyholder belongs to a group of companies which must prepare a consolidated financial statement, the size of the enterprise is determined according to the figures in the consolidated financial statement.

1.5 Are companies permitted to indemnify directors and officers under local company law?

Under German company law, it is generally allowed for a company to indemnify its directors and officers (D&O); however, this is subject to certain exceptions. For example, a company may reimburse defence costs for criminal and liability proceedings where a director or officer is held liable to a third party. However, if liability is established, the company may only indemnify a director under narrow prerequisites. The same applies in a German liability scenario of an insured *vs.* insured claim, which is the typical D&O scenario in Germany. As a result, indemnification will typically be prohibited if the director has breached his duties to the company. For officers, indemnification is permissible except for intentional acts.

1.6 Are there any forms of compulsory insurance?

There are various forms of compulsory insurance in Germany. The most prominent ones are health insurance, third-party motor insurance and professional liability insurance for a number of professions, such as lawyers, tax advisors, accountants and insurance intermediaries.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

The primary source of German insurance law is the Insurance Contract Act. On its 100th anniversary, the Insurance Contract Act underwent comprehensive revision with its current version taking effect as of 1 January 2008. The new law applies to insurance contracts concluded since the beginning of the year 2008 and, subject to certain exceptions, to previously concluded insurance contracts as of 1 January 2009.

In revising the Insurance Contract Act, the legislator intended to promote consumer protection. For example, the new law, on the one hand, introduced extensive duties for insurers to inform and advise policyholders before the formation of the insurance contract and, on the other hand, restricted sanctions in case of breach of the policyholder's obligations to disclose material risks pre-contractually or to cooperate with the insurer in the claims handling process. Accordingly, most provisions of the Insurance Contract Act serving consumer protection are mandatory.

In addition to the Insurance Contract Act, insurance contracts are further governed by the German Civil Code (*Bürgerliches Gesetzbuch*, BGB). Even where the Insurance Contract Act leaves room for party autonomy, standard insurance terms and conditions are subject to Sections 305 *et seq.* of the Civil Code. Accordingly, provisions which are so unusual that the other party to the contract needs not to expect to encounter them do not form part of the contract. This may, for example, apply to foreign provisions copied and pasted into German policies. Furthermore, any doubts in the interpretation of standard business terms are resolved against the user. Moreover, provisions in standard business terms will be ineffective if they unreasonably disadvantage the insured. While this scrutiny plays a predominant rule in consumer insurance, it is also relevant for business insurance.

2.2 Can a third party bring a direct action against an insurer?

As a general rule, only the insured has a claim for coverage against the insurer. There are exceptions, however, in particular for liability insurance. For compulsory liability insurance, Section 115 para. 1 of the Insurance Contract Act entitles the third party to bring a direct action against the insurer:

(i) in the case of compulsory liability insurance (e.g. third-party motor vehicle insurance);
(ii) if insolvency proceedings have been opened in respect of the assets of the policyholder; or
(iii) if the policyholder's whereabouts are unknown.

Moreover, as of 1 January 2008, Section 108 para. 2 Insurance Contract Act states that liability insurers may not rule out by general insurance terms and conditions that the insured assigns its claim for indemnification to the third party bringing the damage claim. A prohibition of assignment may, thus, only be agreed individually or in the case of a large risk and, in the latter case, will have to stand scrutiny of general insurance terms and conditions according to the rules of the Civil Code. If the assignment is valid, the third party shall be entitled to demand indemnification directly from the insurer. This also applies to D&O insurance and the assignment of the insurance claim from an insured person to the insured company which can then bring a direct claim for payment against the insurer.

2.3 Can an insured bring a direct action against a reinsurer?

Under German reinsurance law, there is no direct claim of an insured against a reinsurer, unless specifically agreed, e.g. by means of a cut-through clause.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

The policyholder's duty to pre-contractually disclose material risk information and the insurer's remedies in case of breach are governed by Sections 19 *et seq.* Insurance Contract Act. Before conclusion of the contract, the policyholder has to disclose to the insurer the risk factors known to him which are relevant to the insurer's decision to conclude the contract and which the insurer has asked for in so-called text form.

In case of breach, remedies depend on the policyholder's degree of fault. As a general rule, the insurer may rescind the insurance contract. However, if the policyholder breached the duty of disclosure neither intentionally nor grossly negligently, the insurer will only be entitled to terminate the contract subject to a notice period of one month. Rescission and termination are ruled out if the insurer would also have concluded the contract, although with different conditions, if it had been properly informed of the non-disclosed facts. Instead, such other conditions shall become part of the contract with retroactive effect upon the request of the insurer. Furthermore, for any remedies to apply, the insurer must have warned the policyholder in writing in separate correspondence of the consequences of any breach of the duty of disclosure.

The insurer must assert the remedy afforded to him in writing within one month. The period commences when the insurer gains actual knowledge of the misrepresentation or non-disclosure. As held by German courts, the insurer will be obligated to investigate the facts and circumstances if the insurer has reason to suspect that the policyholder breaches its duty of disclosure.

In the event of rescission after an insured event, the insurer will not be obligated to provide coverage, provided that misrepresentation or non-disclosure refers to circumstances causing the occurrence of the insured event or the extent of the insurer's liability. The restriction will not apply in the case of fraudulent misrepresentation or non-disclosure, though.

In addition to the remedies under Section 19 Insurance Contract Act, in the event of fraudulent misrepresentation or non-disclosure, the insurer will also be entitled to avoid the insurance contract with retroactive effect within one year upon discovering the fraudulent misrepresentation/non-disclosure according to Sections 123–124 Civil Code.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

In general, the policyholder's duty of disclosure only refers to risk information which the insurer has requested in writing. It is disputed whether and to what extent there might be a positive disclosure duty in the absence of a respective written risk question under special circumstances.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

Upon indemnification by the insurer, if the insured is entitled to claim damages from a third party regarding the insured loss, this claim will be assigned by law to the insurer. The insured is required to safeguard its claim for damages or a right serving to safeguard this claim in accordance with the applicable form and time requirements, and shall assist the insurer whenever necessary in asserting such claim or right. If the policyholder intentionally breaches this obligation, the insurer will not be obligated to indemnify the insured insofar as the insurer cannot, as a result, claim recourse from the third party. In the event of a grossly negligent breach, the insurer shall be entitled to reduce indemnification according to the severity of the policyholder's fault.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

Insurance disputes are heard in the courts competent for civil law matters. These are – in descending order of seniority – the Federal Court of Justice (*Bundesgerichtshof*, BGH) in Karlsruhe, 24 Higher Regional Courts (*Oberlandesgericht*, OLG), 116 Regional Courts (*Landgericht*, LG) and 661 Local Courts (*Amtsgericht*, AG). Apart from the Local Courts, all courts usually have specialised chambers or senates for insurance matters. Both the Local Courts and the Regional Courts are courts of first instance. In insurance matters, the court of first instance will be a Regional Court if the amount in dispute exceeds EUR 5,000.

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

Court fees have to be paid by the plaintiff in advance in all commercial disputes including insurance disputes. The amount of the court fees depends on the amount in dispute. The following table gives examples for specific amounts in dispute; however, the actual fee always depends on the specific value of the matter. The court fees shown apply to first instance proceedings; further fees are payable for second or further instances.

Amount: EUR 10,000	Fee: EUR 723
Amount: EUR 100,000	Fee: EUR 3,078
Amount: EUR 1 million	Fee: EUR 16,008
Amount: EUR 10 million	Fee: EUR 113,208
Amount: EUR 30 million	Fee: EUR 329,208

For amounts exceeding EUR 30 million, the court fee is capped at EUR 30 million. Court fees will ultimately be borne by the losing party (loser-pays-rule).

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

The duration of proceedings naturally depends on the complexity of the individual case. The approximate average duration of German court proceedings is comparatively moderate. For example, based on statistics for the year 2018, approximately 45 per cent of first instance proceedings at a Regional Court were resolved within six months and approximately 75 per cent within 12 months. The average duration of first instance proceedings at a Regional Court is 16 months for proceedings

concluded by judgment and 10 months for those terminated otherwise. Appeals on questions of law to the Federal Court of Justice in 2018 took less than 12 months in approximately 15 per cent of cases, one to two years in approximately 60 per cent of cases and more than two years in approximately 20 per cent of cases. Of course, in complex insurance and reinsurance matters, in particular when extensive taking of evidence is involved, the duration of proceedings may and often will be above average.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

German civil procedure does not know pre-trial discovery as known, in particular, from US litigation. Instead, civil proceedings follow the rule that each party must prove the facts that support its position and must produce any documents supporting the relevant facts.

However, there are certain exceptions for the taking of evidence which, while still more restrictive, somewhat resemble document production according to the IBA Rules on the Taking of Evidence in International Arbitration. Accordingly, a party may apply for a court order requiring the other party to produce specific documents in order to prove certain facts if such documents are in possession of the other party and if the other party is obligated to furnish the documents. If the other party does not produce the requested documents, the court may consider the allegations of the party applying for document production as true.

Under the same prerequisites, non-parties must also produce documents within a deadline set by the court. Within this time frame, a party may be required to take legal action to enforce the non-party's obligation.

Further, courts have discretion to order a party or even a non-party to produce specific documents which a party has made reference to in its pleadings within a certain deadline. If a party does not comply with a respective order without good reason, the court will take this into consideration in its evaluation of evidence. Non-parties may be imposed with a fine.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

If a party applies for document production by the other party, the court will only issue a respective order if the applying party has an enforceable claim for delivery of the documents. Under civil law, the other party may have defences against such claim, e.g. resulting from confidentiality obligations. Furthermore, production of documents may be rejected under procedural rules of privilege. In particular, lawyers may and must refuse giving evidence on confidential issues according to professional rules and under criminal law unless authorised to do so by the client. However, this privilege does not extend to documents in the possession of the client or another party. In case of a court order for producing documents, the court will take aspects of confidentiality or privilege into consideration when exercising its discretion.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

The court will order witness testimony by those witnesses offered by a party whose testimony will be relevant for investigating disputed facts. In general, a witness is obligated to follow such order unless the witness is entitled to refuse testimony, e.g. in case of family relationships with a party or in case of self-incrimination.

4.4 Is evidence from witnesses allowed even if they are not present?

In ordinary civil proceedings, witness evidence must, in general, be delivered by testimony. In particular, German civil procedure does not know written witness statements as used in international arbitration or in US or UK litigation proceedings.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

If necessary for the taking of evidence, on application by a party, expert witnesses are appointed by the court. In addition, the parties will often have their own experts and will introduce their reports as part of the pleadings. The neutral expert will usually render a written expert opinion on which the parties may comment. The court may then summon the expert for questioning at the evidence hearing.

4.6 What sort of interim remedies are available from the courts?

German law on civil procedure provides for two kinds of interim relief. First, a party may apply for an interim injunction requiring or preventing a certain action by the other party until the dispute has been finally resolved in the main proceedings. Second, a party may apply for an attachment order preventing removal or dissipation of the other party's assets. For interim protection, the applicant must show with preponderance of the evidence that the applicant has a substantive claim against the respondent and that the matter is urgent.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

A party may appeal a first instance judgment on questions of law and fact if the first instance court has deviated from the party's application by more than EUR 600. While the Regional Courts are competent for appeals against judgments by Local Courts, appeals against first instance judgments by Regional Courts may be filed with a Higher Regional Court. In the final stage, the Federal Court of Justice is competent for appeals against judgments by Higher Regional Courts.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Once litigation commences, the defendant will owe interest on a justified claim as if being in default. The interest rate is generally

five percentage points above the base rate and eight percentage points above the base rate where neither party is a consumer. The base rate of interest is announced by the German Central Bank (*Deutsche Bundesbank*). As of 1 July 2019, the basic rate of interest is -0.88 per cent.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

Litigation costs consist of court fees and expenses and of parties' costs, in particular lawyers' fees. The plaintiff has to advance the court fees up front. Court and lawyers' fees are, in general, recoverable in the event of success. Following the "loser pays rule", the losing party has to bear the costs of the litigation. If the plaintiff partly wins and partly loses that case, costs are either proportionally allocated by reference to the degree of success and loss or court costs are split up and each party bears its own out-of-court costs.

Just like court fees, recoverable remuneration of lawyers is in general determined by statutory rates. If a party agrees to pay its lawyer a higher rate, for example based on hourly rates, the party generally has to bear the extra fees regardless of the court's decision, unless the fees in excess of the statutory rates constitute recoverable damages. Under German law, contingency fees are only permissible under very narrow circumstances and in individual cases. In court proceedings, it may be agreed that in case of failure, no remuneration or a lower amount than the statutory remuneration is to be paid if the parties have agreed that an appropriate supplement is to be paid on the statutory remuneration in case of success.

The court and lawyers' fees are calculated according to the amount in dispute and the procedural stages covered. The higher the amount in dispute is, the higher the costs are. The maximum amount in dispute for purposes of calculation of litigation costs is EUR 30 million, leading to maximum court costs of roughly EUR 330,000 and maximum statutory lawyers' fees of roughly EUR 275,000 (plus VAT) for first instance proceedings. In case of a settlement reached in first instance and again based on an amount in dispute of EUR 30 million, court costs will be reduced to approximately EUR 110,000, whereas lawyers' fees will be increased to approximately EUR 310,000.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

Under German law, mediation (as well as other forms of alternative dispute resolution) is voluntary based on party consent. Courts cannot compel the parties to mediate disputes before or during court proceedings. Courts may suggest that the parties pursue mediation or other alternative conflict resolution procedures. If the parties agree to mediation, the court will stay the proceedings. Furthermore, the courts are obliged to encourage and facilitate amicable solutions during all stages of the proceedings and, in particular, to conduct a settlement hearing before commencing the trial.

4.11 If a party refuses to a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

As mediation and other forms of alternative dispute resolution are voluntary, a refusal to mediate will not have any consequences for the parties, except for potential contractual claims arising out of the agreement on alternative dispute resolution between the parties.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

Over the past decade, Germany has become an increasingly significant venue for international arbitration proceedings. While 72 proceedings were commenced with the German Institution of Arbitration (*Deutsche Institution für Schiedsgerichtsbarkeit e.V.*, DIS) in 2006, case numbers increased to 155 proceedings in 2010 and 172 proceedings in 2016 with a slight decrease to 162 in 2018, while the highest amount in dispute increased from EUR 200 million in 2016 to EUR 270 million in 2018. In 50 of the proceedings in 2018, at least one foreign party was involved.

This development is supported by a number of factors. In comparison, German arbitral proceedings are recognised for their efficient and cost-sensitive organisation. Further, German arbitration law as well as court practice follow an arbitration-friendly approach. Having adopted the UNCITRAL Model Law on International Commercial Arbitration in 1998, Germany provides for a modern arbitration regime with rather detailed, well-structured and easily understandable provisions designed to protect party autonomy and to afford effective arbitral justice.

Moreover, court intervention is limited. A court may not intervene in arbitral proceedings unless expressly empowered under German arbitration law. In fact, courts are restricted to providing supportive judicial assistance, e.g. in the enforcement of interim measures of the arbitral tribunal or in the taking of evidence. Finally, the Higher Regional Court at the seat of the arbitration will be competent for setting aside an arbitral award under very narrow prerequisites.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

In general accordance with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the UNCITRAL Model Law, the arbitration agreement must be in writing.

In consumer insurance, arbitration agreements are the absolute exception. Under German arbitration law, the arbitration agreement would have to be in a document personally signed by the parties. Hence, a strict written form requirement applies.

In business insurance, arbitration agreements are still rather the exception, yet on the rise, in particular for technical or international risks, such as aviation or maritime insurance, but also for other risks, e.g. in D&O and W&I insurance. By contrast, cedants and reinsurers typically prefer settling any disputes in a private, confidential forum and by self-chosen neutrals with the necessary experience and know-how in the industry. In line with worldwide practice, German reinsurance contracts therefore usually contain an arbitration agreement. While most agreements so far provide for *ad hoc* arbitration, parties increasingly use institutional rules.

In business insurance and reinsurance, the arbitration agreement must generally fulfil the written form requirement. However, the form requirements under German law are much more lenient than those under the New York Convention and the UNCITRAL Model Law. The arbitration agreement may not only be contained in a document signed by the parties but also in an exchange of letters, faxes or other means of telecommunication which provide a record of the agreement. Further, the form requirement is deemed to have been complied with if the arbitration agreement is contained in a document transmitted from one party to the other party or by a third party to both parties and – if no objection was raised in good time – the contents of such document are considered to be part of the contract in accordance with common usage. Moreover, reference in a contract complying with the written form requirements to a document, e.g. standard insurance terms and conditions, containing an arbitration clause also constitutes an arbitration agreement provided that the reference is such as to make that clause part of the contract.

In order to oust the jurisdiction of the courts, in the arbitration agreement, the parties must submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. In general, the parties should also specify the number of arbitrators, the place of arbitration and the language of the proceedings as well as the applicable law. Arbitration institutions such as the German Institution of Arbitration or ARIAS Europe provide model clauses which the parties may incorporate into the contract.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

If the parties have included an arbitration clause, German courts will enforce the clause unless the arbitration agreement is null and void, inoperative or incapable of being performed. Hence, a court before which an action is brought in a matter which is the subject of the arbitration agreement will, upon objection by the respondent prior to the beginning of the oral hearing, reject the action as inadmissible. Further, as a German specialty, an application may be made to the court to determine whether or not arbitration is admissible prior to the constitution of the arbitral tribunal. Once the arbitral tribunal has been constituted, it will rule on its own jurisdiction and, in relation to this, on the existence or validity of the arbitration agreement. Thus, German arbitration law follows the principles of separability and provisional competence-competence. However, the final decision on competence is reserved to the courts.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order such interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. These interim measures can only be enforced by the courts. For this reason, parties more often directly apply for interim measures with the courts which retain concurrent jurisdiction for granting interim relief. However, the courts are restricted to attachment orders and interim injunctions under the ordinary prerequisites as applying outside arbitral proceedings.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

The award shall be made in writing, be signed by the arbitrators and state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

Under German law, an arbitral award is final and cannot be appealed on the merits. In particular, while the parties could agree on second instance arbitral proceedings, no *révision au fond* can be agreed by the courts. Instead, the Higher Regional Court at the arbitration seat will be responsible for recognising foreign and enforcing domestic and foreign awards. Further, the Higher Regional Court is competent for applications for setting aside the arbitral award. In line with Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the Higher Regional Court will only refuse to enforce or grant an application for setting aside an arbitral award under very narrow prerequisites, though:

- if a party to the arbitration agreement was under some incapacity pursuant to the law applicable to it or the arbitration agreement is invalid;
- if a party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case;
- if the award deals with a dispute not contemplated by or not falling within the terms of the arbitration agreement, or contains decisions on matters beyond the scope of the submission to arbitration;
- if the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the (few) mandatory provisions of German arbitration law or the agreement of the parties, provided that this contravention presumably affected the award;
- if the subject matter of the dispute is not capable of settlement by arbitration under German law; or
- if recognition or enforcement of the award leads to a result which is in conflict with public policy (*ordre public*).

Dr. Henning Schaloske maintains a broad practice focused on insurance and reinsurance law, and has extensive experience in litigation as well as domestic and international arbitration (institutional and *ad hoc*), including corporate and commercial disputes. In arbitration, he is experienced as counsel as well as an arbitrator (chairman/sole and party-appointed) and is certified as an arbitrator for (re)insurance disputes with ARIAS Deutschland e.V.

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Clyde & Co is a leading, sector-focused global law firm with 440 partners, 1,800 lawyers, 2,500 legal professionals, and 4,000 staff in over 50 offices and associated offices worldwide. The firm specialises in the sectors that move, build and power our connected world and the insurance that underpins it, including: transport; infrastructure; energy; trade & commodities; and insurance. With a strong focus on developed and emerging markets, the firm has achieved compound average annual revenue growth of 15% over the last 10 years, making it one of the fastest-growing law firms in the world with ambitious plans for further growth. In addition to Clyde & Co's continental European offices in France, in 2016, Clyde & Co opened its first German office in Dusseldorf. The Dusseldorf team has since trebled in size and has been recognised as a leading practice for insurance litigation, insurance products and regulatory advice in *The Legal 500*, *Chambers* and others. In November 2018, the team was awarded Insurance Law Firm of the Year for Germany by JUVE, the most prestigious domestic award. In February 2019, Clyde & Co opened a second German office in Hamburg providing market-leading expertise in the marine sector.

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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

According to Law 4364/2016, implementing the EU Directive 2009/138 (Solvency II Directive), insurance and reinsurance companies in Greece are supervised by the Bank of Greece (BoG) and in particular by the Department for the Supervision of Private Insurance. The supervising authority is responsible for: issuing and revoking licences of insurance and reinsurance undertakings; and monitoring compliance of insurance and reinsurance undertakings and distributors of insurance and reinsurance products with Greek and EU legislation, including regulatory requirements, anti-money laundering provisions, imposition of sanctions and co-operation with the European Insurance and Occupational Pensions Authority (EIOPA) and the national regulatory authorities of other EU Member States.

In addition to the Bank of Greece, to the extent that insurance companies are dealing with consumers, the Consumers' Ombudsman and the General Secretariat for the Protection of Consumers may also exercise supervisory authority over insurers, in order to safeguard the protection of consumer rights.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

Without prejudice to the legal provisions concerning freedom of establishment and freedom of services, insurance and reinsurance companies should obtain a licence from the BoG prior to conducting any insurance or reinsurance activities. In order to be eligible for authorisation, the interested undertaking must meet the following requirements:

a) be a *société anonyme* or a mutual insurance cooperative or a *societas europaea*; and
b) have the conducting of insurance and reinsurance activities as its exclusive purpose.

In order to obtain a licence, an undertaking must submit the following to the BoG:

i) its articles of association and a business plan, including the scheme of operations of the company for the first three (3) years of its operation;
ii) evidence that it possesses the eligible basic own funds to cover the absolute floor of the Minimum Capital Requirement (MCR) set out in the law;
iii) evidence that it will be in a position to hold eligible own funds to cover the Solvency Capital Requirement (SCR) set out in the law;
iv) evidence that it will be in a position to hold eligible basic own funds to cover the MCR; and
v) evidence that it will be in a position to have in place an effective system of governance in accordance with the applicable legal provisions, analogous with the nature, scale and complexity of the operations and management of the company.

Additional requirements are set out for life insurance in relation to the solvency of the applicant.

The licence is issued in relation to specific classes of risk. If an undertaking wishes to expand its operations beyond the classes for which it has been authorised, an extension of the licence is required. In order to obtain an extension, the insurer must submit to the BoG a scheme of operations together with evidence that it holds eligible own funds in order to cover the SCR and MCR.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Insurance companies who have their registered seat within the European Economic Area (EEA) may freely operate in Greece on the basis of freedom of services, without an establishment, provided that a notification is made to the BoG through the regulatory authority of their home Member State. Insurers may also establish a branch in Greece, under the framework of freedom of establishment, in order to underwrite insurance.

Freedom of services and freedom of establishment do not apply to insurers having their registered seat outside the EU/EEA, who may only provide services in Greece if they are authorised by the BoG and they establish a local branch or agency.

EU/EEA-based insurers are required to comply with the legal provisions established for the protection of the 'general good'.

The operation of insurers who are headquartered in third countries (non-EU/EEA) is fully regulated by the BoG, and such insurers need to establish a locally licensed subsidiary in order to write business (please see question 1.2 above).

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

In general, insurance contracts cannot deviate from Greek insurance law to the extent that such deviation would result in limiting the rights of the policyholder, the insured and/or the beneficiary of the policy conferred to him/her under the applicable insurance law provisions.

The restriction applies without prejudice to the legal provisions expressly permitting such limitation of rights.

However, there is no restriction to parties' freedom of contract in case of insurance covering transit of goods, credit insurance, guarantee insurance, as well as marine and aviation insurance, all of which are classified as large risks under Greek and EU law.

1.5 Are companies permitted to indemnify directors and officers under local company law?

D&O insurance is permitted under Greek law, to the extent that no coverage is provided in case of the malicious acts of directors and officers.

Furthermore, D&O insurance cannot cover administrative sanctions imposed by public authorities or monetary sanctions imposed within the context of criminal proceedings.

1.6 Are there any forms of compulsory insurance?

In Greece, compulsory insurance is related to third-party liability risks.

The main type of compulsory insurance is motor vehicle liability insurance.

In addition, liability of the following service providers must, among others, also be mandatorily covered with insurance:

i) road, railway and air carriers;
ii) packaged travel organisers;
iii) distributors of insurance products;
iv) entities offering investment services;
v) waste management companies in relation to environmental damage; and
vi) road assistance providers, etc.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

Greek substantive law in general follows the direction of EU law in order to achieve a balance of the interests of insurers and insureds. Particularly in relation to risks which are not classified as large risks, the insureds enjoy a variety of rights, including the right to nullify the conclusion of the contract in case the policy deviates from the terms requested by the policyholder in his/her application. In addition, in case of non-disclosure which is not due to the malice of the policyholder, the insurer cannot avoid the coverage but has only the rights to terminate the contract and, under certain circumstances, to reduce the premium. If non-disclosure is due to the fact that the policyholder answered a questionnaire provided by the insurer and failed to disclose facts which were not included in such questionnaire, the insurer does not have any claim against the policyholder.

In view of the above, Greek law takes into account the interests of both parties, but also recognises that the policyholder is the vulnerable party in the transactional relationship.

2.2 Can a third party bring a direct action against an insurer?

In case of compulsory motor liability insurance, the third injured party may bring a claim directly against the insurer. According to Article 26 of Law 2496/1997, this right applies to all types of liability insurance up to the minimum amount of compulsory insurance.

Under the provisions of the Greek Code of Civil Procedure, a creditor may bring an action against the debtors of their own debtor if the latter fails to claim his/her own rights. Therefore, in case any third party has a claim against the policyholder and the latter fails to exercise his/her rights against the insurer, such third party may bring a claim against the insurer on behalf of the policyholder.

2.3 Can an insured bring a direct action against a reinsurer?

Greek law does not confer any rights to third parties to bring a direct action against a reinsurer. The above analysis in relation to the right of a creditor to bring an action against the debtors of their own debtor may also apply in this case.

The direct action could also be possible through the operation of a relevant provision in the reinsurance policy for direct claims, such as where the so-called 'cut-through' clause is included.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

In general, Greek law provides that in case the policyholder has failed to disclose to the insurer information necessary for the proper assessment of the risk to be insured, the insurer may terminate the contract or ask for the amendment thereof but not to avoid the policy, except if the misrepresentation or non-disclosure is due to malice on the part of the policyholder.

If the misrepresentation or non-disclosure in relation to the risk covered under the insurance is intentional, the insurer may terminate the contract within one (1) month as of the time when the insurer became aware of the breach; and in the event that the insured risk occurs within that period, the insurer shall not be liable to pay any insurance compensation to the insured. In addition, the policyholder is obliged to compensate the insurer for any loss suffered due to the breach of the contractual obligation.

According to the law, the policyholder must notify the insurer of the occurrence of the insured event within eight (8) days of becoming aware of it, and disclose all relevant information requested by the insurer. In case of intentional non-disclosure, the insurer may terminate the contract.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

Prior to the conclusion of the contract, the policyholder is obliged to disclose any information material to the risk. However, if the insurer has posed specific questions to the policyholder in relation to the insured risk, it is deemed that only those questions are material.

After the conclusion of the contract, the policyholder is obliged to disclose to the insurer any information or circumstances which may significantly increase the risk, if such increase would lead the insurer not to conclude the contract had they known such circumstances or to conclude it under different terms.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

The insurer is, by operation of law, subrogated to all substantive and procedural rights of the policyholder against a third party which is liable against it.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

Commercial insurance disputes are subject to the jurisdiction of Civil Courts in the absence of special courts competent for commercial disputes.

In Greece, there are two levels of jurisdiction: (i) the First Instance Court; and (ii) the Appeal Court. Cassation appeals against the judgment of the Courts of Appeal ('*anairesi*') are heard before the Supreme Court of Greece ('*Areios Pagos*'), which acts as a cassation Court.

The First Instance Court in civil (and commercial) matters is divided into: (i) the Magistrates' Courts; (ii) the Single-member Court of First Instance; and (iii) the Multi-member Court of First Instance.

The procedure before the Greek Civil Courts is regulated by the Greek Code of Civil Procedure (GCCP).

The competence of the courts is determined on the basis of two elements: local competence; and monetary competence. In monetary disputes, magistrates' courts hear claims of up to €20,000; single-member courts hear claims between €20,001 and €250,000; and multi-member courts hear all claims exceeding €250,001.

Civil courts are organised following the division of disputes on the basis of their value. Depending on its value, the dispute shall be subject to the: (a) Magistrates' Court (for disputes of up to €20,000); (b) Single-Member Court of First Instance (for disputes of €20,001 and up to €250,000); and (c) Multi-Member Court of First Instance (for disputes of over €250,001).

A trial before a jury is not applicable for the adjudication of commercial or civil disputes; it is solely applicable regarding the hearing of specific felonies before the Criminal Courts.

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

The applicant (plaintiff) must pay a court fee in order to file its application before the Court; this fee varies depending on the competent Court and the subject-matter (amount) of the application.

For representation before the Court during the hearing of the case and for the filing of their briefs, both the applicant and the defendant must pay a court fee. This court fee also varies, depending on the competent Court and the subject-matter (amount) of the application.

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

Through the adoption of Law 4335/2015 in August 2015, which came into effect on 1 January 2016, the Greek parliament enacted significant amendments to the GCCP in order to accelerate the process for the rendering of justice in civil court proceedings (it is an undoubted fact that the speed of rendering justice in Greece was slow compared to other EU Member States). In this respect, the previous partially oral proceedings of the 'ordinary' proceedings have now been replaced by a written procedure.

Following the filing of the claim, both the plaintiff and the defendant have a timeframe of 100 days to file their pleadings and evidential material with the secretariat (130 days if the defendant resides abroad). Thereafter, the parties have a deadline of 15 days to prepare and file their addendum. The case is then considered 'closed'.

Following this date, the secretariat appoints the case to a judge for review and must set a trial date of no more than 30 days later (however, in practice, the setting of a trial date usually exceeds this designated timeframe, mostly due to the backlog of cases before the Civil Courts, and is usually expected within 10 to 12 months and four to six months from the date the case is considered closed for the Single-Member and Multi-Member Court of First Instance, respectively). It should be noted that the 'trial' that takes place is just a typical formality in the sense that no advocacy takes place, nor are witnesses examined. A judgment of the First Instance Court is then expected within six to eight months from the trial date (i.e. within one-and-half to two years from the filing of the claim).

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

Pursuant to the GCCP, civil court proceedings depend on the initiative of the litigant parties (as opposed to criminal court proceedings, which are generally based on the initiative of the Court). As a result, the Court's scope is in great part limited to the content of the statements and allegations of the litigant parties (e.g. the Court may not contest the essential merits of the lawsuit if the defendant has already acknowledged them as true, since such an acknowledgment is binding for the Court – however, this is not the case with matters of law).

Pursuant to Article 245 of the GCCP, the Court, on its own discretion, may order anything that may contribute to the adjudication of the dispute, including the disclosure/discovery and inspection of documents.

Furthermore, pursuant to Article 450 of the GCCP, each litigant party is obliged to adduce before the Court the documentary evidence invoked by the former (par. 1), while each litigant party and any third person is obliged to adduce before the Court all documents related to the case in dispute, except if there are justified grounds on the basis of which the former may refuse to adduce documents (par. 2).

However, in practice, Greek Courts mostly rely on motions filed by the litigant parties, rather than acting *ex officio*.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

As mentioned above (see question 4.1), pursuant to Article 450 of the GCCP, each litigant party is obliged to adduce before the Court the documentary evidence invoked by the former (par. 1), while each litigant party and any third person is obliged to adduce before the Court all documents related to the case in dispute, except if there are justified grounds on the basis of which the former may refuse to adduce this document (par. 2). These justified grounds include legal professional privilege and confidentiality. Therefore, documents described under (a) and (b) may be withheld by litigant parties.

As per the documents described under (c), settlement negotiations/attempts are mostly extrajudicial and therefore a tacit confidentiality obligation is not stipulated.

However, with regards to the mediation process, as per Law 4640/2019, it is explicitly stipulated that the mediation process be confidential, regardless of whether this process was successful or not.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

Pursuant to the GCCP, as amended by Law 4335/2015, the previous partially oral proceedings of the 'ordinary proceedings' have been replaced by a wholly written procedure. Witnesses are not orally examined, but only make a written statement (sworn affidavit) before a notary public or the Magistrates' Court within the 100 days' timeframe for the filing of the pleadings and evidential material.

The Court may order the setting of a new trial date, during which one witness for each litigant party may be examined, if the Court – in its absolute discretion– deems that the examination of witnesses is necessary. To this day, Greek Courts have rarely ordered the oral examination of witnesses in 'ordinary proceedings'.

4.4 Is evidence from witnesses allowed even if they are not present?

Yes, through affidavits obtained in the way described above. At the hearing, as explained above (see questions 3.2 and 4.3), no oral examination of witnesses takes place (in 'ordinary proceedings') unless the Court deems it necessary; in which case, it will order the oral examination of witnesses through an interim decision.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

Expert reports or expert witnesses and expert opinions are allowed in civil litigation and often play a significant role. Such types of evidence can either be ordered by the Court through the appointment of an expert from the Court's lists (or, if there is no such list, it may appoint any person it considers capable as an expert witness) or may even be produced to the Court directly by the parties (as private expertise/a party-appointed expert).

There are restrictions regarding the persons who may be called as expert witnesses, mostly regarding their criminal record and professional status.

Pursuant to Article 391 of the GCCP, each litigant party may appoint a party-appointed expert if the Court appoints an expert witness.

Irrespective of whether the expert report was ordered by the Court or produced by the parties, the Court will assess it freely and may either adopt the report and rely on its findings, or reject it.

4.6 What sort of interim remedies are available from the courts?

In disputes involving an element of urgency, or in order to avert an imminent danger, the Court can order interim remedies, such as the granting of a guarantee, the inscription of a pre-notation of mortgage, the seizure of the assets of the defendant, injunctions (i.e. an order to abstain from performing a certain action), the application for the production of certain documents, etc.

The main criterion in order to be successful in the granting of interim remedies is to demonstrate to the Court that there exists an element of urgency or a necessity to avert an imminent danger. Typically, this applies in cases where a creditor knows that his debtor is disposing of his assets (movable and/or immovable property) and has reasons to believe that the overdue debt will not be eventually satisfied. The creditor has the right to file a petition to the Court and seek one or more of the interim measures mentioned above, i.e. the temporary seizure of the assets of the debtor. If the petition is successful and the remedy is granted, the sale of the assets can be blocked.

However, interim measures are, obviously, temporary by their nature. If the Judge of the Safety Measures orders so, the petitioner must file his 'ordinary' lawsuit against the defendant at the very latest 30 days following the granting of the remedy. Failure to do so means that the remedy awarded is *ex officio* withdrawn.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

The defeated party has the right to file an appeal before the Court of Appeal against the decision of a Court of First Instance, with the exception of the decisions of Magistrates' Courts when following the procedure of 'small-claims' (i.e. regarding claims with a subject-matter of up to €5,000).

An appeal may be based either on grounds related to the factual background of the case (namely, incorrect appraisal of the facts by the First Instance Court) or to matters of law (incorrect application of the applicable law by the First Instance Court).

The judgment of the Court of Appeal is subject to a judicial review before the Supreme Court (*'Areios Pagos'*) solely on matters of law (the factual background of the judgment in review before the Supreme Court may not be contested), following an application of the defeated party.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Unless otherwise agreed by the parties, a statutory interest is usually awarded by the Courts provided that the plaintiff has filed a relevant application in its lawsuit.

The current rate of interest is 7.25%; any higher rate agreed by the contractual parties is deemed invalid.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

As a general rule, pursuant to the GCCP, the defeated party must bear the costs of the winning party (including court fees – fees for the filing of the claim, the participation in court proceedings and the filing of pleadings – attorney fees, and bailiff fees).

A series of exceptions to the above rule are provided under Articles 176–192 of the GCCP.

An offer to settlement prior to trial does not affect the allocation of costs.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

All forms of Alternative Dispute Resolution are voluntary pursuant to Greek law and may not be initiated without the consent of all litigant parties. The Court must prompt, but may not compel, the litigant parties to engage in mediation (as stipulated by Articles 116a and 214c of the GCCP).

However, it should be noted that, pursuant to a very recent enactment (Law 4640/2019), before the initiation of certain

civil proceedings (namely, i) family law disputes, and ii) disputes subject to the 'ordinary proceedings' for claims exceeding €30,000, as of 15 March 2020) the parties must take part in a mandatory 'initial mediation session'. This session is a meeting of the parties before a mediator, which must take place prior to the filing of the claim before the competent Court, during which the parties are informed by the mediator of the mediation process, its main principles and of the possibility of an extrajudicial settlement of the dispute. However, this mandatory 'initial mediation session' is actually a pre-mediation process, while the engagement of the parties in a mediation process remains voluntary. Accordingly, after this session, the parties may agree to subject their dispute to mediation.

This enactment entered into force as of 15 January 2020 for family law disputes and shall enter into force as of 15 March 2020 for disputes subject to 'ordinary proceedings'.

4.11 If a party refuses to a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

With the exception of the mandatory 'initial mediation session' introduced by Law 4640/2019, which precedes the initiation of the mediation process (as described under question 4.10), the litigant parties are not obliged to take part in a mediation process (or other form of Alternative Dispute Resolution); therefore, no consequences are stipulated under Greek law.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

Greek law provides for two different sets of rules, applicable to domestic (Article 867 *et seq.* of the GCCP) and international arbitration (Law 2753/1999).

The sole disputes exempted from the scope of arbitration (deemed as non-arbitrable/not subject to arbitration) are labour law disputes and disputes of which the subject-matter may not be freely disposed by the parties (mainly family law disputes).

Arbitration clauses are fully enforceable under Greek law before the national courts. Civil Courts do not intervene with arbitration proceedings. In case the plaintiff chooses to bring before the national courts a dispute falling within the scope of an arbitration agreement, the Court is bound (if the defendant invokes the arbitration clause at the first hearings of the case) to order the stay of the proceedings and submit the case to arbitration.

The sole involvement of Civil Courts in the arbitration procedure regards the challenge of the arbitral award (as mentioned at question 5.6).

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

Under the provisions of the GCCP on arbitration, arbitration clauses must be concluded in writing, upon penalty of nullity. However, if the defendant does not challenge the competence of the arbitral tribunal, the lack of written form is resolved.

Greek law does not stipulate a specific form of words for the conclusion of an arbitration clause. The requirement of written form is considered met even in case of the exchange of faxes, emails and telegrams. Arbitration clauses concerning disputes that might arise in the future (which is, in practice, the most usual case) should define in detail the legal relations that fall within their scope of application. Tort claims, unjust enrichment claims and other quasi-tortious claims are, in principle, deemed to fall within the scope of an arbitration clause incorporated in a contract, upon the condition that they derive from the same factual background as the breach of contract (pursuant to the case law of the Greek Supreme Court). Therefore, it is preferable that the parties detail the legal relationships that fall within the scope of application of the arbitration clause.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

Arbitration clauses are fully enforceable under Greek law before the national courts.

Greek law on consumer protection also declares null and void any arbitration clause incorporated to a consumer contract that was not concluded after specific and detailed negotiation, deeming such clause as an 'unfair general business clause'.

Of course, this is not the case if the arbitration clause constitutes an independent agreement and is not incorporated in the B2C agreement.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

In domestic arbitration, in spite of the existence of a valid arbitration (domestic or international) clause, Greek courts remain competent regarding applications for interim measures.

In international arbitration, Article 17 of Law 2753/1999 provides for the ability on the part of the arbitral Court to order any interim measure necessary regarding the subject-matter, following an application on the part of one of the arbitral parties.

For examples of interim measures, please see our detailed analysis at question 4.6 herein.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

In both domestic (Article 892 of the GCCP) and international (Article 31 par. 2 of Greek Law 2753/1999) arbitration, it is stipulated that the arbitral court must give detailed reasons for its award, without prejudice to the arbitral parties agreeing otherwise.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

Under both Law 2753/1999 and the GCCP, the parties of arbitration proceedings are not entitled to appeal before the Civil Courts. It is left to their discretionary power to agree to a further recourse against the award before another arbitral tribunal; however, this is an option rarely endorsed in practice.

Under Article 897 of the GCCP (domestic arbitration) and Article 34 par. 2 of Law 2753/1999 (international arbitration), a party is entitled to challenge the arbitral award before the Court of Appeal of the place of the arbitral award's issuance, within a period of 90 days after the service of the award and on following grounds enumerated in the said provisions.

Moreover, any interested party is also entitled to file a lawsuit before the Court of Appeal of the place where the arbitral award was issued, seeking declaratory relief that the arbitral award is null and void on the following grounds, set by Article 901 of the GCCP: (a) if an arbitration agreement was not concluded; (b) if the award was rendered on a subject-matter that could not be submitted to arbitration; or (c) if the award was rendered following arbitration proceedings conducted against a non-existent natural person or legal entity.

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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

The Insurance Regulatory and Development Authority of India (IRDAI) governs all insurance and reinsurance companies in India.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

Insurance business in India can only be undertaken by an Indian insurance company or a reinsurance company/reinsurance branch office that is registered with the IRDAI. Insurers registered in India can undertake life insurance business, general insurance business, and/or health insurance business in accordance with the terms of their registration. Reinsurance companies/reinsurance branches can undertake reinsurance business in accordance with the terms of their registration.

In order to secure registration, an applicant must, along with other formalities, have a minimum paid-up equity capital of Rs. 1 billion (*circa* US$ 13.6 million) in the case of life, general and health insurers, Rs. 2 billion (*circa* US$ 27.3 million) in the case of a reinsurer and a minimum assigned capital of Rs. 1 billion (*circa* US$ 13.6 million) in the case of a reinsurance branch. Moreover, foreign investment in Indian insurance companies is permitted up to 49%, and up to 100% for Indian insurance intermediaries.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Overseas, non-admitted insurers cannot write direct insurance business in India. As a general rule, the purchasing of insurance from overseas insurers by Indian residents is prohibited in India, unless the purchase falls within the general or specific approval of the Reserve Bank of India (RBI).

However, Indian residents are permitted to purchase health insurance policies from overseas insurers provided the aggregate remittance (including premium) does not exceed the prescribed limit. Indian residents are also permitted to purchase insurance policies in respect of any property in India or any ship, vessel or aircraft registered in India with an insurer whose principal place of business is outside India only with IRDAI's permission.

Non-admitted insurers who have registered with IRDAI as Cross Border Reinsurers can write reinsurance of Indian risks from overseas in accordance with the IRDAI's regulations on the reinsurance of life and general insurance business.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

Indian insurers are given the liberty to decide their own policy terms and conditions, but insurance products can only be offered if the terms and conditions have been approved by the IRDAI and/or filed with the IRDAI under the applicable product filing procedures.

Further, the extraneous rules that will impact policy terms are: (a) the Insurance Act 1938 which gives policyholders a right to override contrary policy terms in favour of Indian law and jurisdiction; and (b) Indian policyholders cannot be stopped from approaching Consumer Courts.

1.5 Are companies permitted to indemnify directors and officers under local company law?

Under the Companies Act 2013, there is no ban on companies indemnifying directors and officers. The premium paid on such insurance is not to be treated as the remuneration payable to the officer. However, if such a person is proved to be guilty of negligence, default, misfeasance, breach of duty or breach in relation to the company, the premium paid on insurance will be treated as part of the remuneration.

1.6 Are there any forms of compulsory insurance?

The following insurance covers are examples of those that are compulsory by central law:

- Carriage by Air Act 1972: requires parties to maintain adequate insurance covering any liabilities that may arise.
- Companies Act 2013: insurance of deposits accepted by companies.

- Deposit Insurance and Credit Guarantee Corporation Act 1961: insurance taken by the banks functioning in India (DICGC is an RBI subsidiary).
- Employees State Insurance Act 1948: for insurance to employees in case of sickness, maternity and employment injury.
- Inland Vessels Act 1917: insurance of mechanically propelled vessels.
- IRDAI (Insurance Brokers) Regulations 2018, IRDA (Registration of Corporate Agents) Regulations 2015; IRDA (Revised Guidelines on Insurance Repositories and Electronic Issuance of Insurance Policies) 2015; IRDA (Registration of Insurance Marketing Firm) Regulations 2015; and IRDA (Insurance Web Aggregators) Regulations 2017: professional indemnity insurance covering errors and omission, dishonesty and fraudulent acts by employees and liability arising from loss of documents or property.
- Marine Insurance Act 1963: for marine adventures.
- Merchant Shipping Act 1958: on the lives of crew members.
- Motor Vehicles Act 1988: compulsory third-party liability insurance.
- Payment of Gratuity Act 1972: insurance for gratuity payments to employees.
- Personal Injuries (Compensation Insurance) Act 1963: employer's liability for workers sustaining injuries.
- Persons with Disabilities (Equal Opportunities, Protection of Rights and full participation) Act 1995: insurance scheme for employees with disabilities.
- Public Liability Insurance Act 1991: accidental cover for those handling hazardous substances and environmental issues.
- War Injuries (Compensation Insurance) Act 1943: for workmen sustaining injury in war.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

The statutory framework in India favours insurers more than insureds, but the regulatory framework and the interpretation of applicable law is possibly more favourable to the insureds. For example:

- The Insurance Act 1938 restricts the ability of insurers to call a life insurance policy into question after three years on any grounds (including fraud).
- The IRDAI (Protection of Policyholders' Interests) Regulations 2017 provide, amongst other obligations, that insurers follow certain practices at the point of sale of the policy so that: the insured can understand its terms properly; they have proper procedures and mechanisms to hear any grievances of the insured; they clearly state the policy terms (such as warranties, conditions, insured's obligations, cancellation provisions, etc.); they follow certain claims procedures to expeditiously process claims; and pay interest at the rate of 2% above the bank rate fixed by the RBI at the beginning of the financial year in which the claim has fallen due, in cases of delayed payment, etc.
- This payment of penal interest has been recently extended from delay in settlement of claims to delay in settlement of other payments made to the policyholders, including payments with respect to maturity, survival benefit and annuities, free look cancellation, surrender, withdrawal, request for refund of proposal deposit, and refund of outstanding proposal deposit.
- The IRDAI (Health Insurance) Regulations 2016 permit general insurers and health insurers to decline the renewal of a health insurance policy only on grounds of fraud, moral hazard, misrepresentation or non-cooperation by the insured. Renewal cannot be denied on other grounds; namely, an adverse claims history.
- On 20 September 2011, the IRDAI issued certain guidelines for condoning delay in claim intimation and submission of documents in relation to certain types of policies and policyholders to the effect that insurers should not reject claims on the basis of delayed notification if the delay was unavoidable, unless the insurer is satisfied that the claim would have been rejected in any event.
- The IRDAI (Health Insurance) Regulations 2016 have also stipulated that all health insurance policies offer portability benefits whereby policyholders are given credit for the waiting period already served under previous health insurance policies with that insurer or any other Indian insurer.
- The IRDAI has issued standard form definitions for health insurance and critical illness policies.
- The IRDAI has directed insurers to introduce provisions for covering treatment of mental illness on the same basis as is available for the treatment of physical illness.

On 27 September 2019, the IRDAI issued guidelines on the standardisation of exclusions in health insurance policies, pursuant to which, *inter alia*, certain exclusions are prohibited from being incorporated in health insurance policies and insurers are required to use the standardised wordings for the exclusions as stipulated therein. Further, the IRDAI has also clarified that insurers are required to comply with the Circular of 8 October 2018, which require insurers to not discriminate against the insured on account of HIV/AIDS unless the actuarial studies support denial of health insurance coverage. There is one other feature of the Indian insurance sector that is worth mentioning. This concerns the government-owned insurers, who are considered an instrument of the State and are thus expected to act justly, fairly, and reasonably.

So far as the Court's interpretation of the policy terms and conditions is concerned, we have seen a trend towards strict interpretation. The Supreme Court has held that the terms of the policy have to be construed and applied strictly without altering the nature of the contract, as the same may adversely affect the interests of the parties. The clauses of an insurance policy have to be read as they are and consequently, the terms of the policy that fix the responsibility of the Insurance Company must also be read strictly.

2.2 Can a third party bring a direct action against an insurer?

As a general rule, Indian law recognises the principle of privity of contract and thus a third party should not be able to bring a direct action against an insurer. Motor cases, however, are the exception to the norm:

- It is common practice for third parties to name the defendant's insurer in motor accident-related proceedings.
- The Motor Vehicles Act 1988 makes it mandatory for all vehicles to have third-party insurance or third-party liability cover and 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 Motor Vehicles Act empowers the Motor Accident 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.

2.3 Can an insured bring a direct action against a reinsurer?

We do not believe that a direct action can be brought against a reinsurer because Indian courts have traditionally enforced the principle of privity of contract, and there are cases where the courts have refused to join an insurance company as a party on grounds that there is no privity of contract between the Claimant and the Insurer. This has been the position of the Supreme Court and other High Courts and is likely to apply in case of an insured's direct actions against a reinsurer as well. However, this does not stop the insured from trying to join a reinsurer in proceedings should it wish to do so.

The other exception where an insured may bring a direct action against a reinsurer would be if the contractual arrangements permitted it, for example, through a "cut through" clause, although no such clause has been tested before the Indian Courts so far.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

Indian law mandates that a contract of insurance be one of utmost good faith. Insurers are therefore entitled to a fair presentation of the risk prior to inception and if there has been a misrepresentation or non-disclosure of a material fact, the insurer can avoid the policy *ab initio*. Unless the misrepresentation or non-disclosure was fraudulent, the premium must be returned to the policyholder. For life insurance policies, however, the policy cannot be called into question on any grounds (including fraud) after the completion of three years from the date of the issuance or the revival of the policy.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

The insured is required to disclose all material facts whether or not a specific question is asked, but often what is material is guided by the information and documents sought in the proposal form. The Marine Insurance Act 1963 requires that the insured makes a full and frank disclosure prior to inception. The Supreme Court has said that this is to be done through the proposal form. The IRDAI (Protection of Policyholders' Interests) Regulations 2017 also imposes an obligation on the insured to disclose all material information.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

The right to subrogation is recognised under law. No separate contractual clause is required to trigger the right to subrogation, but as a matter of practice, policies do contain subrogation clauses and insurers will frequently obtain "subrogation letters" and an "assignment" of the third-party claim from the insured. The IRDAI (Protection of Policyholders' Interests) Regulations 2017 also obligate an insured to assist its insurer in recovery proceedings, if the insurer so requires.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

The insured has an option to approach (i) a Court of Civil Jurisdiction, or (if the dispute qualifies) (ii) a Consumer Court, or (iii) a Commercial Court, whereas the insurer can only approach a Civil Court or a Commercial Court for recourse. All the three Courts have pecuniary and territorial jurisdiction, so actions brought before them need to be initiated keeping in mind the geographical location of the defendant/cause of action and also the value of the claim.

The Civil Court and Consumer Courts have a three-tiered hierarchy. The Consumer Courts usually follow (in ascending order) District, State and National Consumer Dispute Redressal Commission. There are 629 District Consumer Dispute Redressal Commissions, which can accept claims up to a value of Rs. 10 million (*circa* US$ 140,000) and 35 State Consumer Dispute Redressal Commission that can accept claims over Rs. 10 million (*circa* US$ 140,000) and up to a value of Rs. 100 million (*circa* US$ 1,400,500) and also appeals against the order of the District Commissions. At the apex lies the National Consumer Dispute Redressal Commission which accepts matters with a value exceeding Rs. 100 million (*circa* US$ 1,400,500) and appeals against the decisions of the State Commissions. An appeal from the decision of the National Commission lies before the Supreme Court of India.

The broad ascending hierarchy of the Civil Courts too is similar. This comprises *circa* 600 District Courts, 24 High Courts and the Supreme Court (highest court in India). Amongst 24 High Courts, four are termed Charter High Courts (i.e. Calcutta, Madras, Bombay and Delhi High Courts) which have original jurisdiction to accept and hear matters which fall above certain pecuniary thresholds, exempting the District Courts from hearing these matters due to a higher pecuniary limit. The rest of the District Courts have unlimited pecuniary jurisdiction, as do the competent Courts of first instance to hear any insurance dispute falling under their territorial jurisdiction. There is no right to a hearing before a jury in India, as the jury system has been abolished and the cases are heard and decided by the judges.

Pursuant to the passing of the Commercial Courts Act 2015, most of the state governments and/or the Chief Justices of various High Courts have designated judges at the District Court and the High Court respectively to adjudicate commercial disputes. The recent amendment to the Commercial Courts Act 2015 has reduced and fixed the minimum pecuniary threshold of commercial disputes at Rs. 300,000 (*circa* US$ 4,125). The amendment also mandates compulsory mediation before a suit is instituted, save such cases where urgent relief is required to be obtained. Proper mechanisms facilitating mediation, however, are yet to be set up. Appeals against the orders of the Commercial Courts of first instance lie before the Commercial Appellate Courts or the Commercial Appellate Division of the concerned High Court (as the case may be), and the Commercial Courts Act 2015 does not allow for any further appeals from the orders of either the Commercial Appellate Court or the Commercial Appellate Division of a High Court.

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

The Court fee is payable to commence a commercial insurance dispute in the nature of a suit. The Court Fee is calculated on an *ad valorem* basis and differs from jurisdiction to jurisdiction.

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

Indian litigation is slow and time-consuming. This is attributed to the reported pendency of around 30 million cases presently in Courts across India. Usually it would take the Court of first instance a minimum of four to six years to reach a decision if both the parties are cooperative. In the case of a strongly contested litigation, the period may exceed eight to 10 years. An appeal from such order would take another five years or so to resolve.

The Commercial Courts Act 2015 requires the Commercial Courts to hold a Case Management Hearing where it may pass orders to, *inter alia*, fix the schedule for filing of evidence, filing written arguments and oral arguments. The Commercial Courts are required to ensure that the arguments are closed not later than six months from the date of the Case Management Hearing. The Commercial Court has to pronounce its judgment within 90 days from the conclusion of arguments.

The Commercial Courts Act 2015 also states that the appellate Courts must endeavour to dispose of appeals filed before it within a period of six months. Of late, the Courts have increasingly mandated strict compliance with statutory timelines in commercial litigation and have even forfeited rights of the non-compliant parties. Our experience regarding the time taken by a Commercial Court to adjudicate upon a dispute has not been uniform. In some instances, disputes have been adjudicated quickly, whereas in other instances, matters have progressed at the usual pace seen in the jurisdiction.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

The power of discovery or summoning of documents is governed by the Code of Civil Procedure 1908 (CPC), as amended by the Commercial Courts Act 2015. The Courts, on a motion by either of the parties to a litigation or of its own accord, direct the parties to summon documents which relate to any matter in the dispute at hand. The relevance of the documents sought under the discovery would depend on the issue at hand. On a motion made for discovery of documents, the Court would direct the party who has made reference to produce the document, to give the same for inspection to the requested party or to answer its inability to produce such document. The Court can also impose costs against a party refusing to produce such documents or for not giving sufficient reasons for non-production of the document.

Non-compliance with an order for discovery of documents can lead to an adverse inference or even dismissal of the action or defence as may be.

Non-parties to the action

The CPC allows any party who would be in possession of documents to produce documents that are material to the dispute even if the person is not arrayed as a party to the ongoing litigation.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

The provisions under the Indian Evidence Act 1872 protect communications between a lawyer and his client. Unless an express permission is given by the client, the lawyer is estopped from disclosing such communications unless the same is in furtherance of an illegal purpose. The Indian Evidence Act also specifies that a person cannot be compelled to reveal information between that person and his/her lawyer unless the same is produced with his/her consent and is required to establish his/her testimony.

The Supreme Court and various High Courts in India have issued guidelines recognising the privilege of communications between a lawyer and his clients over documents made in furtherance of litigation. The privilege attributed to these documents is similar to the position in English law.

In terms of documents prepared in the course of settlement negotiations/attempts, it is common for the parties to mark them "without prejudice", but these are not expressly protected as privileged documents under the Indian Evidence Act and as a matter of practice, are commonly produced before Courts.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

Yes, the Courts have the power to call for witnesses within their jurisdiction to give evidence during the litigation before the final orders are reserved. Any non-compliance with the Court summons can even lead to arrest of the person evading such direction from the Court. The Court may not compel a person who is not a resident within its jurisdiction to be present for giving evidence. In such cases, the CPC recognises the Court's power to issue commissions or interrogatories to the parties whose evidence cannot be obtained easily to determine the issue at hand.

4.4 Is evidence from witnesses allowed even if they are not present?

As per the CPC, the examination-in-chief of a witness is required to be on an affidavit, but his attendance is necessary for the purposes of cross-examination. In the case that the witness is unable to appear before the Court, the Court may, in compliance with the provisions of the CPC, issue commissions or interrogatories to address this. The Supreme Court has even permitted cross-examinations to be conducted through video conferencing in cases where witnesses, for reasons beyond their control, are unable to appear before the Court; for example, an infirm person residing outside India.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

The Indian Evidence Act allows the Court to hear expert evidence on matters of foreign law, science or art. Appointment of an expert is usually on an application filed by a party asking the Court to permit that party to call an expert to give evidence, or the Court may also decide to appoint its own expert. The report/statement filed by the expert will not automatically

become evidence and an expert must be examined as a witness. The contesting party will then have the opportunity to controvert his findings during cross-examination, or even file the evidence of its own expert witness.

4.6 What sort of interim remedies are available from the courts?

The CPC provides for a wide variety of discretionary interim remedies which may be substantive or procedural. In terms of substantive remedies, temporary injunctions and interlocutory orders allow the Court to stop the commission of an act. Further, mandatory injunctions, available under the Specific Relief Act 1963, allow the Court to ask a party to carry out a positive and overt act. In other words, a Court may use an injunction to direct a party to act or restrain it from acting or omitting to act to the detriment of the contesting party. The amended Commercial Courts Act 2015 allows a party seeking an urgent interim relief to bypass the mandatory 'pre-institution mediation' and approach the Court directly.

In addition, a Court may also pass directions for a party to direct a deposit of an amount of money or provide surety in the Court in order to secure the interests of the contesting party, especially where that defaulting party is attempting to defeat a possible award or decree against it. This can be done by way of, *inter alia*, fixed deposits, bank guarantees, demand drafts or a simple direction that a party shall not dispose of its assets during the pendency of the litigation.

These remedies are obviously discretionary and a grant of such a remedy is based on various factors which need to be satisfied and proved before the Court.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

Appeal against decisions of the Court of first instance

The Commercial Courts Act 2015 allows an appeal only in specified circumstances. This right will not be available when the decision of the Court is with the consent of the parties. The first appeal can be made on any ground of error either legally, factually or procedurally, by the Court of first instance. However, no appeal is allowed from any interlocutory order of the Commercial Court and this may be taken as grounds while appealing against the final decree of the Court.

Subsequent stages of appeal

A subsequent appeal from a first appeal is only available in specific cases where there is a substantial question of law involved. Further, no second appeal is available in suits for recovery of an amount which is less than Rs. 25,000 (*circa* US$ 340). There are some High Courts in the country which are the Courts of first instance where the subject matter of the proceedings is more than a fixed amount. These are the Calcutta High Court, Madras High Court, Bombay High Court and the Delhi High Court. No second appeal is available from a decision of these Courts. The first appeal from a decision of a single judge of these Courts lies to a division bench of the same Court. In cases where an Appeal is not provided for and is not specifically barred by any statute, a Letters Patent Appeal is available.

Appeal to the Supreme Court

In civil disputes, the usual sequence is that the decision of a District Court is appealable before a single judge of the High Court. The single judge's decision can be appealed before a division bench of the High Court. In both these cases, a final stage of appeal is provided under the constitution to the Supreme Court for which prior leave of the Supreme Court is required.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

A Court has the discretion to award interest from the date when the cause of action arose to the date of actual payment of the claim. A rate of 9% to 12% is currently applied by the Courts. However, an arbitral award will carry interest at a rate which is 2% higher than the highest prevailing rate of interest on deposits, unless the Tribunal says otherwise.

The Supreme Court has, in the recent case of *Vedanta v. Shenzen Shandong*, laid out guidelines to ensure reasonable exercise of the discretion of arbitral tribunals to award interest on claims.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

The Court may award the successful party its costs of pursuing litigation, but such an award is entirely at the Court's discretion. It is common for costs awards to be made in favour of a successful party, but the principles of awarding costs are archaic and the level of costs awarded is rarely sufficient to cover the actual costs incurred. In a recent decision, while referring to a statutory upper limit of Rs. 3,000 (*circa* US$ 40) for costs awards in cases of vexatious litigation, the Supreme Court suggested that the Parliament should consider raising the limit to Rs. 100,000 (*circa* US$ 1,375). In view of the low level of costs awarded, there are, as yet, no material advantages in making a pre-trial offer in civil litigation and Calderbank letters are hardly, if ever, used.

The Commercial Courts Act 2015 has expanded the definition of costs and the factors to be taken into account by the Court while awarding costs. Costs would now include the fees and expenses of the witnesses, the legal fees and any other expenses incurred in connection with the proceedings. Further, the Commercial Courts are not bound by the aforesaid statutory upper limit for costs awards in cases of vexatious litigation.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

Section 89 of the CPC sets out the provision for settlement of disputes outside the Court, keeping in mind the delay in legal procedures and the limited number of judges available. It has now become imperative for the Courts to encourage, though not compel, parties to explore the possibilities of an out-of-court settlement with a view to end litigation between the parties at an early date. The Courts usually have an in-house mediation centre where experienced senior lawyers are appointed on a confidential basis and parties involved in contentious complex cases, which have the potential for an extremely delayed decision, are compelled to explore settlement at the mediation centre with the neutral experienced lawyers acting as mediators. All proceedings at the mediation centre and settlement discussions are kept confidential from the Court and do not prejudice either party in case mediation fails. In certain circumstances, however, the mediator may file a report before the Court if directed to do so. Parties are, of course, free to return to the Court process.

However, the amended Commercial Courts Act 2015 now requires a plaintiff (to a suit) to mandatorily exhaust the remedy

of 'pre-institution mediation' before it can institute the suit, provided that urgent interim relief(s) are not sought.

4.11 If a party refuses to a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

Generally, consent of the parties is a condition precedent to be referred to the mediation. There are no formal sanctions if proceedings are not followed through to their logical end. However, a dispute falling under the Commercial Courts Act 2015 will not be entertained by the Court if the statutorily required mediation has not been exhausted.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

The Indian Arbitration and Conciliation Act 1996 (ACA) is based on the UNCITRAL Model Law and was recently amended in 2015. The amended ACA applies to arbitrations which have been instituted after 23 October 2015, while the arbitrations instituted prior to this date continue to be governed by the unamended ACA.

The ACA preserves party autonomy in relation to most aspects of arbitration, such as the freedom to agree upon the qualification, nationality, number of arbitrators (provided it is not an even number), the place of arbitration and the procedure to be followed by the arbitration tribunal. The principle of party autonomy was confirmed by the Constitutional Bench of the Supreme Court of India in *Bharat Aluminium Co v. Kaiser* and the same was followed in its subsequent decisions.

The amended ACA allows the Indian Courts to intervene in international commercial arbitrations, to a limited extent of (i) granting interim measures, (ii) providing assistance in taking evidence, and (iii) referring the parties to arbitration. Further, as far as Indian-seated arbitrations are concerned, the ACA expressly bars the Courts from intervening in an arbitral proceeding, except to the extent provided for in the ACA itself. For example:

- Where a party files an action before a Court in spite of an arbitration agreement, the other party can apply to that Court to refer the dispute to arbitration instead.
- A party can apply to a Court for interim remedies (please see the response to question 5.4 below for further details).
- A party may also seek the Court's assistance in taking evidence and summoning a witness.
- A party can seek the Court's assistance for the appointment of an arbitrator if the other party refuses to cooperate in the process.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

An arbitration agreement, as per the ACA, must be in writing and signed by the parties. The agreement should reflect the intention of the parties to submit their dispute(s) to arbitration. There is no prescribed form required for the purpose of an arbitration agreement. In fact, it is not necessary for an arbitration agreement to be incorporated into an insurance/reinsurance contract at all. An arbitration agreement can also come into existence if it is contained in a subsequent exchange of letters, telex, telegrams or other means of telecommunications (including by electronic means) which provide a record of the agreement.

The reference in a contract to another document which contains an arbitration clause also constitutes an arbitration agreement if the contract is in writing and the reference is such that it makes the arbitration clause part of the contract.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

In relation to domestic arbitration, the ACA bars the intervention from the Courts except for some specific instances wherein the Courts are allowed to intervene – for example, for interim relief, reference to arbitration when an action has been instituted before the Court and for the appointment of arbitrators, where parties have failed to nominate arbitrators within the stipulated timeframe.

In relation to international commercial arbitration, the tendency of the Indian judiciary to intervene is now declining. The decision of the Supreme Court in *Bharat Aluminium Co v. Kaiser* has reversed the earlier authority which endorsed an interventionist approach under certain circumstances.

However, there are exceptions to the non-interventionist approach. For example, in *N Radhakrishnan v. Maestro Engineering*, the Supreme Court has held that cases involving allegations of fraud and misrepresentation which go to the root of the agreement, involve adjudication upon substantial questions of law and complicated facts, or that require detailed evidence ought to be decided by the Courts. Nonetheless, judgments of the Supreme Court in *World Sports Group (Mauritius) Ltd v. MSM Satellite*, *Swiss Timing Ltd v. Organising Committee*, and *Commonwealth and A Ayyasamy v. A Paramasivam* have diluted the effect of the judgment in *Radhakrishnan* and demonstrate a growing inclination towards a pro-arbitration and non-interventionist approach in the context of Indian as well as foreign-seated arbitrations.

In addition to the above, the Courts have recognised a few additional categories of matters, such as cases involving disputes relating to: criminal offences; matrimonial disputes; guardianship disputes; insolvency; disputes under the Indian Trusts Act 1882; and winding up and testamentary disputes, which ought not to be arbitrated. Further, the National Consumer Dispute Redressal Commission, in its recent judgment in *Aftab Singh v. Emaar MGF Land Limited & Anr*, held that disputes under the Consumer Protection Act 1986 cannot be referred to arbitration and an arbitration clause cannot oust the jurisdiction of the consumer courts.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

A party to an arbitral proceeding, before or during the proceeding, or even after the arbitral award has been pronounced (but before it is enforced), may apply to a Court for interim relief, seeking:

- the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings;
- the preservation, interim custody, or sale of any goods which are the subject matter of the arbitration agreement;

- the securing of the amount in dispute;
- the detention, preservation, or inspection of any property or thing that is the subject of the dispute; and
- an interim injunction or the appointment of a receiver; and such other interim measure of protection as a Court may find just and convenient.

However, pursuant to the amendment to the ACA in 2015, in the event that the Court grants interim relief prior to commencement of the arbitration, the arbitral proceedings have to commence within 90 days of such order by the Court, unless extended by the Court.

Further, once the arbitral proceedings commence, the Court shall not entertain any application for interim relief unless it is satisfied that the arbitration tribunal will not be able to provide an efficacious remedy.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

As per the ACA, an arbitral award must state the reasons upon which it is based unless: (a) the parties have expressly agreed that no reasons are to be given; or (b) the award is made upon terms agreed between the parties.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

The ACA lays down the grounds on which an award can be challenged before a Court. These grounds are narrow and limited and a Court is not allowed to reassess or re-appreciate the quality of evidence produced before the arbitrator. The Court cannot substitute the tribunal's findings with its own findings or conclusions and will set aside an arbitral award only if it is shown that a party was under some incapacity, the tribunal lacked jurisdiction, there was a failure to follow principles of natural justice, illegal composition of the tribunal and/or if the award is in conflict with public policy.

After the amendment to the ACA in 2015, the scope of "public policy" as grounds for a challenge has been reduced only to situations where an award:

1. was induced or affected by fraud or corruption;
2. is in contravention of the fundamental policy of Indian law; or
3. is in conflict with the basic notions of morality or justice.

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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

The Central Bank of Ireland (the "**CBI**") is responsible for authorising and supervising all financial institutions in Ireland, including insurance and reinsurance companies.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

In order to set up a (re)insurance company in Ireland, it is necessary to incorporate a company and obtain authorisation from the CBI.

When establishing a new (re)insurance company, promoters are permitted to adopt different types of corporate organisations (e.g. a public limited company, a private limited company in the form of a designated activity company ("**DAC**"), a company limited by guarantee, an unlimited company or a European Company ("**SE**")). However, the most common form of company used is a private limited company in the form of a DAC. The incorporation process involves an application to the Companies Registration Office and a company can be incorporated within five business days of an application being made.

DACs are private companies limited by shares that are similar in form and substance to limited liability companies ("**Ltds**"). DACs have a "constitution" comprising: (i) a memorandum of association; and (ii) articles of association. However, unlike Ltds, a DAC's constitution has a main objects clause, which sets out the activities that the (re)insurance company has the corporate capacity to undertake.

To obtain authorisation from the CBI, the promoters are required to submit certain information, including a "scheme of operations", which comprises a detailed business plan for the proposed (re)insurer. The business plan should contain financial projections for a three-year period on a pessimistic, realistic and optimistic basis. It should also include comprehensive details of the nature of the (re)insurance products that it is proposed the (re)insurer will write, the intended market for the products and distribution channels. Draft policy documentation should be submitted as part of the application. The CBI has issued detailed guidance on the authorisation process, i.e. explaining the process and timing for the submission of the application for authorisation, together with a "Checklist" (discussed below) of the matters that should be addressed in the application and the supporting documents to be included in the application. The authorisation process takes between three and six months from the date the fully completed application is made. The process is iterative and typically there is a high degree of engagement with the CBI. It is advisable for applicants for authorisation to meet with the CBI in advance of submitting their application for authorisation.

The Checklist referred to above sets out the information to be contained in the applicant's business plan, as well as the broader information that the CBI requires in assessing the application. Set out below are some of the key areas to be addressed in the business plan:

- ownership structure of the company's parent/group;
- legal structure of the company;
- underwriting strategy, outward reinsurance, outsourcing and investment strategy;
- capital and solvency projections; and
- governance structures (audit, risk management, compliance, financial, management and internal controls).

The role of director and certain senior management positions in (re)insurers constitute "controlled functions" or "pre-approved controlled functions" under the CBI's Fitness and Probity Regime, and any person who it is proposed will occupy a pre-approved controlled function must complete an online Individual Questionnaire.

Once the CBI is satisfied with an application, they issue an authorisation in principle with conditions to be satisfied. Once the conditions are satisfied and the CBI has granted formal approval, the (re)insurer can commence writing business.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

In accordance with the EU passporting provisions, an insurer authorised in another EEA Member State can write business directly in Ireland on a freedom of services or freedom of establishment basis. Generally, non-EEA insurers cannot write business directly in Ireland; however, they may apply to the CBI for authorisation under the European Union (Insurance and Reinsurance) Regulations 2015, which enable third-country

insurers to establish a branch in the state ("**Third Country Branch**"). Third Country Branches do not have the right to passport into other EEA Member States, and so a Third Country Branch that has been authorised by the CBI can only carry on business in Ireland.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

There are some restrictions on parties' freedom of contract under Irish law which are largely aimed at protecting consumers. Irish legislation implementing EU law in relation to consumer protection is the basis for some of the restrictions (e.g., the Distance Marketing of Financial Services Directive and the Unfair Terms in Consumer Contracts Directive). The Consumer Insurance Contracts Act 2019 (the "**2019 Act**") also implies a number of restrictions, such as mandatory cooling-off periods, into consumer contracts of insurance [although at the time of writing, the 2019 Act has not yet been commenced].

The CBI's Consumer Protection Code (the "**CPC**") contains detailed requirements to be met by regulated financial service providers, including insurers, when they are dealing with consumers. The CPC contains certain overarching principles to be adhered to and detailed provisions in relation to the manner in which insurers conduct business with consumers.

1.5 Are companies permitted to indemnify directors and officers under local company law?

Irish law does not permit companies to exempt from liability or indemnity directors or officers in respect of negligence, breach of duty, default or breach of trust. However, it is possible for a company to reimburse a director and/or officer in respect of legal costs incurred as a result of successfully defending proceedings taken against him/her.

Companies are permitted to purchase directors' and officers' ("**D&O**") insurance. Such policies may include the advancement of legal costs, payment of awards and, in certain circumstances, costs incurred by a director in respect of an investigation by the regulatory authorities. D&O insurance generally contains exclusions in respect of fraud and dishonesty, liabilities for bodily injury or any annual fines.

1.6 Are there any forms of compulsory insurance?

Yes. The following insurances are compulsory:

- third-party motor vehicle insurance;
- solicitors' professional indemnity insurance;
- liquidators' professional indemnity insurance;
- certain types of aircraft and shipping insurance; and
- professional indemnity insurance for (re)insurance intermediaries.

In addition, whilst not "compulsory" under Irish law, certain professional bodies require their members to maintain professional indemnity insurance as a condition of membership.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

Generally speaking, the substantive law relating to insurance tends to be more favourable to insurers. However, the 2019 Act was recently enacted by the Irish government to level the playing field between insurers and "consumer" policyholders. The 2019 Act, once it is commenced, will represent a major overhaul of Irish insurance law, modifying well-established legal principles such as "insurable interest" and the principle of "*uberrimae fidei*" (see question 2.5 below) when an insurer is dealing with a consumer.*

Under the 2019 Act, an insurer will no longer be able to refuse a consumer cover merely because their name was not specified in the policy, nor will an insurer be able to reject a claim made in respect of an otherwise valid contract because the consumer does not have an insurable interest in the contract. Rather, the standard applied by section 7 of the 2019 Act is whether the consumer can demonstrate a factual expectation of an economic benefit arising from the preservation of the insured subject matter, or of an economic loss on its destruction. Basis of contract clauses, which seek to convert any statement made by a consumer into a contractual warranty, are also invalidated under the terms of the 2019 Act (section 19).

At common law there is a general perception that the Irish courts tend to take a pro-insured approach by strictly applying the legal principles set out in statute. For example, under the Marine Insurance Act, 1906, which sets out the law on avoidance of insurance policies for material non-disclosure of facts (for non-consumers).

[*At the time of writing, the 2019 Act has been passed by Parliament but its provisions have not yet been commenced by Ministerial Order. The Department of Finance have indicated that they will recommend to the new Minister for Finance that the 2019 Act be commenced; however, we understand anecdotally that certain provisions will not be commenced immediately to allow industry time to adapt to the proposed changes, but we do not have visibility as to which provisions those are.]

2.2 Can a third party bring a direct action against an insurer?

There is a restriction on the ability of a third party to bring a direct action against an insurer. This restriction is due to the principle of privity of contract under Irish law, which prevents a person who is not a party to a contract from enforcing it. There are four statutory exceptions to this general principle:

(a) Section 62(1) of the Civil Liability Act 1961 – a third party may bring a direct action against an insurer where a person, company, or partnership/association is insured under a liability policy and becomes bankrupt (or dies), is wound up or is dissolved, respectively. Generally, the third party will be required to obtain judgment against the insured before proceeding against the insurer.

(b) Section 76(1) of the Road Traffic Act 1961 (as amended) – a third party claiming damages arising from an incident involving a motor vehicle can submit his claim directly to the insurer.

(c) Section 7 of the Married Woman's Status Act 1957 – allows a spouse or child named as a beneficiary to a policy of life assurance or endowment to enforce the policy.

(d) Section 21 of the 2019 Act – will allow injured third parties intended to benefit under a consumer insurance contract to take a direct claim against an insurer in circumstances where a policyholder has died, become insolvent, cannot be found or where "*for any other reason it appears to a court to be just and equitable to so order*".

Third parties may also acquire rights under an insurance contract pursuant to the laws of agency or trust, or alternatively on an assignment.

2.3 Can an insured bring a direct action against a reinsurer?

There is no general right in this jurisdiction which allows an insured to bring a direct action against a reinsurer. The privity of contract principle restricts the insured's rights as the insured is not a party to the reinsurance contract.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

Pursuant to the Marine Insurance Act 1906, avoidance of the policy is the remedy for non-disclosure (section 18) or material misrepresentation (section 20) by the insured. The policy is voidable by the insurer from inception. It should be noted that the Irish courts have not permitted insurers to avoid a policy for material misrepresentation where an incorrect answer is given by an honest proposer.

Under the 2019 Act, insurers will not be permitted to avoid an insurance contract made with a consumer for innocent misrepresentation. In the case of negligence misrepresentation, the remedy that will be available to the insurer must be proportionate and reflect what the insurer would have done, had it been made aware of the full facts when the cover was being put in place. Insurers will be entitled to avoid the policy for fraudulent misrepresentation.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

Parties to contracts of insurance are subject to the duty of utmost good faith: both parties have an overriding duty to disclose all material facts to the other before the contract is made. This goes beyond the usual common law rules on misrepresentation, as the duty of utmost good faith imposes a positive obligation on the parties to make disclosure. It is possible to breach the duty by omission or silence in relation to a material fact.

The remedy for breach of duty is to declare the contract void. In practice, therefore, the duty owed by the insured to the insurer is the most significant.

If a breach of the utmost good faith is alleged, the insurer must show (on a balance of probabilities) that the breach influenced it to make the contract on the particular terms.

In *Chariot Inns Ltd v Assicurazioni General S.P.A.*, the Supreme Court held that an insured must not only complete the proposal form correctly, but must also disclose every matter which is material to the risk.

However, a number of recent Irish decisions suggest that the courts in Ireland have moderated the impact of this duty through the consideration of the nature of the questions raised by an insurer (if any) and by the application of the duty of utmost good faith to the insurer also.

Under the 2019 Act, in the context of consumer insurance contracts, a consumer's pre-contractual duty of disclosure will be limited to responding to specific questions posed in writing by the insurer. Consumers are not required to volunteer any information beyond that. The 2019 Act will also place the onus on the insurer to ensure that the questions contained in the proposal form are specific, unambiguous and clearly drafted.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

An insurer has an automatic right of subrogation once the insurer discharges its indemnity on foot of a valid contract of indemnity, but should include express subrogation clauses asserting and extending the right.

Section 23 of the 2019 Act includes a statutory exception to this rule. It will limit an insurer's ability to exercise subrogation against a third party in circumstances where the third party is a co-habitant, family member or employee of the insured. Where the third party is a co-habitant or family member of the insured or in the context of a motor insurance policy, if the policyholder has consented to the use by the third party of the insured vehicle the insurer does not have an automatic right of subrogation, unless the loss suffered was the result of serious or wilful misconduct. Similarly, an insurer may not exercise subrogation against an employee unless the loss incurred was recklessly or intentionally caused by that employee.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

The District Court limit is €15,000 and the Circuit Court limit is €75,000. Claims with a value in excess of the Circuit Court jurisdiction are heard by the High Court, which has an unlimited monetary jurisdiction. Typically, commercial insurance disputes are heard by the High Court or the Commercial division of the Court, which is a fast-tracked specialised division of the High Court. Insurance and reinsurance disputes can be heard in the Commercial Court if they meet certain criteria; namely that: (i) the value of the claim or counterclaim exceeds €1 million; or (ii) the court considers that the dispute is inherently commercial in nature. Cases are admitted into this list following a hearing before the head judge in the Commercial Court.

There is no right to a hearing before a jury for insurance or reinsurance disputes; such disputes are heard by a judge sitting alone.

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

Entry to the Commercial Court list requires the payment of €5,000 in stamp duty. Commencing proceedings in the District Court, Circuit Court or High Court requires the payment of nominal filing fees.

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

The average length of a case heard by the Commercial Court, from entry into the Commercial List to conclusion, is 20 weeks. However, complex cases may take significantly longer, particularly where contentious issues relating to discovery may exist.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

a) A party to proceedings in the High Court may seek discovery of categories of documents which are relevant to the issues and necessary to dispose of the matter fairly, and save costs. The Court will also consider whether the request is proportionate and whether the documents may be obtained from a more readily available source.

(b) A party must first request voluntary discovery of categories of documents and if agreement on discovery is not reached, an order for discovery can be sought from the court.

Parties must disclose all documents which fall within the categories of discovery and not only those documents which support their case. The contents of documents which are subject to privilege do not need to be disclosed.

The High Court may make an order for discovery against a non-party where it appears that the person is likely to have or has had in its possession, custody or power documents which are relevant to the proceedings.

The party seeking the non-party discovery must indemnify such person against the costs of the discovery. The court will also consider the possible prejudice or oppression which the non-party might suffer in complying with the order.

Normally, parties seek voluntary discovery following delivery of the defendant's defence. In limited circumstances it is possible to obtain discovery by court order prior to the commencement of proceedings. The likelihood is that such orders are only likely to be made in cases where a clear proof of wrongdoing exists and where the information sought is the names and identities of wrongdoers, rather than factual information concerning the commission of a wrong.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

The concept of legal professional privilege enables a party to protect itself from disclosure of certain communications between a client and his solicitor. When legal privilege has been established, neither the client nor the solicitor can, for any reason, be compelled to disclose details of this communication. The two principal types of legal privilege are:

(a) Litigation privilege arises only after litigation or other adversarial proceedings are contemplated or commenced and it protects all documents produced for the sole or dominant purpose of the litigation in question. Litigation privilege includes all communications between:
   (i) a solicitor and his client;
   (ii) a solicitor and his non-professional agent; and
   (iii) a solicitor and a third party.
   The communications over which privilege is claimed must be made for the dominant purpose of advancing the prosecution or defence of the case or the seeking or giving of legal advice in connection with it.

(b) Legal advice privilege protects communications between a solicitor, acting in his professional capacity, and his client, provided that the communication is confidential and for the purpose of seeking or giving legal advice.

(c) A third category of documents which may be withheld and protected from disclosure or admissibility as evidence in court relates to communications made without prejudice for the purpose of negotiating a settlement, including mediation.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

A party may obtain a subpoena requiring a person to attend as a witness at the final hearing of an action. Failure to attend can amount to contempt of court.

Generally, witnesses are only required to give evidence at the final hearing (except where necessary for an interim application). In proceedings admitted to the Commercial Court, the witnesses are required to provide witness statements which are exchanged in advance of the final hearing.

4.4 Is evidence from witnesses allowed even if they are not present?

It is a fundamental rule of the adversarial court system that witnesses are examined orally in open court. However, it is possible in certain circumstances to give oral evidence by way of video-link where the case is suitable.

A witness may also give evidence by way of a sworn affidavit, which may be presented as primary evidence, although they may subsequently be cross-examined on the contents of the affidavit.

In limited circumstances, such as illness of the witness, evidence can be given by commission. This involves the questioning of the witness in a place other than the court by an independent lawyer commissioned by the court to take the evidence.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

Expert witnesses are generally retained by a party to the litigation and the courts rarely appoint an expert witness. However, there are incidences where the High Court has chosen to appoint its own expert in intellectual property litigation. Expert witnesses have a duty to the court to give objective judgment on the matter at hand.

There are no general restrictions on calling expert witnesses.

The rules of the Commercial Court require the parties to exchange expert reports in advance of the trial, and pre-trial directions will include directions in relation to expert reports. Such directions regularly include a pre-trial expert meeting in an effort to reduce the number of issues between the parties.

4.6 What sort of interim remedies are available from the courts?

Interim injunctions or interlocutory injunctions are the main form of interim relief available in this jurisdiction. Interim injunctions are granted *ex parte* (without notice to the other party) for a short period until a hearing for an interlocutory injunction involving the other party can take place. The test generally applied by the court in considering an interlocutory injunction application is: 1) whether there is a serious/fair issue to be tried; 2) whether damages would be an adequate remedy; and 3) whether the balance of convenience lies in granting or refusing an injunction. An applicant for an injunction will be

required to provide an undertaking to cover any damages for which he may be liable as a result of the injunction in the event that he is ultimately unsuccessful in the proceedings.

Generally, an injunction will restrain/prohibit a person from doing something or will require a person to do something. Specific types of injunction include the following:

- *Quia Timet*: used to prevent an anticipated infringement of a legal right;
- *Mareva*: used to prevent the removal or disposal of assets;
- *Anton Piller* Orders: allow for entry onto the premises of a defendant for the inspection and removal of items of evidence; and
- *Ne Exeat Regno* Writ and *Bayer* Injunction: these orders can be sought to prevent a defendant from leaving the jurisdiction.

These particular types of orders are rarely granted because of the onerous impact they may have on an individual's rights. The court, at its discretion, may make an interim attachment order to preserve assets pending judgment. An application for an order can be brought where it can be established that the defendant has assets within the jurisdiction and there is a serious risk of those assets being dissipated with the intention of evading judgment prior to the hearing of the action. The plaintiff in such an application is responsible for any loss resulting from the freezing of the defendant's assets if the order was not honestly obtained with full and frank disclosure.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

Cases decided in the District Court may be appealed to the Circuit Court and decisions of the Circuit Court (including appeals from the District Court) may be appealed to the High Court. In addition, either party may appeal on a point of law directly to the High Court from the District Court.

The Court of Appeal has appellate jurisdiction from a decision of the High Court (including the Commercial Court) in respect of matters of law and fact. Decisions of the High Court on appeal from the Circuit Court cannot be appealed to the Court of Appeal.

It is generally not possible to adduce oral evidence (or new evidence) on appeal to the Court of Appeal, and the hearing is primarily based on the consideration of the transcripts of the evidence provided in the High Court and the submissions of the parties. The Court of Appeal will generally be slow to overturn a finding of fact arrived at by the High Court, unless it is satisfied that the evidence that was acted on could not reasonably have been correct. Successful appeals tend, therefore, to turn on the interpretation and application of the law.

A case may be appealed from the Court of Appeal where the decision involves a matter of general public importance, or in the interests of justice, it is necessary that there be an appeal to the Supreme Court.

In exceptional circumstances warranting a direct appeal, a case may be appealed from the High Court directly to the Supreme Court ("leapfrog appeal").

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Section 22(1) of the Courts Act, 1981 provides that in proceedings where a court orders the payment of a sum of money (damages), the court also has discretion to order the payment of interest on the whole or any part of such damages in respect of a part or the entire period between the dates when the cause of action accrued and the date of judgment. This rate of interest currently stands at two per cent. This is discretionary and it is only awarded in cases where the trial judge deems it appropriate. Once judgment is awarded, Courts Act interest applies on the monetary sum awarded.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

In this jurisdiction, the general rule is that "costs follow the event". This means that the party in whose favour judgment is given will be awarded their costs against the unsuccessful party. As with any general rule, this rule is subject to exceptions, such as where a party's conduct in the proceedings is deemed improper by the court.

There are a number of tools which a defendant can use to put the plaintiff "on risk for costs", including lodgments, tenders and Calderbank offers or open offers. The Rules of the Superior Courts (High and Supreme Courts) (Order 22, rule 1(1) RSC) provide for a lodgment procedure to encourage early settlement of cases, thereby avoiding the expense and court time involved in a full trial. A defendant can lodge money in court by way of offer to the plaintiff in full and final settlement of the plaintiff's claim. If the plaintiff refuses or fails to accept the lodgment and is not awarded a sum which is in excess of the lodgment at the hearing of the action, the plaintiff will be penalised as to costs. Generally, the plaintiff will have to bear their own costs from the date of lodgment onwards and also discharge the defendant's costs from that date onwards, unless the court orders otherwise. Insurers are permitted to make a tender offer *in lieu* of lodging the money into court.

A Calderbank offer is an offer to settle the proceedings made "without prejudice save as to costs" and has a statutory basis pursuant to Order 99 of the Rules of the Superior Courts. Where the settlement offer is declined, and the plaintiff does not beat the Calderbank offer, this can severely reduce any award for court costs that the party might otherwise have been legally entitled to, and in some cases can result in the winning party being made to pay the losing party's legal costs. The courts have recognised the desirability of imposing financial consequences on a plaintiff who refuses what ultimately proves to have been a reasonable offer of settlement notwithstanding that the same was made on a without prejudice basis. A Calderbank offer will not be effective where a lodgment or tender could have been made.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

The courts cannot compel the parties to mediate or engage with other forms of Alternative Dispute Resolution ("**ADR**"). However, in the High Court and Circuit Court, a judge may adjourn legal proceedings on application by either party to the action or of its own initiative, to allow the parties to engage in an ADR process. The courts may also make any orders or directions it considers necessary to facilitate effective use of the ADR process.

In addition, there are costs sanctions for parties who unreasonably refuse to engage in ADR.

The Mediation Act 2017 aims to encourage and facilitate the use of mediation in resolving civil, commercial and family disputes.

Under the Act, solicitors are required to advise clients, prior to initiating proceedings, to consider mediation and sign a certificate accordingly, confirming that they have been so advised.

4.11 If a party refuses to a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

A party failing to mediate (or engage with other forms of ADR), following a direction of the court, can be penalised as to costs.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

The Arbitration Act, 2010 adopted the UNCITRAL Model Law on International Commercial Arbitration (the "**Model Law**") into Irish law in June 2010. The Arbitration Act, 2010 applies to all arbitration agreements entered into after that date, although agreements which pre-date the commencement of the Arbitration Act, 2010 may remain subject to the previous regime.

Article 5 of the Model Law provides that no court shall intervene in arbitration except where provided by the Model Law. The High Court has a limited supervisory role under the Arbitration Act, 2010 and the Model Law. The parties may refer matters, such as the appointment of an arbitrator (in default of agreement) or the removal of an arbitrator for failure to carry out his functions, to the High Court. Further, the courts have a role in, *inter alia*, staying any litigation pending the arbitration, making interim orders for the purpose of the arbitration and recognising/enforcing an interim measure or final award issued by an arbitrator.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

It is an essential prerequisite that for arbitration and any subsequent award to be binding, there must be an agreement to arbitrate between the parties. The Arbitration Act, 2010 does not prescribe the content of an arbitration agreement or the form of words to be used. At a minimum, it must reflect an agreement between the parties where disputes or differences which may arise will be referred to arbitration. An agreement to arbitrate must be made in writing to come within the meaning of the Arbitration Act, 2010.

A particular feature of the 2010 Act is that it gives the parties autonomy over a range of issues which include not only the arbitration procedure, but the powers to be given to the arbitral tribunal and to the court.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

Article 5 of the Model Law significantly restricts the court's role in respect of arbitration. The Arbitration Act, 2010 provides that an arbitration clause will survive a finding that a contract, of which the clause forms part, is void. This would include a case where a contract of insurance is repudiated for non-disclosure of a material fact. Given the restrictions on the court's role, it may no longer be theoretically or practically possible to obtain an injunction restraining the appointment of an arbitrator or the conduct of arbitration. There is no restriction as to when an arbitration agreement must be concluded and it may be reached before or after a dispute has arisen.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

The High Court or the Circuit Court may adjourn proceedings for the parties to consider reaching an agreement to arbitrate, and should they fail to so agree, the court may make such order as it sees fit in respect of the proceedings.

The Irish courts are not precluded from granting interim measures, although most interim measures may now also be granted by the arbitral tribunal; for example, the tribunal has a default power to order interim measures such as the grant of interim injunctions and securing monies or goods in dispute. The High Court can further assist the arbitral tribunal or a party in relation to the provision of evidence; however, it has no jurisdiction with regard to discovery without the express agreement of the parties. Section 10 of the 2010 Act provides that the High Court may not, unless otherwise agreed by the parties, make any order for the security of costs or discovery of documentation.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

Pursuant to the provisions of the Arbitration Act, 2010 and the Model Law, an arbitrator must provide his award in writing and must provide reasons, unless the parties agree that no reasons should be provided or if it is a consent award.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

A decision of an arbitrator under the Arbitration Act, 2010 may generally not be appealed to the courts. However, there are grounds under which the decision may be reviewed and set aside by the High Court.

The grounds for setting aside a decision are limited and are set out in the Model Law, and include the following:

(a) a party to the arbitration agreement was under some incapacity or the arbitration agreement was otherwise invalid;
(b) the applicant was not provided with proper notice of the arbitration or was otherwise unable to present his case;
(c) the decision deals with matters beyond the scope of the arbitration agreement;
(d) the composition of the arbitration tribunal or procedure was not in accordance with the arbitration agreement; or
(e) the award is in conflict with public policy.

An application to set aside the award under article 34 must be made within three months from the date on which the party making the application has received the award, or if a request for correction and interpretation of the award has been made to the arbitral tribunal under article 33, then within three months of the date when a decision on the request has been made by the arbitral tribunal.

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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

Insurance business in Israel is regulated by the Commissioner of the Capital Market, Insurance and Savings, appointed by the Minister of Finance.

Two advisory bodies advise the Commissioner – an Advisory Committee (four members) and the Advisory Council (15 members – no more than six government employees).

The Commissioner operates pursuant to the Supervision over Financial Services (Insurance) Law, 1981.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

A new insurance company could be either a company incorporated in Israel or a foreign insurance company registered in Israel as a foreign company, which is subject to supervision by a regulator in its country of incorporation.

With the objective of increasing competition in the insurance industry to lower premiums for consumers, the Commissioner reduced the minimal capital requirements for establishing new insurance companies in Israel. As a result, two new insurance companies – both direct digitals – commenced business, and it is anticipated that additional insurance companies will be registered.

An application for an insurer's licence must, by law, include the following:

(a) the classes of insurance requested;
(b) details of the insurance programmes and terms suggested;
(c) details of the insurance premiums and other charges;
(d) examples of insurance policies, proposal forms and other forms that the insurer will use;
(e) details of the suggested reinsurance arrangements;
(f) company registration documents;
(g) details of all the company's officers;
(h) details of all controlling shareholders of the company; and
(i) details of the applicant's financial means.

Note: (f)–(h) must be supplied by a foreign applicant, regarding the local company that will serve as the local representative.

In considering the application, the Commissioner must, by law, take into account the following considerations:

(a) the applicant's business plan and estimated prospect of success;
(b) the company's officers' suitability to their functions;
(c) the applicant's financial means; minimal capital requirements apply pursuant to the line of business which the new company wishes to write;
(d) the financial means of the applicant's controlling shareholders;
(e) the applicant's plans regarding reinsurance and regarding the team of employees, and the estimated prospect of success in carrying them out;
(f) whether granting the licence will enhance competition in the financial market, in particular in the insurance market and the level of client service in this field;
(g) government economic policy; and
(h) considerations concerning the public good.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Writing insurance in Israel requires a licence. Foreign insurance companies cannot write insurance business in Israel, but Israeli citizens may buy insurance abroad. Reinsurance business by a foreign insurer does not require a licence.

The Commissioner is authorised to license a foreign company if the latter is registered in Israel and subject to regulation in the country of origin.

In a unique act, the Israeli Government enacted a regulation in December 1951 exempting Lloyd's Underwriters from the stipulations of the law of Controlling Insurance Service. The main practical effect of this is that Lloyd's Underwriters are permitted to write business directly in Israel.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

In 1981, the Insurance Contract Law was enacted and applies to all classes of insurance except marine, aviation, diamonds and precious metals and reinsurance. The Insurance Contract Law is a consumer protection-oriented law and many of its provisions override contradicting stipulations unless the contract broadens coverage.

The legislature has set forth detailed rules regarding the content and layout of insurance policies in general, creating rules regarding specific types of insurance.

Great emphasis is put on the visual presentation of the policy text. Insurers must textually accentuate limitations and exclusions and place them adjacent to the clauses dealing with the related coverage clauses. The policy must be presented in clear language, stating the details of the policy-owner, the basic scope of coverage, policy limits, period of insurance, premium rates and all exclusions.

Standardised policy wording applies to personal insurances – home, auto and health and life – which overrides contradicting terms in the policy, unless these extend coverage.

Various regulations restrict the insurers' freedom to limit coverage, especially regarding health, life and long-term care policies, in order to ensure their reliability. The Commissioner intervenes in some cases; for example, where the definition of the insured event has become impractical due to advances in medical care, the Commissioner can impose an amended definition.

Insurance companies are also required to adhere to the directives by the Commissioner regarding their duties towards the insureds and provisions regarding policy conditions.

Furthermore, there are several types of compulsory insurance which impose terms in various classes of insurance.

1.5 Are companies permitted to indemnify directors and officers under local company law?

The Israeli Companies Law allows a company to indemnify directors and officers against liability arising from acts and omissions carried out in their capacity as such; however, such indemnity can be provided only in the following matters:

(a) monetary liability in favour of a third party;
(b) reasonable litigation costs expended due to a criminal investigation against them where no indictment was filed, and costs are otherwise indemnifiable only if the director or officer was acquitted or convicted of an offence which does not require proof of criminal intent;
(c) reasonable litigation costs expended in defence of a claim filed against the director or officer by the company itself or on its behalf or by a third party; or
(d) legal expenses with regards to proceedings or investigations by an authorised authority, against the directors or officers, which resulted without either a criminal indictment or a monetary liability as an alternative to criminal prosecution against them.

The Companies Law prohibits the indemnification (as well as insurance and exemption) of a director or officer against the following matters:

(a) breach of fiduciary duty towards the company, unless committed in good faith and with reasonable grounds to believe that the action would not prejudice the company's interests;
(b) acts committed intentionally or recklessly;
(c) acts committed with the intention of gaining unlawful personal benefit; and
(d) fines and penalties, including civil fines and monetary levies.

1.6 Are there any forms of compulsory insurance?

Israeli law imposes compulsory insurance requirements on professionals and/or individuals in several areas, such as:

- **The capital market**: insurance requirements are imposed on investment advisers and distributors; investment portfolio managers, mutual fund managers and trustees; and provident funds, their managing companies and underwriting companies – all in order to protect clients against negligent acts and omissions and infidelity of employees.
- **Banks**: there is no statute which compels banks to acquire compulsory insurance; however, the Commissioner of Banks has issued a directive which requires banks to acquire employee dishonesty insurance.
- **Bodily injury coverage**: Israeli law imposes compulsory insurance requirements for the coverage of bodily injury in the following fields:
  - **Clinical trials in human subjects**: insurance requirements are imposed on the clinical trial sponsor.
  - **Motor accidents**: the Israeli non-fault law provides, as a rule, compensation for all victims of motor accidents, regardless of the question of fault regarding the accident itself. The law is enforced by compulsory insurance for all vehicle owners.
  - **Organised sport activities** are subject to compulsory accident insurance.
  - **School children** are covered by compulsory accident insurance by the local authorities.

Interestingly, regarding Cost Sharing Transportation which was defined by an amendment to the Transportation Regulations, the Commissioner has issued a position paper that if the Cost Sharing Transportation complies with the relevant definition (*inter alia*, no profits and not a business), it does not require a designated policy.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

The Insurance Contract Law is a consumer protection-oriented law, which favours the insured.

The Insurance Contract Law stipulates specific rules limiting the freedom of contract and insurers' rights to invoke remedy for misrepresentation, non-payment of premiums, late notification and various other topics concerning the insurer-insured relationship. These limitations and conditions override contradicting terms in the insurance contract unless they favour broader coverage.

2.2 Can a third party bring a direct action against an insurer?

The Insurance Contract Law provides third parties statutory privity, which is independent and cannot be limited or annulled by the policy and will prevail over receivership or bankruptcy proceedings against the insured. Defence pleas that the insurer may have are retained for defence in the third-party action.

2.3 Can an insured bring a direct action against a reinsurer?

The Insurance Contract Law does not apply to reinsurance other than to afford an automatic right of subrogation (except for a foreign insurer). Israeli courts have determined that there is no privity between the insured and the reinsurer. The insured is not considered the beneficiary under the reinsurance contract, unless the parties to the reinsurance agreement include a cut-through clause which affords the insured direct privity with the reinsurer.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

The Insurance Contract Law's remedies for misrepresentation or non-disclosure prevail over any contradicting terms in a policy. There is no automatic remedy and the law promotes a relative rule: where misrepresentation or non-disclosure is detected after the occurrence of an insured event, the insurer's

liability will be reduced by the ratio between the premium paid and the higher premium that would have been collected had the full facts been disclosed.

Total exemption from liability will apply only if the non-disclosure was fraudulent or if a "reasonable insurer" would not have entered the insurance contract even for a higher premium.

The remedy will not apply – unless the non-disclosure was fraudulent – if the undisclosed facts were known or should have been known to the insurer or if the non-disclosure was caused by the insurer, or if the undisclosed fact no longer existed when the event occurred or had no effect on its occurrence or on the insurer's liability or the extent thereof.

Regarding life, disability, disease or accident insurance – remedy is limited to three years after inception of the policy, unless the non-disclosure was fraudulent.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

The Insurance Contract Law imposes the duty to answer the insurer's questions, on a proposal form in respect of a material matter, fully and truthfully. A material matter is defined by law as one which could affect a reasonable insurer's willingness to assume the risk in general or to assume it under the terms specified by the policy.

The law further stipulates that fraudulent concealment of a matter, the materiality of which the insured was aware, is regarded as an untruthful and incomplete answer. Israeli courts have interpreted this in conjunction with the questions posed by the insurer on the proposal form: any subject not mentioned on the proposal form has been deemed as immaterial and therefore there can be no positive duty of disclosure regarding such a subject and no sanction for non-disclosure.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

The right of subrogation is automatic by law. The subrogation claim is made in the insurer's name and can be up to the amount of the benefits paid.

Subrogation may not be exercised in a way that impairs the insured's right to collect compensation from the third party in excess of the insurance benefits received. This may be interpreted as affording the insured's primary right for collection. The law does not specifically state that the insurer must claim these excess sums for the insured, but it is customary to offer the insured to join such a claim in order to prevent contentions against the insurer and to promote cooperation of the insured. Subrogation is not allowed where the event was caused unintentionally by a third party whom the insured would not bring action against due to there being a family or employer-employee relationship.

An insurance company that wishes to execute subrogation proceedings must inform the third party of its intention to claim at least 30 days in advance.

Case law (November 2017) has determined that a foreign insurer (not licensed as an insurer in Israel) has no right of subrogation in its own name in Israeli courts. In view of this, in some cases, an agreement between the foreign insurer and the insured, who had been paid insurance benefits, provided that the insured would initiate a claim against the wrongdoer for the amount of his retention on his own behalf, and for the amount received from insurer as trustee for insurer. However, according to a new (November 2019) District Court decision, a foreign insurer cannot circumvent the prohibition to file a subrogation claim by authorising the insured to file a claim on its behalf. It should be noted that this is a new decision of a District Court and may be appealed or overturned by a future ruling of the Supreme Court in another case.

We believe that this case law should not apply to Lloyd's Underwriters, who are permitted to transact in insurance business in Israel.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

The Israeli judiciary system is based on the English adversary system, but without a jury. Presiding judges are professional and are elected until retirement age. There are six districts, in each of which there are between two and eight lower (magistrate) courts and one district court. Each district court serves both as a first instance court and as an appeal court. The Supreme Court in Jerusalem serves as an appellate court and as the High Court of Justice. Commercial claims (including insurance) valued at up to NIS 2.5 million (USD 720,000 approx.) fall within the jurisdiction of the lower courts (with right of appeal to the district court); claims in excess of this value are brought at first instance to the district court (with right of appeal to the Supreme Court).

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

The court fee for a commercial insurance dispute is a set rate of 2.5% of the amount claimed. The first half of the fee must be paid at the start of the proceedings, when filing the lawsuit. The second half is payable before the trial phase of the proceedings.

Refund of the court fee is mandatory where the lawsuit is withdrawn or resolved by settlement before three pre-trial hearings have taken place. Furthermore, the court has discretion to refund the court charge at a more progressed phase, where the parties have reached a settlement agreement through an alternative dispute resolution process such as arbitration or mediation.

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

The time from filing to final judgment is approximately three-and-a-half years, not including pauses for mediation or settlement efforts.

The Israeli judiciary court system is severely backlogged. As a result, litigants are actively encouraged to seek out-of-court resolutions by settlement, mediation or arbitration. Case management has also become more efficient in today's technological age and the judiciary system has been fully computerised, allowing parties direct access to the court file.

The Israeli Rules of Civil Procedure is about to undergo significant reform, which was scheduled to come into effect from September 2019 but has since been postponed to September 2020. The overriding objective of this reform, similarly to the Lord Woolf reform in England, is to enable the court to deal with cases justly and at a proportionate cost while improving the efficiency and speed with which they are dealt with. The new procedure places severe time constraints on litigants while expanding the court's discretion regarding case management.

The reformed Rules of Civil Procedure are expected to accelerate proceedings due to stricter time limits for preliminary proceedings and defence. The new rules warrant the particular attention of the claims departments of insurers, who will have to review claims handling procedures to meet the new requirements.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

The Civil Procedure Rules enable litigants to demand discovery of documents, response to a questionnaire or demand provision of details regarding pleadings. Current policy is to promote disclosure at the pre-trial stage and mitigate surprise discovery which can delay the course of the trial. The court may issue orders to official authorities for discovery of reports and records, such as police or fire brigade investigation reports, National Insurance Institute data and similar. The court also has the authority to summon non-litigants to court as witnesses in order to present documents in their possession.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

The answer to all these questions is affirmative. Israeli law upholds the principle of the privileged attorney-client relationship. The privilege is statutorily protected and unlike other privileges (physician/patient, journalist/source, etc.), is absolute and can be waived only by the client. The privilege applies to documents kept within the confines of the attorney-client relationship and does not extend to settlement or negotiation correspondence with a third party. These will be privileged or inadmissible as evidence only by agreement by the parties on a purely contractual basis. Case law has extended the privilege to *the work product of the lawyer*, which encompasses reports and documents contracted by the lawyer for the benefit of the client's representation regarding ongoing or anticipated court proceedings contingent on this being the essential aim of the document. Regarding settlement negotiations, in order to promote litigants to settle disputes out-of-court, the courts will uphold the customary privilege regarding negotiation offers. In conjunction with this policy, all aspects of mediation proceedings are privileged by law, unless both parties waive the privilege.

Case law determines that the only insurance-related documents that are privileged are those created and collated for the main purpose of preparing for anticipated litigation. Other insurance documents, such as those prepared for examining policy coverage as part of insurer's routine claim examination, are not privileged.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

True to the adversary system, Israeli courts are not active in determining which witnesses or evidence will be heard. The courts retain the authority to determine whether particular evidence or testimony is admissible. The courts do have the power to order any person present in the courtroom to give evidence if this seems necessary. Furthermore, the courts may issue witness summonses in order to compel witnesses to appear in court. The summons may be enforced by the police but can only be issued within Israeli jurisdiction territory.

4.4 Is evidence from witnesses allowed even if they are not present?

Hearsay is inadmissible as a rule, subject to common-law exceptions and all witnesses must appear in court to present evidence. Evidence is commonly presented as a written statement in the form of an affidavit and the witness must be present to allow the counterparty the opportunity to cross-examine the witness. In special circumstances, the courts may allow hearing testimony via a video conference or, in rare cases, testimony can be heard outside the courtroom; e.g. by the hospital bedside of a sick witness or at the scene of the event.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

Where expert testimony is necessary, each party appoints its own expert at its own expense. Party-appointed experts are ostensibly independent and cannot have any interest in the outcome of the case. The courts will usually appoint an independent expert who is considered an extension of the court itself. *Ex parte* meetings or correspondence by the court-appointed expert with parties are not allowed subject to mutual agreement. Costs of the court-appointed experts are usually to be shared equally. After the court-appointed expert's opinion is issued, the parties are entitled to amend their pleadings with regard to new evidence and/or file a supplementary expert opinion relating to the court-appointed expert's opinion. Regarding motor accident injury cases, Israel has adopted a no-fault regime focusing on effective and quick remedy for all injured parties. The court proceedings have also been facilitated and do not allow for parties to introduce expert opinions. The court has sole discretion to appoint an expert.

4.6 What sort of interim remedies are available from the courts?

Interim remedies are rarely sought regarding tort and insurance cases. Civil Procedure Rules allow for pre-action orders for disclosure of documents, mainly accounting documents. Temporary injunctions and freezing orders in respect of assets can also be obtained subject to posting of a bond in order to ensure payment of costs should the remedy be retracted.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

There is an automatic right of appeal of the judgment from the court of first instance to the appeal court (from Magistrate to District and from District to Supreme) within 45 days. The grounds for an appeal are factual or legal mistakes. As a rule, the appeal court will not intervene on points of fact unless a severe and obvious error is evident, nor will it intervene in decisions regarding the credibility of witness.

Leave to appeal is required to allow access to a second appellate instance and to appeal interim decisions. As a rule, the

appellate court will only allow such appeals in exceptional cases. With regard to appellate judgment, the petitioner must show severe injustice or that the issue is one of importance to the public. The petition for leave to appeal must be filed within 30 days of the handing down of the subject decision.

Most District Courts will now complete hearing of an appeal within six months to a year. At the Supreme Court, however, a case may take much longer.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

The Interest and Linkage Law authorises the courts to award interest regarding monetary award. The court is further authorised to award linkage (to the monthly cost of living index) and interest, either by the full statutory rate (which is published quarterly by the Ministry of Finance, lately around 1%) or less. Linkage and/or interest can be awarded from the date of occurrence of the cause of action or from any later date.

The Insurance Contract Law states a mandatory award of linkage from the date of occurrence and interest at the rate defined by the Interest and Linkage Law from 30 days after the occurrence. A recent amendment to the Insurance Contract Law stipulates that in personal insurance (life, auto, home, health – but not liability) the court is obliged to award, and in non-personal insurance the court may award, an additional interest award of up to **20** times the basic interest rate, when an insurer did not indemnify the insured the amounts not in dispute in good faith on the appropriate date (in long-term care insurance – up to 10 times). If the court decides not to apply this special rate, the court should explain the reasons for its decision.

With respect to bodily injury claims, where capitalisation of future loss is calculated, the fixed annual interest rate implemented by the courts has been 3% for the past 50 years.

In recent years, there have been attempts by plaintiffs to convince the courts that due to the very low rate of interest, there is no justification for capitalisation based on a 3% interest rate and the calculation should be based on 2%. The difference between these two calculations can be very significant in an individual large case and would certainly have a significant impact on Insurers should it be implemented across the board.

The Supreme Court reviewed a case in August 2019 in which this issue was raised. After a thorough review and discussion, which included requesting the position of the Attorney General, the Supreme Court rejected the appeal to reduce the interest rate. The Court concluded that although the customary 3% rate was high, it was not unreasonable, and such a significant amendment should be made by the legislature and not by the courts.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

The courts distinguish between lawyers' fees and other costs and are authorised to award either or both to the winning party. Lawyers' fees are usually awarded as a percentage of the judgment (between 5% and 20%).

Positive incentive for early settlement is afforded by rules regarding payment and refund of court charges. Court charges are levied on monetary claims at the rate of about 2.5% of the claim. Half of the court charges are paid on filing the claim and the second half is paid only if the case goes to trial. Furthermore, the first half of the court charges will be refunded automatically to parties that settle before three pre-trial hearings have been held and the court is authorised to refund the entire charges paid if a resolution is reached, at any stage, by mediation or arbitration.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

The Civil Procedure Rules mandate referral of all litigants in all claims for over NIS 75,000 (excluding damages for victims of motor vehicle accidents) to hold a meeting with a mediator to discuss holding mediation talks. This is a pre-condition for continuing to trial, but the court is not authorised to penalise parties for not agreeing to mediation or for not making an offer to settle.

4.11 If a party refuses to a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

In Israel, mediation requires the agreement of both parties and is non-binding. There are no consequences for a party who refuses mediation or declines a settlement offered by the mediator.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

The Israeli Law of Arbitration determines the narrow boundaries of the court's authority to intervene in arbitration. The statute emphasises the principle of party autonomy and the courts practise self-restraint regarding intervention in arbitration proceedings or rulings.

The courts are authorised to make several procedural decisions regarding arbitration, such as to appoint an arbitrator, to remove an arbitrator deemed as unworthy of the parties' confidence or where the procedure is unjustly prolonged or is being ineffectively conducted. The court can also intervene if witness summonses have been issued in bad faith.

The law provides an exhaustive list of grounds for more substantial intervention, including the authority to annul an arbitration ruling, to amend or supplement it, or to instruct the arbitrator to make such amendments. This authority is exercised with restraint. The main statutory grounds for such intervention are where it is found that: there was no binding arbitration agreement; the arbitrator was not properly appointed or acted without or beyond the scope of the powers granted by the parties; a party was not granted reasonable opportunity to bring evidence or pleadings; the arbitrator did not rule regarding one of the questions requiring ruling; the ruling was not given according to the provisions of the agreement regarding ruling by law or was not reasoned as required; the ruling was given after the required time; and the ruling was against public policy. If there is a stay of court proceedings when there is an arbitration agreement, but nevertheless one of the parties initiates a court claim, the court may assist the arbitrator by summoning witnesses, service of documents, various injunctions and other orders.

It should be noted that a bill proposed by the Ministry of Finance in 2018 stipulated the establishment of an Insurance Arbitration Institute and compulsory arbitration of insurance

claims in this institute (except for claims by big companies (according to turnover and number of employees) and claims against third parties). If and to what extent this proposed bill will be approved is yet to be seen.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

As stipulated by the Commissioner, an insurance policy may not include a clause binding the insured to arbitration, in case of a future dispute.

Such a clause is considered to be prejudicial to insured's rights.

This stipulation does not apply when the insured specifically agreed to the arbitration clause.

In case the insured agreed to include the arbitration clause, no specific wording is required, and the court will examine the essence of the parties' agreement in each case. Limitation to specific issues will be upheld by the court and can be concluded; for example, from the arbitrator's specified qualifications. For example, in a case where the parties agreed to appoint an engineer to arbitrate a future dispute, the court concluded that the arbitration could not be enforced regarding a question of law.

In re-insurance the parties are free to include an arbitration clause.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

See question 5.2 above.

The law provides the court limited discretion to decide that the dispute will not be determined by arbitration despite the arbitration agreement. Where a party petitions to stay the court process in order to refer the dispute to an arbitrator, the court may "in extraordinary circumstances" decline. Such has been the decision where it was obvious that the arbitration would not settle the dispute and would inevitably have to be followed by a complex court procedure.

Furthermore, where the State is bound by an international convention to determine the issue in the courts, this will prevail. Finally, if the arbitrator has been deposed by the court, the court may refrain from appointing an alternative arbitrator and rule on the dispute in court.

In insurance matters, courts are more inclined to grant relief to an insured who objects to participation in arbitration proceedings. The reasoning for this is usually based on a finding of prejudicial provisions in a standard contract.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

The arbitrator or a party may apply for an interim relief, such as:

(a) an injunction;
(b) an appointment of a receiver;
(c) stay of exit from the country of a party to the arbitration;
(d) writs for freezing orders in respect of assets;
(e) writs for seizing documents;
(f) alternative service of documents; and
(g) penalty actions regarding witnesses that refuse to appear or testify.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

The statutory rule is that, unless the parties expressly stipulate otherwise, the award must be reasoned. A non-reasoned award may be annulled by the court if the parties did not expressly agree to waive this rule.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

A party to an arbitration award does not have the inherent right to appeal the decision to the courts. However, if the arbitration agreement provided that the arbitrator must decide pursuant to the law, the parties may also agree that the decision may be appealed to court, with leave of the court, in cases where a fundamental error occurred in applying the law which caused travesty of justice.

The parties may agree to allow an appeal to an additional arbitrator. The appellant arbitrator must reason his decision. He may not hear witnesses and his decision should be based on the material which was in front of the first arbitrator with the addition of the parties' position in the arbitration.

Harry Orad, Adv. began his legal career in 1976 as a commercial lawyer specialising in corporate and property law. He also served as a municipal court justice. In 1983, he joined the highly acclaimed National Fraud Unit of the Israeli Police, rising to the rank of chief superintendent, where he investigated complex financial institution fraud and white-collar crimes. Since 1986, Harry has specialised in insurance and reinsurance law. Harry drafted some of the first D&O policies in Israel and later redrafted these policies to comply with new legal provisions. He has lectured on corporate governance issues in Israel and abroad. Between 1988 and 1989, Harry worked in London as a consultant to one of the major insurance law firms. Harry's expertise in insurance law includes directors' and officers' liability, banking insurance (bankers' blanket bonds), financial institutions, crime insurance, credit insurance, product liability, pollution and contamination.
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Most of the firm's clients are foreign companies, including some of the largest insurance and reinsurance companies in the world that are involved in providing large-scale, unique and high-risk insurance policies in Israel. The firm also represents Israeli insurance companies as well as foreign clients interested in developing business in Israel, including pharmaceutical and hi-tech companies.

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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

The supervisory authority of the insurance and reinsurance sector is the *Istituto per la Vigilanza sulle Assicurazioni* ("**IVASS**" – formerly, *Istituto per la Vigilanza sulle Assicurazioni Private e d'interesse collettivo*, "**ISVAP**"), set up by Law no. 135 of 7 August 2012, converting Law Decree no. 95 of 6 July 2012.

In accordance with the provisions of Legislative Decree no. 209 of 7 September 2005, as subsequently amended and integrated (the "Italian Insurance Code", "**IIC**"), IVASS carries out its supervisory functions by exercising, *inter alia*, powers having an authorisation, prescriptive and sanctioning nature in accordance with the provisions of the IIC.

According to the same IIC, the main purpose of IVASS' supervision is the adequate protection of insureds and persons entitled to insurance benefits. To such purpose, IVASS pursues the sound and prudent management of insurance and reinsurance undertakings, the transparency and fairness of the latter *vis-à-vis* customers, as well as, on a subordinated basis, the stability of the financial system and markets. IVASS' supervisory powers over transparency and fairness towards customers of insurance and reinsurance companies are exercised jointly with the *Commissione Nazionale per la Società e la Borsa* ("**Consob**"), each according to its respective competences, as set forth by applicable provisions.

The Italian Minister of Economic Development is also provided with certain functions related to the insurance sector. In particular, said Minister adopts the provisions set forth by the IIC within the framework of the dedicated policy laid down by the Italian Government. *Inter alia*, the Minister of Economic Development is empowered to order, upon IVASS' proposal, the revocation of the authorisation to exercise insurance business or the extraordinary administration of insurance and reinsurance companies.

Other authorities provided with certain functions relating to the insurance sector are: (a) the *Commissione di Vigilanza sui Fondi Pensione* ("**Covip**", *i.e.*, the Italian supervisory authority for pension funds), with particular reference to individual pension plans and other integrative pension schemes; and (b) the *Autorità garante per la Concorrenza ed il Mercato* ("**AGCM**", *i.e.*, the Italian Antitrust Authority), in relation to, *inter alia*, consumers protection, unfair commercial practices and distance selling.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

Companies intending to conduct insurance business in Italy must be authorised by IVASS. In particular, IVASS issues the authorisation to exercise insurance activity when the following conditions are met: (i) the company is set up in the form of a joint stock company, mutual insurance company (whose stakes are represented by shares provided with the requirements contemplated by the IIC), European company pursuant to Regulation (EC) no. 2157/2001 or European cooperative company pursuant to Regulation (EC) no. 1435/2003; (ii) the general and administrative office is located in the territory of the Italian Republic; (iii) the company is provided with the eligible basic own funds necessary to cover the Minimum Capital Requirement ("**MCR**") in an amount not lower than those set forth by the IIC; (iv) the company demonstrates that it will be able to hold eligible basic own funds in order to prospectively cover the Solvency Capital Requirement ("**SCR**") and the MCR; (v) the company files, along with its deed of incorporation (*atto costitutivo*) and articles of association (*statuto*), a business plan in line with the requirements set forth by the IIC; (vi) holders of qualified shareholdings in the company are provided with the Fit & Proper requirements and the conditions for the authorisation set forth by the IIC are met; (vii) the company demonstrates that it will be able to comply with the corporate governance system set forth by the IIC; (viii) individuals carrying out management and supervisory functions as well as key officers are provided with the required Fit & Proper requirements; and (ix) no "close ties" (*stretti legami*) among the companies or the entities of the relevant group exist which may hinder the actual exercise of supervisory functions. Further conditions are necessary in case a company intends to exercise Motor Third Party Liability ("**MTPL**") insurance or life insurance jointly with accidents and disease insurance.

Companies intending to exercise business exclusively for reinsurance in Italy must be authorised by IVASS. In particular, pursuant to the provisions set forth by the IIC, IVASS issues the authorisation to exercise reinsurance activity when a number of conditions are met, most of which appear to be generally in line with those referred to above in the previous paragraph.

The procedure and further documents for the obtainment of the authorisation by IVASS are regulated (i) for companies requesting authorisation to exercise insurance business in Italy, by ISVAP Regulation no. 10/2008, as subsequently amended and integrated ("**Regulation 10**"), and (ii) for companies requesting authorisation to exclusively exercise the reinsurance business, by ISVAP Regulation no. 33/2010, as subsequently amended and integrated ("**Regulation 33**").

IVASS may request information and clarifications in relation to the documentation filed within the context of the authorisation procedure. In such case, such procedure is suspended until the receipt of said integrative information/documentation (or, should the company not provide the requested integration within 90 days from the relevant request by IVASS, the authorisation request will automatically be considered withdrawn).

In case of a positive outcome, IVASS issues the authorisation within 90 days from the date of receipt of the complete authorisation request (save for cases of either interruption or suspension) and transmit the relevant decision to the company. In such case, the company may start the insurance/reinsurance activity after its enrolment with the competent Register of Companies.

In case of a negative outcome, before adopting a formal decision of denial of authorisation, IVASS communicates to the interested company the reasons for the denial and invites said company to provide useful data or documents in order to avoid such denial. Within the term indicated by IVASS (in any case not fewer than 10 days from the receipt of the communication), the company may provide in writing its observations (and supporting documentation, if any). Such communication interrupts the term for the authorisation procedure that starts lapsing again from the date upon which said observations are provided to IVASS. If instead the company does not provide any observation or the reasons for the denial are still in place, IVASS issues the final negative decision and communicates it to the company.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Foreign insurers located in a Member State other than Italy may write business in Italy, according to EU and national implementing provisions (i) directly, *i.e.*, if passported under a freedom to provide services regime, or (ii) through a branch set up in Italy, *i.e.*, under the right of establishment.

Foreign insurers located outside the European Union may write business in Italy only through a branch set up in Italy. Of course, they can also write reinsurance of a domestic insurer. However, the latter should not constitute a mere "fronting" domestic insurer.

Both the procedures to operate in Italy under freedom to provide services and on a right of establishment basis are regulated in detail by the IIC and relevant implementing regulations, in line with EU applicable provisions.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

The Italian civil legal system is based on the "civil code". The code contains, among others, a set of general and specific rules and principles applicable to contracts, including insurance contracts. Such rules can be "mandatory", *i.e.*, the parties are not free to depart from them, and they are applicable irrespective of whether the parties specifically refer to them. Some rules can also have a public policy nature or apply irrespective of whether the contract is subject to Italian law. In addition, an insurance contract must also satisfy regulatory requirements (in terms of form and provisions) and rules governing fair dealing with consumers.

Therefore, the parties do not enjoy complete freedom in determining the terms and conditions of an insurance contract and they should always verify that the relevant agreement does not conflict with civil and regulatory provisions of mandatory application.

For example, the code provides, *inter alia*, that: (i) clauses required by the law are inserted in the contract by operation of law, also in substitution of the different clauses inserted by the parties; and (ii) the parties are bound not only by what is written in the contract, but also by all the related consequences set forth by the law or, in absence thereof, according to uses and upon equitable principles ("*equità*").

1.5 Are companies permitted to indemnify directors and officers under local company law?

Italian civil and corporate law principles allow a company to indemnify its directors and officers for conducts carried out in the interest of or in their capacity as representatives of the company, subject to: (i) the general limitations of fraud, wilful misconduct and, usually, gross negligence; (ii) the need for the indemnity to be specific and determined; and (iii) specific provisions of law. Gross negligence can also be included in the scope of the indemnity. Case-by-case review is of course required, as this matter has been significantly scrutinised by courts. Companies providing indemnity to their directors and officers can take out insurance (usually this coverage is included in the D&O insurance coverage of the directors and officers).

1.6 Are there any forms of compulsory insurance?

In Italy there are several forms of compulsory insurance, meaning insurance that the insured is required to take. The typical example is MTPL insurance, that is in fact mandatory under Italian law, and, as such, is one of the more strictly regulated insurances in the Italian framework and constitutes a unique case as it is also mandatory for the insurer. The IIC provides, in fact, for the so-called "obligation to contract" of the insurer, the violation of which is subject to significant fines.

Other categories of compulsory insurance mainly relate to certain professional categories that are mandatorily required to be provided with an insurance coverage (*e.g.*, lawyers, accountants, doctors, tour operators), specific forms of compulsory insurance for employees and explosion/fire insurance in case of mortgages.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

In general terms, the substantive law relating to insurance may be said to be more favourable to the insured than the insurer. This is mainly due to the circumstance that, except for corporate entities and individuals acting in their business capacity, policyholders who are individuals are considered as falling within the definition of a consumer, as set forth by the Italian Consumers Code – *i.e.*, the "*natural person acting for purposes other than those relating to his/her entrepreneurial, professional, commercial or artisanal activity*" and, as such, are considered the "weaker" party *vis-à-vis* the insurer in the insurance contract. Such approach is also reflected in several provisions relating to the insurance sector, including several of those set forth by the IIC and various of its implementing regulations.

Furthermore, also indicative of said approach is the fact that (as anticipated above) the purpose of IVASS' supervision is "*the adequate protection of insured and persons entitled to insurance benefits*" – that is, pursued through the sound and prudent management of companies and their transparency and fairness towards customers – and, only on a subordinated basis, that of the stability of the system and of the financial markets.

2.2 Can a third party bring a direct action against an insurer?

As a general principle governing civil liability, an injured third party has no direct action against the insurer, with whom the third party has no contractual or non-contractual relationship.

Certain exceptions to the above principle are provided. For example, with reference to claims concerning damages caused by motor vehicles and boats, damaged third parties may bring actions directly against the insurer.

Moreover, the insurer has the right to pay the compensation due directly to the injured third party and, in any event, the insurer is bound to proceed directly with the payment in favour of the injured party should the insured demand to do so.

2.3 Can an insured bring a direct action against a reinsurer?

According to the general principle set forth by Art. 1929 of the Italian Civil Code, a reinsurance contract does not create any relationship between the insured and the reinsurer.

Nonetheless, such relationship may be set forth on the basis of specific contractual provisions – existing in the market practice – by means of which the reinsurer binds itself *vis-à-vis* the ceding insurer to pay the sums due by the latter directly to the insureds in the event that the ceding insured is not able to (*e.g.*, due to its insolvency).

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

Pursuant to Art. 1892 of the Italian Civil Code, misrepresentation or non-disclosure by the policyholder relevant to such circumstance that, if known by the insurer, the latter would have not given its consent or would have not given it on the same conditions, is a cause for annulment when the policyholder has acted with wilful misconduct or serious negligence. In such case, the insurer is no longer entitled to request the annulment of the contract if, within three months from the date it has gained knowledge of the misrepresentation or non-disclosure, it does not declare to the policyholders its intention to act for the annulment of the concerned contract.

Pursuant to Art. 1893 of the Italian Civil Code, in case of misrepresentation or non-disclosure by the policyholder without wilful misconduct or serious negligence, the insurer is entitled to terminate the contract by means of a declaration to be made to the policyholder within three months from the date it gained knowledge of the misrepresentation or non-disclosure.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

As described under question 2.4 above, Arts. 1892 and 1893 of the Italian Civil Code provide for a positive duty on the insured to disclose to the insurer the circumstances relating to the risk to be insured in such a way that the insurer is put in the position of correctly evaluating whether or not to cover the concerned risk and, if so, under which conditions.

Other provisions (Arts. 1897 and 1898) of the Italian Civil Code provide for further duties of disclosure on the policyholder, *i.e.*, in event either of reduction or worsening of the insured risk, in which case the policyholder is bound to communicate to the insurer the occurrence of such circumstances.

The scope of the positive duty of disclosure on the insured has been highly debated in the last few years by Italian scholars and case law, in particular with respect to cases where the insurer, in order to evaluate whether or not to enter into the policy, requests the prospective insured to fill in a questionnaire for the evaluation of the risk. In such cases, according to certain Italian case law, the fact that certain specific circumstances were not included by the insurer in the questionnaire may be interpreted as symptomatic of the "indifference" of the insurer as regards such circumstances, thus implying a lack of wilful misconduct or serious negligence of the prospective insured in case of non-disclosure of information not specifically requested by the insurer.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

In relation to non-life insurance, pursuant to Art. 1916 of the Italian Civil Code, the insurer that has paid the insurance benefit is subrogated, up to an amount equivalent to the benefits paid, in the rights of the insured *vis-à-vis* the third parties responsible for the damage.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

The venue of the first instance court within the Italian territory is determined on the basis of three criteria: the matter of the dispute; the value of the dispute; and the territory.

The lower court of first instance ("*Giudice di pace*") has competence over (i) insurance disputes for a value not exceeding EUR 5,000.00 (EUR 30,000.00 starting from October 31, 2021), and (ii) disputes over damages caused by vehicles and boat traffic for a value not exceeding EUR 20,000.00 (EUR 50,000.00 starting from October 31, 2021).

The tribunal (court of first instance) has general competence over other insurance disputes.

With reference to the territory criterion, in B2C agreements (*e.g.*, between insurance company and consumers, as the insured may be), the choice of a court different from that located in the district where the consumer has residency or is domiciled may be enforceable only if the insurer proves that the relevant clause has been previously and properly negotiated between the parties.

With reference to transactional litigations relating to insurance disputes, EU Regulation No. 1215/2012 also provides for certain limits to the parties' choice of jurisdiction.

Under Italian law, no civil disputes can be submitted before a jury.

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

The party who commences an insurance dispute has to pay the upfront court tax (so called "*contributo unificato*"), plus EUR 27.00 as stamp duty, at the time of filing the initial complaint. The value of the upfront court tax depends on the value of the claim and it is increased by half when the case is brought before a second instance court and doubled for proceedings before the Supreme Court. In case of fast-track proceedings, the upfront court tax is reduced by half.

A supplementary stamp duty of EUR 200.00 is due for proceedings commenced before the Supreme Court.

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

The writ of summons must be served upon the defendant at least 90 calendar days prior to the date of the first hearing indicated by the claimant in the writ of summons (such date would be then confirmed or rescheduled by the Judge). Should the service of process be performed outside the Italian territory, the longer term of 150 calendar days between the service of the writ of summons and the date of the first hearing shall apply. Both these terms could be reduced up to 50% by the President of the Court upon a claimant's justified request.

The duration of the proceedings strongly depends on several circumstances (for example, the courts' workload, complexity of the evidence-gathering phase, number of witnesses to be examined, etc.).

On the basis of our experience, we estimate the duration of first instance proceedings to be around 18–30 months. For the appeal phase, we estimate a duration of two to three years, and for the proceedings before the Court of Cassation, a duration of two years.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

Judges' powers in relation to the evidence-gathering phase are limited, as such powers represent an exception to the general principle according to which parties are exclusively responsible for introducing allegations and evidence in judicial proceedings.

Under certain circumstances, judges may order the parties to the proceedings and third non-parties to consent inspections on them or on their assets. In any circumstance, the parties and third non-parties may not be required to disclose certain information relating to their professional activities (such as client-attorney privilege). Also, upon a party's request, the judge may order the other party or a third non-party to the proceedings to disclose certain documents whose admission he/she deems necessary, provided that certain strict requirements are met. In particular, the requesting party (i) has to identify specific documents held by the other party, and (ii) has the burden to prove that such documents were not among those that the same party had a duty to hold.

Independently from a party's request, the judge may request from the Public Administration ("**PA**") written information concerning acts and documents of the same PA.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

Under Italian law, each party has the right to produce documents it is willing to disclose and, except for the above-mentioned extraordinary judges' powers (question 4.1 above), there is no obligation for a party to disclose any document within judicial proceedings. However, in order to support its case and have its claim upheld, each party shall disclose the documents proving its allegations (as an example, since insurance agreements must be proved in writing, the party who claims the execution of the agreement must produce a copy of the same).

Moreover (i) for deontological reasons, lawyers are prevented from producing any correspondence exchanged with other lawyers, as well as correspondence relating to settlement negotiations or attempts marked as confidential, and (ii) any correspondence between lawyers and their clients is subject to attorney-client privilege and lawyers cannot be requested/ordered by the judge to disclose any information obtained from their clients or by virtue of their professional activities.

The information acquired during the mediation procedure must not be used in ordinary proceedings relating – even only partially – to the same subject matter, which are commenced or continued after the failure of the mediation procedure, unless the other party gives its consent.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

As a general remark, courts have no powers to require witness examination.

Each party has the right/burden to file a request for witness examination, provided that the witness and the circumstances upon which the examination has to be carried out are specifically identified. The judge will then admit the witness examination relating to those circumstances he/she deems admissible and relevant to the proceedings. The examination shall only be carried out by the judge, who has the power to ask witnesses further questions.

With particular reference to insurance disputes involving damages on properties only, a newly introduced provision requests that witnesses must be identified by the insured as well as by the insurance companies within specific time limits. The judge shall declare inadmissible the examination of witnesses identified at a later stage, unless evidence is provided that their prompt identification was objectively not practicable.

The 1970 Hague Convention provides for specific rules to be applied in order for the examination of witnesses residing abroad.

Should the witness duly summoned not appear at the hearing scheduled for his examination, the judge may order the witness to be accompanied to the same hearing or a following hearing, and require the witness to pay a fine between EUR 100.00 and EUR 1,000.00.

Witnesses are examined during the evidence-gathering phase.

4.4 Is evidence from witnesses allowed even if they are not present?

Article 257-*bis* of the Italian Code of Civil Procedure provides for written examination of witnesses. However, this instrument – that should be authorised by the judge – is not widely used in practice, since it requires the prior consent of all parties.

Moreover, should the witness justifiably not be able to attend the hearing, or applicable law provisions or international conventions authorise him/her not to attend the hearing, the judge shall proceed with the examination at the witness' residence or office.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

Under Italian law, witness examination is aimed at proving historical facts and events only, and does not include expert opinion. Therefore, parties are not entitled to file a request for the admission of an expert witness examination. However, the parties have the right to file expert reports.

Likewise, the judge, also upon the parties' request, has the power to appoint an independent expert with specific expertise who shall provide the judge with any technical assistance and clarification that he/she may require. Each party may appoint an expert, who can participate in expert tests and activities and provide consideration in a report drafted by the court-appointed expert.

All parties to the proceedings are jointly and severally liable *vis-à-vis* the court-appointed expert for paying the consideration due for the activities performed by the expert.

4.6 What sort of interim remedies are available from the courts?

Under Italian law, before a dispute is commenced, and also while a dispute is pending, a party may obtain various interim measures, and, in particular:

- seizures, aimed at ensuring the custody of a specific asset whose ownership or possession is disputed, or aimed at freezing real and personal assets of the defendant; and
- urgent precautionary measures aimed at limiting or avoiding serious damages, also considering the timing for the conclusion of ordinary proceedings (for example, prohibiting someone from doing something).

In urgent cases, upon a party's request, the judge may issue interim measures without prior notice to the defendant. In this case, a hearing shall take place for the urgent measure to be confirmed or revoked, considering the defendant's position and defence.

Other interim remedies are provided in order to allow the acquisition of evidence before ordinary judicial proceedings start when it is likely that the evidence could not be effectively taken once the evidence-gathering phase formally commences (such as witness evidence or technical inspection).

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

Generally, first instance decisions (which are provisionally enforceable) can be challenged before the courts of appeal ("*Corti di Appello*"). Under a general point of view, there is no specific limit on the grounds for appeal that a party may propose, since appeal proceedings may lead to a complete re-examination of the case.

Decisions of courts of appeal may generally be challenged before the Italian Supreme Court ("*Corte di Cassazione*") on the basis of limited grounds. The Italian Supreme Court essentially verifies issues concerning jurisdiction and the proper application of the law by the court of appeal, but cannot overrule the interpretation of facts and evidence given by the court of appeal.

The parties to the proceedings may also agree that the decision by the court of first instance will be challenged directly before the Italian Supreme Court in relation to proper application of the law by the court of first instance.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Yes, interest is generally recoverable in judicial proceedings, usually upon the parties' request.

Should the agreement provide for an interest rate to be applied in case of late payment, then the agreed interest rate will be applied (please note that Italian legislation prevents the application of interest rates equal to, or higher than, rates periodically set by specific law provisions).

Should no interest rate be agreed by parties, the legal interest rate established by the Ministry of the Economy will apply (starting from 1 January 2019, the legal interest rate is established at 0.8% *per annum*).

Also, a higher legal interest rate shall apply in case of late payment relating to commercial transactions. For judicial or arbitration proceedings commenced at the end of 2014, if no interest rate has been previously agreed by parties, interest accrued from the date on which the judicial proceedings is commenced shall be calculated on the basis of the higher interest rate provided for late payment on commercial transactions.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

Each party bears its own legal costs during proceedings. At the end of judicial proceedings, the judge awards costs and expenses applying a ministerial regulation establishing fees due for each phase of the proceedings, on the basis of the value of the dispute.

In principle, the unsuccessful party shall refund to the successful party legal costs and expenses. Yet, under certain circumstances, courts may decide to set off legal costs and expenses between all parties. The provisions of the ministerial regulation concerning legal fees have been changed recently in order to, *inter alia*, reduce judges' powers in determining the amounts of costs and expenses to be awarded and provide specific rules in relation to the fees due for the mediation and negotiation procedures.

Courts may also order (i) one party to pay a sum of money to the other party in case of procedural misconduct or frivolous claims, and (ii) the successful party to refund costs to the unsuccessful party if the final judgment reflects – or recognised an amount equal to or less than – the settlement agreement proposed by the judge or by the other party during the mediation procedure, and rejected by the successful party with no justified reasons.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

In certain matters, including insurance agreements, parties shall try to settle the dispute by mediation before commencing judicial proceedings (mandatory mediation). Otherwise, recourse to mediation is a voluntary choice of the parties.

The judge has also the power to refer the parties to mediation whenever he/she deems it necessary or appropriate (delegated mediation). Also in this circumstance, the mediation represents a mandatory procedure.

Like mediation, the assisted negotiation procedure represents a mandatory attempt to settle disputes out of court, which must be used by the parties before commencing judicial proceedings relating to compensation for damages caused by motor vehicles and boat traffic, or to the payment of amounts not exceeding EUR 50,000 (mandatory negotiation procedure). In this latter case, parties are not required to attempt the mandatory negotiation procedure if the dispute concerns contractual obligations in B2C agreements.

4.11 If a party refuses to a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

In case of mandatory mediation, or a mandatory negotiation procedure, should the party who intends to start the judicial proceedings fail to commence the relevant procedure, and such a failure be ascertained within the first hearing, judicial proceedings cannot be continued and will be declared inadmissible ("*improcedibile*"). In this case, the judge may give the parties a deadline for starting the relevant mandatory procedure.

Similarly, in case of delegated mediation, the proceedings cannot be pursued when the party fails to comply with the judge's request.

In any circumstance, parties' refusal to mediate or to participate in a mediation or assisted negotiation procedure may be taken into account by courts in awarding legal costs and expenses.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

Unless the parties have made specific reference to the regulation of an arbitral institution, arbitration is regulated by Arts. 806–832 of the Italian Code of Civil Procedure. Parties may agree to arbitrate contractual and non-contractual disputes (excluding those involving the parties' inalienable rights), unless a specific provision of law states otherwise.

In general terms, Italian courts have no power to intervene in arbitration proceedings with an Italian seat. Nevertheless, some exceptions are provided. In particular, judicial courts:

- may intervene in the appointment of arbitrators (when a party fails to do so): the President of the Tribunal may refuse to appoint the arbitrator if he considers the arbitration clause manifestly non-existent or if the arbitration clause manifestly provides for foreign arbitration;
- shall decide on a party's request relating to rejection of arbitrators;
- may be requested by arbitrators to order the appearance of witnesses before them; and
- have competence in adopting urgent or interim measures (which cannot be issued by the Arbitral Tribunal).

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

In order to be valid, the arbitration agreement/clause shall be in writing. No specific form of words is required, provided that the parties' will to submit disputes to arbitration appears clearly and unequivocally from the arbitration clause, with the exclusion of the courts' jurisdiction.

Unless otherwise provided for by law, parties may agree to submit to arbitration for (i) pending disputes (to be specifically indicated), or (ii) future disputes, either contractual or non-contractual (provided that the non-contractual relationships are specifically referred to). It is forbidden for the parties to submit to arbitration disputes concerning rights which a party could not alienate ("*diritti indisponibili*").

In B2C agreements (as insurance agreements may be), the arbitration clause is enforceable provided that the business party proves that the clause was previously and properly negotiated between the parties. Also, if the arbitration clause is included in the general terms and conditions of one party, it has to be specifically approved in writing with a so-called "double signature". Under a *de jure condendo* perspective, a Panel appointed by Parliament for the review of arbitration law ("*Commissione Alpa*") has submitted the text of a proposed reform to the Consumer Code aimed at encouraging the enforceability of the arbitration clause in B2C agreements.

In re(insurance) agreements, it is advisable that the arbitration clause perfectly matches (and has the same wording) as the arbitration clause contained in the insurance agreement.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

Italian courts may refuse to enforce the arbitration clause/agreement should the same not comply with the requirements indicated under questions 5.2 and 5.1 above.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

Arbitrators do not have the power to issue interim measures; therefore, the party seeking interim relief shall in all cases resort to the judicial authority. Courts can issue in principle any type of interim measures (see question 4.6 above).

Under a *de jure condendo* perspective, the Panel appointed by Parliament for the review of arbitration law ("*Commissione Alpa*") has submitted the text of a proposed reform of arbitration proceedings where arbitrators, under certain circumstances, are provided with powers to issue interim and precautionary measures.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

Arbitral tribunals have to state the reasons for the award, which shall contain at least a brief description of the legal grounds of the decision. Should the arbitral tribunal not comply with the above rule, parties may challenge the award before the court of appeal of the arbitration venue (see question 5.6 below).

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

Arbitration awards are always challengeable and any parties' waiver to this right is null and void. Three forms of judicial recourse against arbitral awards are available:

- challenge for annulment;
- challenge for revocation (*e.g.,* where there has been fraud, collusion or corruption by arbitrators or one of the parties); and
- third-party challenge (when award damages rights of a party which has not participated in the arbitral proceedings).

Challenge proceedings for the annulment of the award shall be commenced before the court of appeal of the arbitration seat, within 90 days from the service of the award, or, if no service occurred, within one year from the last signature of the award.

Parties may claim the annulment of the award on the basis of very limited grounds (for example: invalidity of the agreement to arbitrate; or the award concerns matters which could not be submitted to arbitration by law or by the arbitration clause/agreement). No challenge on the merits of the decision is allowed, except in case it involves application of law provisions and the parties expressly agreed to it, or it is provided by law.

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Japan

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Kazuo Yoshida

1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

The Financial Services Agency (the "FSA") regulates both insurance and reinsurance companies.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

Any foreign insurer may operate an insurance business in Japan through either a subsidiary or a branch. If establishing a branch, the foreign insurer is required to obtain a licence as a "foreign insurer" under Article 185(1) of the Insurance Business Act (the "IBA"). If establishing a subsidiary, the subsidiary is required to obtain a licence as an "insurance company" under Article 3(1) of the IBA. The standards for granting both licences are basically the same. However, when establishing an insurance company, the foreign insurer is additionally required to be authorised as a major shareholder of the insurance company under Article 271-10(1) of the IBA.

Under Article 246(1)(i) and (xiv) of the Enforcement Order of the IBA, the FSA endeavours to make decisions whether to grant a licence within 120 days after its receipt of the licence application. This is called the "standard processing period". However, this period is only required to be followed on a best-endeavour basis, and interpreted to commence when the formal application documents are filed. In practice, the foreign insurer or its subsidiary would hold many discussions about the application documents with the FSA before the formal filing. We advise you to expect that such discussions would take at least one year.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Under Article 186(1) of the IBA, without the licence described in question 1.2 above, foreign insurers are prohibited from concluding any insurance contracts that insure any persons who have an address, residence or property in Japan, or a vessel or aircraft registered here. However, this prohibition does not apply to the following contracts:

- reinsurance contracts;
- marine insurance contracts that cover vessels registered in Japan, cargo transported by such vessels, or liabilities that arise therefrom;
- aviation insurance contracts that cover aircraft registered in Japan, cargo transported by such aircraft, or liabilities that arise therefrom;
- space insurance contracts that cover launches into outer space, cargo transported by such launches, or liabilities that arise therefrom;
- insurance contracts that cover cargo originating in Japan and in the process of being shipped overseas; and
- overseas travel insurance contracts that cover injury, illness or death, or cargo of overseas travellers.

Also, the prohibition does not apply even for contracts other than the above if the insurance contract applicant obtains permission in advance from the FSA.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

Article 10 of the Consumer Contract Act voids any clauses in any consumer contract that restrict the rights or expands the duties of consumers beyond the application of provisions unrelated to public order in the civil law, and that unilaterally impairs the interests of consumers in violation of the fundamental principle prescribed in Article 1(2) of the Civil Code. Also, mandatory provisions in the Insurance Act void any agreements that, contrary to such provisions, treat policyholders adversely.

1.5 Are companies permitted to indemnify directors and officers under local company law?

Under Article 424 of the Companies Act, in general, the liabilities of directors or executive officers cannot be indemnified unless all shareholders unanimously consent to the indemnification. However, such liabilities may be reduced to some extent under certain circumstances. For example, the board of directors may make a resolution, or the company may enter into certain agreements with non-executive directors to reduce the liabilities in certain cases pursuant to its articles of incorporation.

1.6 Are there any forms of compulsory insurance?

Examples of compulsory insurance in Japan are:

- automobile accident compensation insurance; and
- industrial accident compensation insurance.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favorable to insurers or insureds?

In general, the substantive laws of Japan such as the Insurance Act and the Consumer Contract Act are more favourable to the insured, as mentioned in question 1.4 above.

2.2 Can a third party bring a direct action against an insurer?

In general, any third party who is neither insured nor a beneficiary of an insurance contract cannot bring a direct action against any insurers. However, certain special laws authorise third-party actions. For example, under Article 16 of the Act on Securing Compensation for Automobile Accidents, any aggrieved party has the right to claim damages directly against the insurer.

2.3 Can an insured bring a direct action against a reinsurer?

No, the insured cannot bring a direct action against any reinsurers.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

Under Articles 4, 37 and 66 of the Insurance Act, all policyholders or the insured are obligated to disclose any material matters regarding the risks covered by insurance contracts and as requested to be disclosed by the insurer. If any policyholder or the insured violates this obligation intentionally or with gross negligence, the insurer may cancel the insurance contract. However, the insurer cannot do so in the following cases:

- when the insurer knew of the violation or did not with gross negligence;
- when an agent of the insurer interferes with the disclosure; or
- when an agent of the insurer solicits non-disclosure or false disclosure by the policyholder or the insured.

The insurer's right to cancel will be extinguished one month after the insurer knew of the cause of cancellation or five years after the contract was concluded. If the insurer cancels the insurance contract, the insurer will be discharged from its liability for insurance payments, except for any damages not caused by any undisclosed matters.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

The obligation described in question 2.4 above does not arise if the insurer does not request the policyholder or the insured to disclose all matters material to certain risks. Articles 4, 37 and 66 of the Insurance Act are prescribed as mandatory provisions, which void any agreements that, contrary to such provisions, treat policyholders adversely. However, the following contracts are not subject to these mandatory provisions, meaning that insurers are allowed to provide other provisions that prescribe broader obligations for policyholders than those prescribed in Article 4 of the Insurance Act:

- maritime insurance contracts prescribed in Article 815(1) of the Commercial Code;
- insurance contracts that cover aircraft, cargo transported by such aircraft, or liabilities that arise from aircraft accidents;
- insurance contracts that cover nuclear facilities or liabilities that arise from nuclear facility accidents; and
- non-life insurance contracts that cover damages arising from business activities.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

Under Articles 24 and 25 of the Insurance Act, the insurer is entitled to be subrogated to any salvage of the object for which an insurance payment was made, or is entitled to the right to seek damages or other compensation recovered by the insured through an insured event for which an insurance payment was made.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

Under Article 4 of the Code of Civil Procedure, disputes are generally heard before the court with jurisdiction over the area where the defendant resides. However, a jurisdiction clause in the insurance policy may change the court that hears the dispute. Depending on the value of the dispute, it is resolved in either a district or summary court. Since Japanese law does not adopt a jury system, there is no right to a hearing before a jury.

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

Court fees depend on the value of the dispute. For instance, it costs 320,000 yen to commence an action for a claim of 100,000,000 yen.

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

The first trial date is scheduled within one month after the suit is filed. The trial period depends on the case, but it generally takes around one year until the final decision is rendered. If the case is settled, the trial may be terminated earlier. On the other hand, if the case is appealed, it will obviously take more time.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

Under Article 223 of the Code of Civil Procedure, the court may order the submission of certain documents by the holders of such documents if the court finds them necessary for the trial

and the document holders have no grounds to refuse the court's order. This order can be issued regardless of whether the document holder is a party to the action. Under Article 220 of the same Code, the document holder may not refuse to submit a document in the following cases:

(i) a party possesses the document as cited in the suit by the same party;
(ii) the party who intends to submit the document as evidence has the right to request delivery or inspection of the document;
(iii) the document was prepared in the interest of the party who intends to submit the document as evidence or with regard to the legal relationship between the party and the document holder; or
(iv) the document does not fall under any of the following:
- it states any matters for which the document holder, his/her family members, etc. can be prosecuted;
- it relates to any secrets regarding a public officer's duties that, if submitted, may harm the public interest or substantially interfere with the performance of such duties;
- it states any matters that a physician, dentist, pharmacist, seller of medicine, birth attendant, attorney, notary or priest knew while performing their occupational duties, or any matters relating to technical or occupational secrets, neither of which are released from the duty of confidentiality;
- it was prepared exclusively for use by the document holder (excluding any documents held by a government and used by a public officer for an organisational purpose); or
- it relates to a suit pertaining to a criminal case or a record of a juvenile case, or a document seized in these cases.

Under Article 224 of the same Code, if any party to the action does not comply with an order to submit a document or has caused the document to be lost or otherwise unusable in order to prevent the opposing party from using it, the court may conduct fact-finding concerning the alleged statements made in the opposing parties' documents. If any non-party to the action does not comply with the order, the court may impose a non-criminal fine of not more than 200,000 yen on the non-party.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

The Code of Civil Procedure does not explicitly authorise any party to withhold from such disclosure documents. However, these documents do not always contain first-hand information relating to facts. Therefore, the document holder could argue that these documents are not necessary for the trial and that the petition for the order should be dismissed.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

Under Article 190 of the Code of Civil Procedure, the court may examine any person as a witness. If any witness does not appear before the court without justifiable grounds, the court will order that the witness shall bear any court costs incurred from the non-appearance and impose a non-criminal fine of not more than 100,000 yen on the witness.

4.4 Is evidence from witnesses allowed even if they are not present?

Under Article 205 of the Code of Civil Procedure, the court may have witnesses submit documents *in lieu* of being examined if the court finds it appropriate and the parties do not object.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

The Code of Civil Procedure does not explicitly prescribe any restrictions on calling expert witnesses, and it is not common to have a court-appointed expert in addition to or in place of party-appointed experts.

4.6 What sort of interim remedies are available from the courts?

Even if a final decision has not been rendered, under Article 20 of the Civil Preservation Act, any party may file a petition for an order for provisional seizure over another party's assets if a compulsory execution with regard to a claim for monetary payment is impossible or extremely difficult. Also, under Article 23 of the same Act, any party also may file a petition for an order for provisional disposition with regard to a disputed subject matter if an exercise of rights is impossible or extremely difficult due to changes to the existing state of the subject matter.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

In general, there are two stages of appeal. First, the losing party may appeal to the upper court based on any grounds if such party objects to the decision rendered by the court of first instance. The final court is the Supreme Court, but it only has jurisdiction over material violations of law, precedent cases, and the Constitution, and it basically does not determine facts.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Regardless of whether the case is disputed in court, the party who failed to perform its obligation must pay delinquency interest, which is calculated at 5% or 6% unless otherwise agreed between the parties. This rate will be lowered to 3% from April 2020 by amendment of the Civil Code.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

In general, any court decision requires the losing party to bear court costs. If a settlement is made, the costs are generally borne by both parties. The parties may save any trial costs including the costs for witnesses by settling prior to trial.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

Courts cannot compel the parties to mediate disputes or engage in other forms of ADR. However, under Article 89 of the Code of Civil Procedure, courts may recommend that the parties settle their dispute regardless of the status of the suit. This recommendation is commonly made before and after the trial for witnesses. If the parties accept the recommendation before the trial, they can save the cost of the trial. After the trial, the court may provide more detailed implications for its final decision which may motivate the parties to accept the recommendation.

4.11 If a party refuses to a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

Even if a party refuses a court's settlement recommendation, no sanctions will be imposed for such refusal. However, through the recommendation procedure, the parties may at times infer the direction of the final decision if no settlement is made. In consideration of the possibility of winning the case, the parties will decide whether to accept the court's recommendation.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

Under Article 14 of the Arbitration Act, the court in charge must dismiss an action upon the defendant's petition if it finds that the dispute in the action is subject to an arbitration agreement.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

Article 13(2) of the Arbitration Act states that arbitration agreements are required to be made in writing but does not explicitly prescribe any form of words that must be put into the agreement.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

The court will refuse to enforce an arbitration clause in the following cases:

- when the arbitration agreement is invalid;
- when execution of the arbitration agreement is impossible; or
- when the defendant has made statements in the court hearing procedure.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

Article 15 of the Arbitration Act states that an arbitration agreement does not preclude the parties of a dispute subject to the agreement from petitioning for a provisional disposition by the courts.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

Under Article 39(2) of the Arbitration Act, the arbitral tribunal is required to state the reasons for its award unless otherwise agreed by the parties.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

The decision of an arbitral tribunal has the same effect as the court's final decision. Therefore, in general, the parties to an arbitration cannot appeal the arbitral tribunal's decision to the courts. However, under Article 44 of the Arbitration Act, the parties may file a petition with the court to set aside the arbitral award in the following cases:

- the arbitration agreement is invalid due to the limited capacity of a party;
- the arbitration agreement is invalid on grounds other than the limited capacity of a party pursuant to the laws and regulations designated by agreement between the parties as those to be applied to the arbitration agreement;
- the petitioner did not receive notice as required under Japanese laws and regulations in the arbitrator appointment procedure or the arbitration procedure itself;
- the petitioner is unable to defend in the arbitration procedure;
- the arbitral award contains a decision on matters beyond the scope of the arbitration agreement or of the petition presented in the arbitration procedure;
- the composition of the arbitral tribunal or the arbitration procedure violates Japanese laws and regulations;
- the petition filed in the arbitration procedure is concerned with a dispute that may not be subject to an arbitration agreement pursuant to Japanese laws and regulations; or
- the content of the arbitral award is contrary to public policy in Japan.

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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

Insurance and reinsurance in the Republic of Kazakhstan is regulated by the National Bank of the Republic of Kazakhstan. The National Bank of the Republic of Kazakhstan is the central bank of Kazakhstan and represents the upper (first) tier of the banking system of Kazakhstan. All other banks comprise the lower (second) tier of the banking system. As well as the banking system, the National Bank is also a government regulator for the insurance sector. Since January 2020, it has been planned to transfer the functions of the regulator to the newly established Agency on Financial Monitoring of the Republic of Kazakhstan.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

An insurance company is set up in the form of an open joint stock company and requires registration with the Ministry of Justice and a licence for insurance activity. Insurance companies operating in general insurance cannot combine their activity with life insurance. The majority of shares should always belong to residents of Kazakhstan. An insurance company is a commercial organisation which performs its activity in accordance with the law on insurance and other normative legal acts of Kazakhstan.

The Committee for the control and supervision of the financial market and financial organisations of the National Bank of the Republic of Kazakhstan grants permission to establish and license an insurance/reinsurance organisation. They provide a list of the documents necessary to obtain permission to establish and grant a licence, as well as other qualifying requirements.

According to the order of the Board of the Agency of the Republic of Kazakhstan on the regulation and supervision of the financial market and financial organisations, dated August 22, 2008 #131 'On approval of the Instruction on standard values and calculation methods for prudential standards of insurance (reinsurance) organisations, forms and terms of presenting of the reports on fulfilment of prudential standards'.

The minimum authorised capital for a newly created insurance/reinsurance organisation must equal:

- when seeking a licence in the 'general insurance' sector – 430 (four hundred and thirty) million tenge;
- when seeking a licence in the 'life insurance' sector – 670 (six hundred and seventy) million tenge;
- when seeking a licence in the 'general insurance' sector and a reinsurance licence – 450 (four hundred and fifty) million tenge;
- when seeking a licence in the 'life insurance' sector and reinsurance licence – 690 (six hundred and ninety) million tenge; and
- when seeking a reinsurance licence, with reinsurance being the only line of business – 530 (five hundred and thirty) million tenge.

The timeframe for granting permission is within three months of the date when the applicant filed the last documents requested by the authorised body, as per the law on insurance, but no later than six months from the date of receiving an application.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

The market is restricted. Foreign insurers can only reinsure the risk of a domestic insurer. However, there are certain requirements which local insurance companies should follow.

1) **Local retention**. Each insurer should follow prudential standards set by the law; among which is the solvency margin indicator. Previously, there was a minimum retention requirement on each insurance agreement of not less than 5% of that which the solvency margin indicator calculated for the month in which the insurance agreement was issued. However, starting from the beginning of 2017, this requirement has been waived. Now the risk can be 100% reinsured.
2) **Reinsurers' rating requirement**. According to the law on insurance, there is a requirement whereby if the risk is reinsured to a foreign insurance company, it should be rated. The minimum rating requirement is 'A-' as per the S&P rating agency. Ratings from A.M. Best and other Fitch rating agencies are also recognised. However, if the risk is reinsured to a foreign reinsurer with a lower rating of financial stability, the insurance company transferring the risk should increase their capital reserve as shown in the following table.

Reinsurer	Rating as per international rating agency	% of increase of the minimum amount of solvency margin
Group 1	'AA-' or higher	0%
Group 2	From 'A+' to 'A-'	0%
Group 3	From 'BBB+' to 'BBB-'	0.21%
Group 4	From 'BB+' to 'BB-'	0.75%
Group 5	From 'B+' to 'B-'	3.8%
Group 6	Lower than 'B-' or no rating	33%

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

There are internal rules of insurance developed by each insurance company independently in line with the supervising bodies' guidelines.

1.5 Are companies permitted to indemnify directors and officers under local company law?

Yes. There are no restrictions relating to a company indemnifying directors and officers.

1.6 Are there any forms of compulsory insurance?

The following forms of insurance are compulsory:

1) Obligatory Employees' Personal Accident Insurance, which is required for employees while performing their labour duties.
2) Obligatory Third Party Motor Liability Insurance.
3) Hazardous Objects' Liability Insurance.
4) Obligatory Environmental Liability Insurance.
5) There are other specific types of insurance dedicated to specific types of activities (travel agent/operator, crop production, etc.).

As of 2019, obligatory types of insurance are issued online in electronic format.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

In general, (re)insurance agreements protect the interest of the insurance company. The National Bank is in the process of creating ombudsmen sections which will enable the Insured to make complaints with respect to their policies and related claims.

2.2 Can a third party bring a direct action against an insurer?

A party which does not have any title in the insurance agreement cannot bring a direct action against the insurance company.

2.3 Can an insured bring a direct action against a reinsurer?

As per insurance legislation, the fronting insurance company which issues the insurance contract is fully responsible in front of the Insured and the Insured has no right to go directly to the reinsurance company.

Cut-through clauses are not popular with local insurance companies. However, if such a clause is attached to a reinsurance contract, this will enable the Insured to take action against the reinsurer, if required.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

As per the law, the insurance company can reject the claim, not return the premium and, if required, take legal action against the Insured.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

Yes. As per the principles of insurance, the client has to disclose all material information, which he is aware of, regarding the risks that are going to be transferred to the insurance company and, furthermore, he should update the insurance company during the policy period in case the circumstances change from those stated at the inception of the cover. Otherwise, the insurance company can reject the claim, if any, and not return the premium as well.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

A subrogation clause is a standard clause within an insurance agreement unless otherwise agreed.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

The specifics to consider in cases of business disputes, i.e. disputes arising in business activities, lie in the fact that cases of this kind are within the jurisdiction of specialised inter-district economic courts and the process of proving the argument of opposing sides is based on documents only. Along with contracts, these documents include primary accounting documents (invoices, bills, certificates of acceptance of work performed/services provided/goods delivered, powers of attorney, etc.). The specifics of prosecuting cases in the category of business disputes are associated with the substantive laws by which the opposing parties were guided in their relationship, whether a supply, construction, insurance, government procurement or other contract. It should be noted that, in the majority of these types of cases, in order to apply the laws in a correct and uniform manner, the Supreme Court has adopted normative resolutions, on the basis of which the parties to the proceedings and their representatives build their tactics and strategy for proceedings of a particular category.

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

State dues are subject to be paid when applying to the court. Any additional payments are not allowed.

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

Depending on the value of the dispute, it may take between three and six months. Usually the parties appoint a law firm or lawyers specialised in insurance affairs.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

The courts have full power in this regard.

By virtue of the Civil Procedure Code, Article 65, each party shall prove the circumstances it refers to as the grounds for their claims and objections. Legal representation in court involves a deep analysis of all the circumstances of the case. For this, it is necessary to examine all the documents and all the evidence, and to question the concerned parties, etc.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

No. A party cannot withhold documents from disclosure.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

Yes, they do. In cases where one party is reluctant to give evidence, the court is able to ask the embassy in his territory to send an application via the local court, inviting him to the court in order for him to provide his evidence. In cases where the parties are residents of Kazakhstan, the court can request parties to attend court on a specific date to provide their evidence and local law enforcement bodies are used by the court to enforce this.

4.4 Is evidence from witnesses allowed even if they are not present?

No. In cases where the party is not present, he is able to provide his evidence by referring to a notary public and then sending the legalised version to the country where the case is in process.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

Depending on the case, an expert witness can be called in. It is not common to have a court-appointed expert.

4.6 What sort of interim remedies are available from the courts?

Depending on the case, remedies can vary, and may include a fine, imprisonment with the right to pay a fine instead of the period of confinement, or imprisonment.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

Yes, there is, and the appeal can go on; usually the court of appeal accepts a maximum of between three and five appeals.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Yes, it is recoverable. The current rate is between 0.1% and 0.5%.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

Civil lawyers and solicitors charge their clients as per the regulated tariffs. Cases can be settled prior to trial in case there will be benefits for the parties due to the status of the claim. But usually, the general trend is to refer cases to court.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

This is not a usual practice. However, if the court decides to use a mediator either for one party or all parties involved, they have to invite them to the court, advise them on the purpose of the invitation and ask them to introduce their mediators. The court can use legal enforcement authorities to make a party/parties obey.

4.11 If a party refuses to a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

If a party refuses such a request, it will receive a court application with a deadline to mediate.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

The law does not instruct the parties to specify a concrete arbitration institution to which they refer their disputes and, in practice, when the parties fail to identify an arbitration institution in the arbitration clause or have indicated a non-existent arbitration institution, this used to create a legal conundrum. The court should refer the parties to arbitration if one of the parties to an arbitration agreement raises an objection to the adjudication of the dispute in the court. However, if arbitration proceedings cannot be commenced because a non-existent arbitration institution has been named, the parties would not be able to arbitrate either. As a result, the dispute could get stuck in legal limbo without a chance of a sensible resolution, because invalidation of the defective arbitration clause could be done only by means of a decision of the court or an arbitral tribunal. An attempt to obtain it could result in another vicious circle. In 2010, the Parliament introduced an amendment to the International Arbitration Law which allowed the court to take jurisdiction over a dispute even if there was an arbitration agreement, if the court found the arbitration agreement to be unenforceable. A similar patch was applied to the Domestic Arbitration Law in 2013.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

Under both the International Arbitration Law (The Law of the Republic of Kazakhstan #23-III dated December 28, 2004 'On International Arbitration') and the Domestic Arbitration Law (The Law of the Republic of Kazakhstan #22-III dated December 28, 2004 'On Arbitration Tribunals'), parties can enter into an agreement to arbitrate a dispute related to civil law relationships between parties, which either has already arisen or may arise in the future. Such an agreement must be in writing and specify the consent of the parties to refer the dispute to arbitration. The International Arbitration Law specifically states that such agreement may be in the form of an arbitration clause in a contract or in the form of a standalone agreement, and that such a standalone agreement may be formed by way of an exchange of correspondence by any means; although the Domestic Arbitration Law does not contain these details, the same principle should apply based on the general rules of contract formation.

However, concerning insurance, an arbitration clause should be inserted within the insurance agreement.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

An arbitral award issued either under the International Arbitration Law or the Domestic Arbitration Law can be enforced through court. A foreign arbitral award may be enforced in accordance with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the European Convention on International Commercial Arbitration.

The party seeking enforcement must file a petition with the court attaching the originals of the arbitration agreement and the arbitral award (or duly authenticated copies of these documents). The enforcement may be sought within three years of the issuance of the award. If the award is issued in a foreign language, a duly authenticated translation to Kazakh or Russian must be attached. The court must review the petition for enforcement of the award within 15 days from receipt of the petition and either issue an execution writ, which has the power of a judicial act and must be complied with by any and all entities and individuals, or deny enforcement if any of the grounds for denial are proven. The grounds for denying enforcement are listed in the Civil Procedure Code and both arbitration laws, and generally correspond to the grounds listed in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

The draft law 'On arbitration' includes the same grounds for denial of enforcement and a couple of additional grounds: the existence of an enforceable judgment or arbitral award on the same subject matter, between the same parties, on the same grounds; and the issuance of the award as a result of a crime as confirmed by a verdict of the court.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

Under both the International Arbitration Law and Domestic Arbitration Law, the parties to arbitration proceedings may apply to the court for interim security measures. The petitioner must provide the court with a confirmation that the arbitration proceedings have been properly commenced in order for the court to review the request.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

Yes. The tribunal must provide details. However, this can be foreseen within the documents before submitting the application for arbitration to the tribunal.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

The domicile court cannot appeal the decision. However, the arbitral conclusion can be challenged by an arbitral head appointed by both parties.

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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

The business of insurance is regulated by the Financial Services Commission ("**FSC**") and the Financial Supervisory Service ("**FSS**") with a mission towards maintaining market stability in the financial services sector, ensuring the financial health/strength of financial institutions, and promoting consumer protection in the sale of financial services products in the Republic of Korea ("**Korea**").

The FSC has authority to regulate financial institutions including insurers, banks, securities firms, asset management companies and other financial-related organisations. The FSC develops financial policies, promulgates financial-related laws/regulations, issues licences to financial institutions as well as oversees cross-border matters such as anti-money laundering activities. The FSS is the "executive arm" of the FSC having direct regulatory supervisory authority over the business operations of insurers and reinsurers along with solicitors, agents, brokers, etc.

The Korea Fair Trade Commission ("**KFTC**") promotes the protection of consumer interests from anticompetitive and antitrust perspectives with respect to insurance products, price-fixing of premiums, tied-products in the marketing and sale of insurance products, solicitation activities, as well as cases of market dominance and market influence. The National Tax Authority ("**NTS**") is primarily involved in the assessment and collection of taxes including financial institutions such as insurers and reinsurers.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

An insurer or reinsurer must be licensed and shall establish itself as a Korea branch or a subsidiary pursuant to the Insurance Business Act ("**IBA**"). A Korea branch is treated as an *extension* of its foreign head office while a Korea subsidiary is a separate legal entity set apart from its parent/shareholder(s).

The minimal capital for a branch is KRW 3 billion (approximately USD 2.5 million), and as a subsidiary it is KRW 30 billion (approximately USD 25 million). An applicant must satisfy other qualifications such as (1) "seasoning" with a licence in its home jurisdiction, (2) minimum capitalisation, (3) an acceptable credit rating from internationally recognised credit-rating agencies (*e.g.*, A.M. Best's, S&P and/or Fitch's), (4) no prior history of sanctions which are equal to or more severe than an institutional warning or criminal fines for the previous three years, (5) manpower to conduct the core functions of the insurance or reinsurance business, and (6) a feasible three-year business plan.

There is a two-step licensing process where a Preliminary Licence is issued confirming that the applicant has satisfied all requirements under the IBA, and a Final Licence is issued when the applicant demonstrates to the FSC that it is prepared to conduct the business of insurance with the necessary manpower and physical facilities, along with the necessary capitalisation.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Foreign insurers, which are commonly referred to as non-admitted, unauthorised or non-licensed insurers, are also regulated by the FSC and FSS in Korea, and may write insurance business on a cross-border basis subject to various rules and limitations.

A foreign insurer is permitted to write insurance under Article 3 of the IBA and Article 3 of the Enforcement Decree to the IBA (together the "**Cross-Border Regulations**"). As a general rule, Article 3 of the IBA requires all Korean residents to purchase insurance with licensed insurers; however, when read together with Article 7 of the Enforcement Decree which provides for several exceptions, a Korean resident may purchase insurance with a foreign insurer with respect to (1) life insurance, (2) import/export cargo insurance, (3) aviation insurance, (4) travel insurance, (5) hull insurance, (6) long-term accident and health, or (7) reinsurance. Sales of the foregoing insurance on a cross-border basis are permitted on the caveat that such insurance may only be marketed and sold through regular mail, telephone, facsimile, or other electronic methods from an offshore location and may not use insurance solicitors, agents, brokers, or employees of any authorised insurer pursuant to the Insurance Business Supervisory Regulation to the IBA.

In addition, a Korean resident may also conclude an insurance contract if the person (i) secured three rejections in the admitted market, (ii) confirmed that a particular insurance product is unavailable in Korea, (iii) renewed an existing insurance contract procured in a foreign country and continued prior to expiration or termination, or (iv) obtained prior approval from the FSC for hardship cases.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

Korean courts will respect the agreements of contracting parties in accordance with the principle of freedom of contract;

however, the validity and enforceability of insurance contracts are also subject to the IBA, the Standard Contracts Regulation Act ("**SCRA**") and the Korean Commercial Code ("**KCC**").

The SCRA provides minimum requirements for the prevention of unfair terms and conditions which are disadvantageous to policyholders/insureds. Requirements under the SCRA include: (1) standard terms and conditions of insurance contracts to be applied in "good faith" and equally to all policyholders of similar insurance contracts, risks, etc.; (2) ambiguous terms and conditions to be applied *contra proferentem* (*i.e.*, against the insurer as the drafter of the insurance contract); and (3) other terms and conditions that may be disadvantageous, burdensome or onerous, and which are interpreted strictly.

The IBA also requires insurance contracts to include: (1) insurance coverage; (2) exclusions/exemptions; (3) term of insurance; (4) triggers for liability; (5) termination grounds; (6) rights and payment of policy dividends or earnings; (7) payment of interest; and (8) other material terms in accordance with the IBA.

The KCC-specific provisions related to insurance contracts prescribe additional provisions, and the absence of such provisions may render the contracts void. For example, Article 669(4) of the KCC will void an insurance contract if the insured amount significantly exceeds the value of the subject matter insured due to any fraud, misrepresentation or concealment by the policyholder/insured. Article 644 of the KCC voids an insurance contract where the risk insured against loss has already occurred or can never occur in the absence of a fortuitous event.

1.5 Are companies permitted to indemnify directors and officers under local company law?

Directors and officers are liable for their intentional acts, wilful misconduct and/or negligence in performing their duties subject to any corporate governance rules and the articles of incorporation/association. Directors and officers can be released from such liability in two ways: (i) by the unanimous consent of the shareholders; or (ii) by the release of the articles of incorporation/association. Such release shall be subject to a limitation of six times the total remuneration including any bonuses, dividends and other compensation for an inside director and three times the total remuneration for an outside director. In this regard, companies may also procure Directors & Officers Liability insurance for the protection of its directors and officers.

1.6 Are there any forms of compulsory insurance?

The Korean government requires mandatory insurance coverage for certain commercial and personal risks, mainly for the protection of both first-party and third-party losses.

At a minimum, commercial operators including energy facilities, and common carriers such as airlines, cargo ships, trains etc., must procure and maintain Commercial General Liability Insurance ("**CGL**"). In Korea, CGL may be purchased as Commercial Package Insurance, which offers other important coverage such as property, machine break-down, and business interruption.

Fire Legal Liability and Fire Bodily Injury Insurance are compulsory for many commercial businesses/operations, including restaurants, private educational institutions, hospitals, hotels, government buildings, and small businesses located in multi-dwelling residential properties.

With ever-growing dependency on liquefied petroleum gas and other similar high-pressure gases in Korea, Gas Legal Liability is also a mandatory cover for both commercial and residential property owners including manufacturers of gas containers, refrigeration and air-conditioning machinery, gas dealers, suppliers, etc.

Pursuant to the recent Act on Promotion of Information and Communications Network Utilisation and Information Protection, a provider of information and communications services must procure insurance for the potential liability for damages due to leakage or forgery of personal information.

As in other jurisdictions, automobile insurance is compulsory for all vehicles with an engine of 55cc and higher for operation on roads in Korea.

The Korean Government also administers a mandatory social insurance scheme for every citizen and resident with (1) the National Pension, (2) National Health Insurance, (3) Employment Insurance, and (4) Industrial Accidents Compensation; premiums are deducted from wages or collected from the individual.

There is other mandatory insurance, such as oil contamination liability insurance required for ship-owners of oil tankers and guarantee insurance for real estate brokers.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

Korean regulators strictly apply laws/regulations in the conducting of insurance business while overseeing the insurance industry with a fundamental aim of ensuring consumer protection. The insurance regulations and the FSC/FSS monitor the market so that insurers remain solvent; business activities are in accordance with the regulations; distribution channels and solicitation activities are not disadvantageous to insureds; insurance products, rates and forms are in line with standards and rules; and trade and pricing are compliant with permitted activities and standards, including prohibitions – all of which are favourable to the insured.

2.2 Can a third party bring a direct action against an insurer?

A third party may bring a direct action against an insurer for damages caused by the policyholder/insured under an insurance contract, which shall be limited to the amount of coverage under the insurance contract. In addition, an insurer shall have the right to defend a third party claim made against it in accordance with the terms and conditions of the underlying insurance.

2.3 Can an insured bring a direct action against a reinsurer?

An insured can bypass an insurer and make a direct claim against a reinsurer if such contractual wording exists in the reinsurance agreement, commonly known as a "cut-through" clause. The direct action claim pursuant to a cut-through clause will be subject to the same terms, conditions and limits as set out in the underlying insurance contract which, in any event, should be "back-to-back" with the reinsurance contract. Also, a direct claim may be made without an express contractual right in the reinsurance contract when an insurer is financially impaired or insolvent. In this situation, the insured has an automatic right of claim against the reinsurer tantamount to a right of subrogation.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

An insurer may terminate an insurance contract for misrepresentation, concealment or non-disclosure of material information through fraud or gross negligence of the policyholder/insured which then relieves the insurer from forward-going liabilities from the effective date of termination. Further, an insurer may make a claim to recover insurance proceeds paid due to such misrepresentation, concealment or non-disclosure, but will not be obligated for any return premiums.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

Under Korean law, the policyholder/insured has a duty to inform the insurer, on application for insurance, all facts in response to questions and those that would be material to the conclusion of the insurance contract. In order for an insurer to terminate the insurance contract, it must be shown that the insured intentionally or by gross negligence failed to notify a material fact to the insurer. However, if the insured has not been specifically asked by the insurer of such material fact, the insured is unlikely to be regarded as having been intentionally or grossly negligent in their failure to notify.

Under the KCC and most of the insurance contracts, an insured has a duty to disclose to an insurer all material facts when entering into an insurance contract, especially as the insurer cannot be in a position to know all material facts that are relevant. In the event of a breach of the duty to inform, the insurance contract may be terminated with a right of indemnity for any losses in favour of the insurer, or the insurance contract may be void *ab initio*. It is generally said that information is "material" to the conclusion of an insurance contract if, had the insurer been aware of same, it would not have concluded the insurance contract on the same terms and conditions.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

Pursuant to the KCC, an insurer automatically acquires a right of subrogation against a third party upon payment of insurance proceeds to the policyholder/insured. In this regard, no express clause or separate agreement is needed in favour of the insurer conferring a right of subrogation.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

Insurance claims may be heard and decided by the courts of Korea, which are assigned to the Civil Division of the District Court of competent jurisdiction. As such, there is no forum selection; nor is there a specific court venue for insurance disputes. It is noted that in cases where the amount in dispute exceeds KRW 200 million, the case will be heard by a panel of three judges (presiding judge with two associate judges); whereas cases involving a dispute amount of less than KRW 200 million will be heard by one judge. There is no jury system for cases concerning insurance disputes and the judges are the final arbiter of all facts, evidence and arguments.

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

A plaintiff, and especially a foreign plaintiff, bringing a claim in a Korean court is required to pay stamp duty taxes and service fees as court costs for the administration of the case. The amount of stamp duty fees is calculated and collected on a case-by-case basis dependent on the amount of claim in dispute.

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

The judicial system in Korea for commercial disputes, including those involving insurance claims, is comprised of District Courts, High Courts, and a Supreme Court. Most commercial disputes take six to 12 months with a decision by the District Court at the first instance. On appeal, a case will then take another six to 12 months at the High Court. On final appeal to the Supreme Court, a case may proceed quickly with a decision within months, but may take up to three years given the complexity, merits, docket and even political considerations. Notwithstanding the foregoing, timelines are estimates and can vary on a case-by-case basis.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

Litigants may submit briefs, arguments, and evidence and seek testimony from witnesses on request to the court; the judges will review all evidence adopted by the court and determine its probative value as it deems appropriate. However, there are no procedural rules providing for an evidentiary disclosure/discovery process which is prevalent in common law jurisdictions. Pursuant to the Civil Procedure Act ("**CPA**"), a party can make a motion to the court to compel a party or non-party to the litigation to submit specific documents, information and even respond to interrogatories requested by the moving party. The court will rule on the motion in its discretion. Once compelled, a responding party must provide the documents, information or answers to the interrogatories as requested by the moving party subject to certain exceptions, such as confidentiality of public officials, privileged materials with doctors, lawyers, accountants, etc.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

As in question 4.2, documents, information or responses to interrogatories may be withheld if they (a) relate to legal counselling, (b) are prepared in contemplation of litigation, or (c) are produced in the course of settlement negotiations – all of which are considered proprietary or professional secrets of lawyers. In the event that a party makes a motion for same for submission to the court, the responding party may object to such disclosure/submission of same on grounds that the requested documents, information and/or answers to interrogatories fall under the exceptions for production or disclosure to the court. However, if a party in possession of any of the documents, information or answers mentioned in (a), (b) and (c) above submits such evidence to the court, the other party will not be able to prevent the other party from such submission, which shall be admitted as evidence.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

The CPA provides for witness examinations and solicitation of testimony through direct examinations, cross-examinations and re-direct examinations. A court is empowered to compel a witness to testify if the witness has failed or refused to appear without any justifiable reason. In addition, the court may order the witness to bear any costs incurred by the parties in relation to the non-attendance or impose an administrative fine not exceeding KRW 5 million pursuant to the CPA. In rare cases, the court may put the witness in detention for a maximum of seven days if the witness fails to appear to the court at a second scheduled hearing and witness examination again without justifiable reason.

4.4 Is evidence from witnesses allowed even if they are not present?

Pursuant to the CPA, there are two ways in which witness testimony may be submitted into evidence: (a) oral testimony; or (b) a sworn written statement. Court approval is required in order for a party to call a witness to the court, and the party seeking the testimony of the witness must submit a questionnaire in advance listing out questions that will be asked of the witness, or a chronology of facts and/or events to be testified to by the witness in the court room.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

There are no restrictions on who may be called as an expert witness. However, the court has the authority to appoint an expert in its discretion *in lieu* of a party-appointed expert. For instance, the court may seek recommendations for an expert to survey the cause or damage to a property claim or an appraiser to determine the quantum of damages. However, the court is not obligated nor limited to candidates offered by a party and may appoint an expert in its discretion. The costs for expert witnesses are first borne by the party requesting evidence from an expert witness. Subsequent to a court's final judgment, the fees shall be borne by the unsuccessful party. Also, in a partial ruling in favour of a party, the fees for the expert witness will be shared between both parties in proportion to the ratio of the award and/or fault.

4.6 What sort of interim remedies are available from the courts?

The two most common types of interim remedial measures are provisional attachments and preliminary injunctions. In both cases, the applicant must make a *prima facie* showing that it will be irreparably harmed if the interim relief is not granted. These remedies are available in support of foreign court proceedings and arbitrations that are currently pending or to be commenced. A party to a foreign proceeding may apply for injunctive relief to a Korean court having jurisdiction over the subject matter. A court may also issue an evidentiary preservation order where evidence to be examined before the lawsuit is filed upon a party's motion for preservation until submitted as evidence once the litigation has commenced. In such case, a court must find that there is risk of the evidence being compromised, tampered, lost, altered, destroyed, etc.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

As explained in question 3.3, there are two stages of appeal in the Korean court system. A party has a right to an appeal without the approval of the court to which it is appealing to or which rendered the final judgment that such party is willing to appeal to the next instance. The non-prevailing party may appeal to a High Court to challenge the facts and/or law as applied, which must be made within 14 days from the date of service of the judgment. Judgments are final and binding if there is no appeal. The High Court may re-examine evidence and legal arguments *de novo*.

Following an adverse judgment by a High Court, a final appeal may be made to the Supreme Court. The Supreme Court does not have *certiorari* powers as in other jurisdictions to reject an appeal but will only review cases in which the interpretation of the law is in question, and generally will not revisit evidence ascertained in lower courts.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Once a judgment is rendered, interest accrues first at the statutory interest rate of 6.0% per annum from the date on which a claimant is entitled to make such claim against an insurer for insurance proceeds until the date on which a written complaint demanding the performance of such monetary obligation was served on the insurer. From the date following the date on which a written complaint was served to the insurer (*i.e.*, the defendant) until the insurance proceeds are paid in full, interest accrues at the statutory rate of 12.0% per annum. The 12.0% rate was effective 1 June 2019 (previously 15.0% per annum).

Under a partial award in favour of a claimant for an insurance claim or where the court finds that an insurer (*i.e.*, the defendant) had valid arguments in defence of the claim, interest will accrue at the rate of 12.0% *per annum* from the date on which the judgment was rendered by the court and 6.0% *per annum* prior to the date on which the judgment was rendered; that is, the rate of 12.0% *per annum* will not apply from the date on which the particular written complaint was served on the insurer (*i.e.*, the defendant).

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

A non-prevailing party bears the costs of the legal proceeding. Attorney's fees are recognised as costs of legal proceedings and are recoverable subject to limits prescribed by the Supreme Court Regulations. Pursuant to such regulations, recoverable costs are calculated in proportion to the claim amount, but typically only a part of the attorney's fees incurred are recoverable. The costs of a lawsuit are borne by the parties in cases where a partial award is issued by the court in proportion to the ratio of the award.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

A court does not have a right or power to compel litigants to mediate disputes or engage in other alternative dispute resolution methods which include reconciliation. However, the court may recommend the parties to mediate or settle disputes, which

it will determine to be more appropriate than other dispute resolution methods.

Mediators are appointed by the court and there are no restrictions on who can serve as a mediator. In the case where the parties fail to reach a mutual agreement and the court considers that there is a possibility for a mutual agreement, the court may rely on the views of the mediators to render a compulsory mediation decision. In the event that a party challenges the compulsory mediation decision, it must do so within two weeks from the date on which the decision was served to void same; and the parties will then continue the dispute previously stayed in litigation at the court. A court's compulsory mediation decision will be conclusive and final.

There are two types of reconciliation: (a) a reconciliation where the parties to the litigation voluntarily reach a mutual agreement during the litigation; or (b) a reconciliation proceeding where the judges decide the subject matter of the agreement and recommend that the parties accept such decision. In the event that the parties are at an impasse, the court may render a reconciliation decision similar to mediation. Otherwise, the parties will continue the litigation in court.

4.11 If a party refuses to a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

Each party has the right to refuse to mediate or settle the dispute. In the event of an impasse, the parties will have the option to continue with the litigation without prejudice based on such refusal to mediate. See also question 4.10.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

In Korea, there is no special court of arbitration; however, the Korean courts give recognition to and will enforce arbitral awards pursuant to the relevant laws, institutional rules and the New York Convention (where applicable) while actively cooperating with arbitration institutions and the arbitration community. The Korean Arbitration Act ("**KAA**") has adopted the UNCITRAL Model Law on International Commercial Arbitration of 2006 ("**UNCITRAL Model Law**") and closely follows its provisions. Moreover, a Korean court may not intervene once arbitration has commenced except for in limited circumstances, such as:

- the appointment of arbitrators in the absence of an agreement by the parties;
- to render a court judgment on the acceptance of a request for challenging an arbitrator on claims of lack of impartiality or independence;
- to render a court judgment on the existence or validity of the arbitration agreement; and
- revocation of an arbitral award.

Notwithstanding, a Korean court may also revoke an arbitral award pursuant to the KAA due to incapacity, improper or absent notices, an award that is out of scope, lack of mutual agreement, issues in enforcement of the award, etc.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

A mutual agreement to resolve matters by arbitration must be included in the insurance contract or reinsurance contract. The KAA requires an arbitration agreement to be made in writing, and the validity and enforceability of an arbitration clause will not be in question if it contains such agreement, even if there is no agreement on matters such as the seat of arbitration, language or arbitral institution.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

The court will refuse to enforce an arbitration clause in a contractual agreement between parties if a party to the agreement was subject to incapacity at the time of entering into the agreement. Also, pursuant to a Supreme Court judgment, where an insurance contract has an optional arbitration agreement clause allowing a party to select between arbitration and litigation as a means to resolve the dispute, such clause will be ineffective if one party decides to proceed to arbitration without the mutual agreement between the parties and the other party opposes the arbitration proceeding. However, if the party opposing arbitration does not raise objections by the first hearing, an arbitration agreement is deemed.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

According to Article 10 of the KAA, "[a] party to arbitration agreement may request, before the commencement of or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure". In Korea, examples of interim relief by the court may include provisional attachments, preliminary injunctions, or arguably, preservation of evidence as listed above. See also question 4.6.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

The arbitral tribunal is legally bound to state detailed reasons for its award unless the parties have agreed that no reasons are to be given.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

An arbitral award is final and, therefore, cannot be appealed to the court. However, an arbitral award may be revoked by a court if any of the grounds set forth in the KAA apply. See also question 5.1.

Jin Hong Kwon has dedicated his legal career to Lee & Ko, and is currently the Partner-in-Charge of the Insurance & Reinsurance Practice Group, and also a member of the Financial Services & Compliance Division. His expertise covers areas of compliance under the Insurance Business Act, Act on Corporate Governance of Financial Companies, Personal Information Protection Act and their subordinate and related regulations. In addition, Mr. Kwon is well-experienced in matters involving licensing and registrations, policy wording review and drafting for life and non-life insurers, outsourcing and delegation compliance, cross-border solicitation and transactions, data privacy-related issues (both onshore and offshore), contract drafting and negotiations and other key issues involving insurance and reinsurance market participants in Korea. While enjoying a solid reputation in the Korean market, Mr. Kwon also worked as a foreign attorney at Stephenson Harwood in London in 2009.

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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

The Luxembourg supervisory authority of the insurance sector is the *Commissariat aux Assurances* (**CAA**).

The CAA is a public institution under the authority of the Minister of Finance. According to the law of 7 December 2015 on the insurance sector, as amended (the **Insurance Sector Act**), the principal objective assigned to the CAA consists in guarantying the protection of insurance policyholders and beneficiaries.

In this respect, the CAA is in charge of the regulatory approval and supervision of Luxembourg insurance and reinsurance undertakings, as well as of insurance intermediaries and so-called "professionals of the insurance sector" composed of various service providers in relation to the insurance industry.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

The establishment of an insurance or reinsurance company in Luxembourg is subject to corporate and regulatory procedures.

From a corporate standpoint, the company must be setup and registered under one of the legal forms permitted by the Insurance Sector Act and according to the law of 10 August 1915 on commercial companies, as amended.

From a regulatory perspective, the operation of insurance or reinsurance activities is subject to the approval of the Luxembourg Minister of Finance, upon the filing of an application for a licence to the CAA evidencing at least the following requirements:

- The company's managers and directors possess the appropriate skills and good repute to ensure a sound and prudent management of the insurance or reinsurance undertaking.
- The qualifying shareholders' identities are satisfactory in view of the sound and prudent management of the undertaking.
- The company's accounts are certified annually by an external auditor whose status, skills and experience meet the requirements of the Insurance Sector Act.
- The company holds the eligible own funds, capital and solvency requirements set out in the Insurance Sector Act. The company's business plan includes the information required by the CAA Regulation 15/3 pertaining to insurance and reinsurance undertakings, as amended, and is viable.
- The company is able to abide by the legal and regulatory requirements relating to the governance system. The central administration of the undertaking is located in Luxembourg.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

The operation of insurance business in and from Luxembourg is subject to the granting of a prior licence by the Minister of Finance through an application process handled by the CAA (please refer to question 1.2 above).

With respect to foreign insurers, the three following categories of exceptions to the above principle are applicable:

- Insurance undertakings authorised in an EEA Member State can operate an insurance business in Luxembourg under the principles of establishment or freedom to provide services (European passport).
- Insurance undertakings authorised in non-EEA countries are not considered as operating insurance activities in Luxembourg (and do not need to be authorised beforehand in such case), where the policyholder has taken the initiative of the subscription of the insurance contract. Pursuant to the Insurance Sector Act, the policyholder is regarded as having taken the initiative of the subscription of the contract where he has requested its conclusion without having been contacted beforehand by the insurance undertaking or by any other person, either mandated by the insurance undertaking or not. Please note that if such operation was, however, carried out through a local branch, then a prior authorisation would be required.
- Insurance undertakings authorised in non-EEA countries having acceded to the General Agreement on Trade in Services (**GATS**) do not need to be authorised for the operation of insurance covering the following risks:
  a) Risks linked to maritime trade, aviation, and space launching and loading of devices including satellites. Such risks include those relating to the transported goods, the vehicles used for the transport and any liability arising therefrom.
  b) Risks linked to goods in international transit.

Please note, however, that if the above risks were covered through a branch established in Luxembourg, then a prior authorisation would be required.

Outside the above exceptions, it is still possible for a foreign insurer to consider a fronting route with a local insurer.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

Insofar as Luxembourg law governs the insurance contract, the mandatory provisions of the amended law of 27 July 1997 on the insurance contract (the **Insurance Contract Act**) are applicable. Furthermore, except where the Insurance Contract Act states otherwise, the provisions of the Consumer Code are also applicable to the insurance contract.

Please note, however, that derogations from mandatory provisions are permitted where specifically allowed by the Insurance Contract Act. For example, where the insurance contract qualifies as covering large risks in the meaning of Art. 43.21 of the Insurance Sector Act, the parties can derogate from several requirements such as the mandatory information to policyholders, the policy period and conditions of termination, or the jurisdiction clause.

1.5 Are companies permitted to indemnify directors and officers under local company law?

Companies are allowed – and not obliged – to indemnify their directors and officers for their civil liability arising out of the performance of their duties in accordance with the applicable provisions and on behalf of the company.

Such indemnity could take the form of indemnity letters or D&O insurance policies, and is subject to the following limitations:

- No indemnity is allowed with respect to criminal liability on the grounds of public policy. It is, however, questionable under Luxembourg law whether administrative fines could be the subject of indemnification or insurance.
- Companies may not indemnify their directors and officers for their civil liability resulting from the acts committed outside the scope of their functions.

1.6 Are there any forms of compulsory insurance?

Compulsory insurance does actually exist under Luxembourg law; examples are listed as follows:

- Liability insurance in respect of motor vehicles (Act of 16 April 2003 relating to mandatory insurance of civil liability in relation to motor vehicles, as amended).
- Professional liability insurance of architects and consulting engineers (Art. 6 of the Act of 13 December 1989 on the organisation of the professions of architect and consulting engineer).
- Professional liability insurance of insurance brokers and professionals of the insurance sector (Insurance Sector Act).

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

Luxembourg substantive provisions relating to insurance are contained in the Insurance Contract Act, which could overall be viewed as favourable to the insured. Such provisions include, among others:

- The application of the Consumer Code (the provisions of which are very favourable to consumers) to insurance contracts, except where specified otherwise in the Insurance Contract Act (Art. 3.1 of the Insurance Contract Act).
- The mandatory content of the insurance contract, as well as the (pre)contractual information required from the insurer in application to the Insurance Contract Act plead for a regime in favour of the insured.
- Some specific provisions are clearly in favour of the insured, such as the prior notice of termination applicable to certain contracts, which is 30 days for the insured versus 60 days for the insurer or the cancellation right granted exclusively to the insured under certain conditions (Arts 62–3 and 100 *et seq.* of the Insurance Contract Act).

Notwithstanding the above perspective, the Insurance Contract Act ensures a certain level of protection to the insurer, notably by imposing certain obligations to the insured, such as the notification of the risk increase (Art. 34 of the Insurance Contract Act), or the duty to take all reasonable measures to prevent and mitigate the loss or damage once occurred (Art. 27 of the Insurance Contract Act). The insurer could even reserve the possibility to terminate unilaterally the insurance contract under certain conditions after payment of the insurance claim (Art. 41 of the Insurance Contract Act).

2.2 Can a third party bring a direct action against an insurer?

In liability insurance, the damaged or injured person has a direct claim against the insurer and can therefore bring direct action against the latter (Art. 89 of the Insurance Contract Act).

Please note, however, that certain exceptions, nullities or disqualifications applicable to the insurance contract could be opposed by the insurer to the injured or damaged person (Art. 90 of the Insurance Contract Act).

2.3 Can an insured bring a direct action against a reinsurer?

Luxembourg law does not specifically provide for a direct action from the insured against a reinsurer. This is consistent with the principle of relative effect of contracts contained in Art. 1165 of the Civil Code, according to which contracts may only have effects among parties (i.e. with respect to a reinsurance contract, the insurer and the reinsurer).

However, pursuant to Art. 1166 of the same Code, creditors are allowed to exercise all the rights and actions of their own creditors except for third-party stipulation (*stipulation pour autrui*). Insofar as the reinsurance agreement does not constitute a third-party stipulation, it is questionable whether an insured might not be entitled to bring a direct action against a reinsurer on the grounds of Art. 1166 of the Civil Code.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

The consequences of either misrepresentation or non-disclosure of material information by the insured depend on whether such non-disclosure or misrepresentation were intentional or not.

In the event of an intentional misrepresentation or non-disclosure, the contract is void if the intentional misrepresentation or non-disclosure mislead the insurer on the elements of risk appreciation. In such case, the insurer is entitled to the premiums due until the date upon which he became aware of the intentional misrepresentation or non-disclosure. Please note

that the above regime is without prejudice to any misrepresentation with respect to the age of the insured in life insurance. In such case, according to Art. 102 of the Insurance Contract Act, the parties' performances are increased or decreased depending on the insured's actual age, which should have been taken into consideration.

If the misrepresentation or non-disclosure was not intentional, the contract is not void. The insurer shall propose to the insured an amendment to the contract effective from the date on which he had knowledge of the misrepresentation or omission, or, if the insurer can evidence that he would not have insured the risk, he is allowed to terminate the contract. If the insured refuses the insurer's proposal, the latter can terminate the contract. The above regime is subject to a specific timeframe and further conditions detailed in Art. 13 of the Insurance Contract Act.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

Luxembourg Insurance Contract law does actually contain such an obligation from the insured to make a declaration in respect of the risk at the contract's inception and during the policy period, irrespective of whether the insurer has specifically asked about them or not.

Pursuant to Art. 11 of the Insurance Contract Act, when entering into the contract, the insured is required to declare precisely all circumstances known to him and that should reasonably be considered by him as an element of risk appreciation by the insurer.

However, the circumstances already known or expected to be reasonably known by the insurer do not need to be declared by the insured.

Please note that with respect to life insurance, genetic data may not be communicated under Luxembourg law.

During the policy period, the insured must declare all new circumstances or amendments of circumstances which may cause a significant and lasting worsening of the insured risk. In such case, the contract may be amended or terminated by either party subject to the conditions set out in Art. 34 of the Insurance Contract Act.

Likewise, a decrease of the risk of occurrence of the insured event could lead to an amendment of the policy terms or its termination in the conditions set out in Art. 33 of the Insurance Contract Act.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

Art. 52 of the Insurance Contract Act provides for a subrogation right in favour of the insurer upon payment of the indemnity.

The insurer is subrogated into the rights and actions of the insured or the beneficiary against the third party responsible for the damage, for the amount thereof. If the insurer's subrogation can no longer produce its effects because of the insured or the beneficiary, the insurer can claim from them the compensation paid.

Notwithstanding the principle of subrogation, the insured or beneficiary having been partially compensated for their damage by the insurer is still allowed to claim for a compensation of the remaining indemnity to the party responsible for the damage.

Except in cases of malicious acts, the insurer has no recourse against the insured's direct descendants, ascendants, spouse and associates, as well as the persons living in his home, his guests and domestic workers. Nonetheless, the insurer can take an action against the above persons insofar as their liability is actually covered by an insurance contract.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

A commercial insurance dispute shall be brought before ordinary jurisdictions, which may vary depending on the *ratione valoris* of the dispute.

Jurisdiction lies before the *Justice de Paix* for disputes below EUR 10,000, and before the *Tribunal d'arrondissement* for disputes above that amount.

There are no hearings before a jury in Luxembourg.

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

There are no court fees in Luxembourg.

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

The average duration of a case is between nine and 12 months from the service of the writ of summons and the judgment (first instance).

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

There are no disclosure/discovery proceedings in Luxembourg as known in common law jurisdictions.

However, remedies do exist to request a court order aiming at the disclosure of a specific document, detained by a party or by a third party to the dispute.

The requested document must be crucial for the resolution of the dispute and the claimant should evidence that the document does actually exist.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

There are no disclosure/discovery proceeding in Luxembourg, so this question is not applicable.

Legal privilege applies by default for communication between lawyers.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

Although it is not frequent, courts have the possibility to require witnesses to give evidence in the course of the proceedings.

4.4 Is evidence from witnesses allowed even if they are not present?

Written testimonies are admissible, and commonly used in the frame of Luxembourg proceedings.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

Before a dispute arises, or in the course of the proceedings on the merits, each party has the ability to request to the court the appointment of an expert who will be requested to provide a report on specific matters defined by the court.

Party (unilateral) expert reports are treated as ordinary written evidence.

Both possibilities are commonly used before the Luxembourg jurisdictions.

4.6 What sort of interim remedies are available from the courts?

A wide range of remedies are available from the courts, *inter alia,* to preserve evidence, to request urgent measures to prevent an imminent damage or to resolve an obvious illegal situation, to obtain payment of unchallenged claims, or to obtain a prohibition order.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

A decision from a court of first instance can be appealed, and the term to appeal is 40 days (term which can be extended for non-Luxembourg domiciled claimants).

There is only one layer of appeal, and further, a (non-suspensive) Supreme court (*Cour de cassation*) remedy is available for matters limited to law.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Before Luxembourg courts, late interest (legal or contractual) is generally recoverable.

The current rate (2019) of the legal interest is 2%.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

Costs are usually borne by the unsuccessful party (which does not include lawyers' fees). There is no legal scheme available aiming at favouring settlement prior to trial.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

Further to an amendment in the New Code of Civil Proceedings made in 2012, courts are obliged to stay the dispute in case of a valid mediation clause that has not been exhausted. There are no other legal incentives obliging the courts to direct parties to Alternative Dispute Resolution.

4.11 If a party refuses to a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

Please refer to our answer under question 4.10.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

Courts may intervene at any stage of arbitration proceedings seated in Luxembourg, in support of the arbitration proceedings (appointment of the arbitrators, revocation of arbitrations, etc.). Summary proceedings are also available in parallel to an arbitration on the merits of a dispute.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

Under the Insurance Contract Act, arbitration clauses are in principle prohibited in insurance contracts. Where an arbitration is allowed, i.e. in case of disagreement between the insurer and the insured with respect to legal expenses insurance, note that in application to Art. 95 of the Insurance Contract Act, the insurance contract shall provide for the right for the insured to have recourse to the arbitration procedure provided by Art. 1224 *et seq.* of the New Code of Civil Proceedings. The Insurance Contract Act does not, however, require specific wording for such mention in the insurance contract.

Post-dispute arbitration agreements are allowed under Luxembourg insurance contract law.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

Courts may refuse if the matter is not arbitrable.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

Most forms of interim relief available under Luxembourg law can generally be obtained in parallel to arbitration proceedings (unless agreed otherwise by the parties).

These interim reliefs can be, *inter alia*, measures aiming at freezing assets or a situation pending the resolution of a dispute, the appointment of a judicial expert (which is usual in insurance matters), urgent measures to prevent an imminent damage, or evidence disclosure requests made to third parties.

Aside from interim reliefs aiming at supporting the arbitration process (e.g. solving issues regarding the appointment of an arbitrator), urgent or provisory measures can be requested to Luxembourg courts.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

Unless the parties have expressly agreed otherwise, the arbitral tribunal must give a motivation for its award.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

An award given by an arbitral tribunal cannot be appealed before Luxembourg courts (unless provided otherwise in the arbitration clause).

If the arbitration takes place in Luxembourg, the parties may bring annulment proceedings on the grounds listed in the New York Convention; or should this convention not apply, on the grounds listed in the New Code of Civil Proceedings. Non-Luxembourg seated arbitrations will be subject to an exequatur prior to enforcement.

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NautaDutilh is an international law firm specialising in Luxembourg, Belgian and Dutch law. The firm was founded in 1724 and is one of the largest in the Benelux. More than 400 lawyers, notaries and tax advisors work at the firm's offices in Luxembourg, Brussels, Amsterdam, Rotterdam, London and New York.

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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

In Mexico, insurance and reinsurance companies are mainly regulated by Mexico's Treasury Department (SHCP), through its Insurance, Social Security and Pension Funds Unit. The National Insurance and Bonding Commission (CNSF) is the governmental body responsible for the authorisation of Mexican insurance companies as well as supervising their day-to-day operations. The National Commission for the Protection and Defence of Financial Services Users (CONDUSEF) is the agency responsible for receiving complaints from financial services consumers, including policyholders. Mexico's central bank issues monetary policies regarding insurance activities.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

According with the Insurance and Bonding Companies Law (*Ley de Instituciones de Seguros y de Fianzas*) (LISF), the process for setting up a new insurance (or reinsurance) company in Mexico must be followed before the CNSF. As an initial step, a submission must be filed enclosing detailed financial information and forecasts, technical guidelines (i.e., underwriting, risk management), corporate governance information (i.e., directors, manuals) and the draft charter documents to be adopted by the insurance/reinsurance company. Once the filed documents and information are approved by CNSF's Governing Board, the CNSF shall issue an official communication authorising the formation of the company as a stock corporation, which shall be published in the Official Gazette of the Federation. This approval is verified *ex ante* by the notary public responsible for issuing the corresponding deed of incorporation and by the Public Registry of Commerce prior to recording such deed. Once the incorporation of the company is evidenced before the CNSF, it will issue the insurance licence authorising the company to start operations and requiring it to do so within the following 90 days. During such 90-day period, an operational audit must be carried out by CNSF. Failure to obtain the CNSF's sign-off and commence operations within the 90-day period will result in the cancellation of the licence, which means that the process will need to be restarted. The approval process for a new Mexican insurance/reinsurance company takes approximately nine months, from the relevant filing date.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

As a rule, foreign insurance companies are prohibited from offering and selling insurance products in Mexico. The LISF sets forth the lines of insurance business and scenarios where the participation of foreign insurers is expressly prohibited. However, this prohibition is not absolute: a foreign insurer may coordinate with its prospective insured to request a waiver with respect to the applicable prohibition. This waiver mechanism is limited to those cases where the insurance offered or provided by the foreign insurer is not otherwise available in the Mexican insurance market. Also, a waiver may be obtained by foreign insurers when the type of insurance offered in Mexico covers losses that may only occur in the country where the foreign insurer is authorised to conduct its business. Unlike the insurance business, the offering and sale of reinsurance in Mexico is open to foreign reinsurers, provided they are registered with the General Registry of Foreign Reinsurers kept by the CNSF.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

Non-negotiable insurance products must be registered with the CNSF prior to their marketing. The registration process requires the filing of a technical note corresponding to the product, the relevant contractual documentation, an analysis executed by a certified lawyer and a certified actuary to the effect that the former and the latter are consistent and compliant with Mexican law and regulations. CONDUSEF may impose a fine for abusive insurance wordings and may request amendments of such wordings. As of 2017, non-negotiable insurance products must also be registered with CONDUSEF.

1.5 Are companies permitted to indemnify directors and officers under local company law?

Yes, under the General Law of Commercial Companies (*Ley General de Sociedades Mercantiles*), companies can indemnify their directors and officers. D&O liability insurance is available in Mexico for that purpose.

1.6 Are there any forms of compulsory insurance?

Yes, in Mexico there are some industries and activities that must maintain compulsory liability insurance to cover third-party

claims for damages such as public transport concessionaries or handling of hazardous waste and material. Each state can regulate the specific activities that must maintain compulsory insurances (i.e. liability insurance for vehicles using intra-state roads). Liability coverage is mandatory for all private vehicles using Federal highways. In most cases, failure to obtain compulsory insurance is subject to a fine.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

Generally, the substantive law relating to insurance is more favourable to insurers. There are some aspects, however, where the law narrows the discretion of insurers. For instance, in the context of the duty of utmost good faith of the insured, the insurer's right to avoid the cover must be based on misrepresentations and inaccuracies made in the questionnaire required for obtaining disclosure of relevant facts. Also, the greater attributions afforded to CONDUSEF have reinforced insured rights *vis-à-vis* insurers.

2.2 Can a third party bring a direct action against an insurer?

In Mexico, the doctrine of privity of contract is strictly upheld and, therefore, actions by third parties against an insurer for coverage have only a remote chance of succeeding.

However, article 147 of the Mexican Insurance Contract Law (*Ley sobre el Contrato de Seguro*) provides that "*liability insurance shall directly confer the right to be indemnified to the affected third party, who will be considered as beneficiary, since the date of the loss occurrence*". Consequently, in the case of liability insurance, the affected third parties can claim payment directly from the insurer.

2.3 Can an insured bring a direct action against a reinsurer?

No, one of the few reinsurance principles under Mexican law for which there is clear and express authority is that a policyholder or non-signatory to a reinsurance agreement cannot bring a direct action against a reinsurer for coverage.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

In accordance with the Insurance Contract Law, an insurer can avoid the insurance contract obligations based on misrepresentations contained in the relevant application or questionnaire, even if the actionable misrepresentation has no bearing on the loss.

The insurer must notify the insured of its decision to rescind within 30 days of having knowledge of the misrepresentation; otherwise, the insurer would be estopped from exercising its right to rescind.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

At its inception, the duty of the insured to disclose matters material to the risk is limited to the questions specifically contained in the questionnaire that may be requested by the insurer. After inception, the insured has a duty to disclose any circumstance that materially varies the risk within 24 hours of having knowledge upon the occurrence of such circumstance; unless such requirement is waived, failure to notify the insurer gives it the right to avoid insurance contract obligations.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

Yes, the Insurance Contract Law provides for an automatic right of subrogation by the insurer with respect to the rights of the insured upon the payment of an indemnity.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

Commercial insurance disputes may be brought before state or federal courts at the election of the plaintiff. State courts are generally preferred as they handle commercial cases more frequently. It is important to note that, in accordance with the LISF, plaintiffs can bring insurance complaints before any office of CONDUSEF in this case, the competent judge will be the one corresponding to the domicile of the CONDUSEF office where the dispute has been brought.

Insurance disputes that do not exceed 1.5 million pesos (MXN)must be brought before oral trial courts, which tend to be faster than ordinary courts.

Additionally, Federal Law for the Protection of Users of Financial Services (*Ley de Protección y Defensa al Usuario de Servicios Financieros* – the CONDUSEF Law) provides that all insurance companies must have special client attention units (*Unidades Especializadas*) for receiving claims and complaints in connection with insurance contracts. Pursuant to the CONDUSEF Law, the insured will have the right (but not the obligation) to seek mandatory conciliation with the insurer before CONDUSEF prior to resorting to either an arbitral procedure with CONDUSEF or to the courts, this mechanism is only for claims that do not exceed 6 million Investment Units (*unidades de inversion* (UDIS)) in value. Also, insurers may agree to be part of the Arbitral System managed by CONDUSEF. Insurers must register at least three insurance products, disputes over which may be solved through such mechanisms.

If an insurer does not attend to the conciliation meetings, or does not file certain documents requested by CONDUSEF, a penalty fee will be imposed and the insured may gain the right to request the issuance of a resolution by CONDUSEF. This resolution can be considered an executive title; this means that the insured may collect the amount stated on the resolution on a fast-track procedure that may seize the goods of the insurer. Mexico does not have a jury trial system.

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

Under Mexican legislation, public justice by governmental courts or bodies, is completely free. Thus, no court fees are payable at any point of a commercial insurance dispute.

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

A commercial case is immediately brought to court once the complaint is filed. The court may take a few days to decide on the admission of the complaint. The court may refuse admission of the complaint if it is notoriously frivolous. However, once the complaint is admitted, the trial commences before the court. The scope of pre-trial procedures in Mexico is very limited and is optional.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

The concept of discovery does not exist in Mexican procedural law. A party to the action can request the court to order the production of specifically identified documents that are in the records of the opposing party or in the files of a government office. Also, a party may request the inspection of documents or records held by third parties as evidence of specific facts alleged in the complaint. An order for the general production of documents, however, is beyond the powers of Mexican courts.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

Statutory provisions applicable to professional secrecy in Mexico exempt legal counsel from testifying against clients or delivering documents and information in their possession that relate to the client. There is no rule, however, that extends the privilege to the attorney-client work product in possession of a party; thus, a party would, in principle, have no legal basis for withholding documents in its possession (a) relating to advice given by lawyers, (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts, if so ordered by the court.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

Mexican courts have powers to require witnesses to give evidence during the evidentiary stage of the trial, provided that the party offering such witnesses swears under oath that it is not able to present such witness. Before the trial, the only witnesses that may be examined are those that are awaiting an imminent death or those that are ready to leave the country, in which case the judge may also exercise its subpoena powers.

4.4 Is evidence from witnesses allowed even if they are not present?

As a rule, witnesses must be present to testify. Written testimony is only allowed from senior citizens, persons that are ill and government officials. Also, witnesses whose testimony is obtained through domestic or international letters rogatory do not need to be present for testifying before the court conducting the proceedings.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

Expert witnesses must hold a professional title or certificate, unless the profession in which they are proficient or experts does not require a title or certificate. If there is a conflict between the testimonies rendered by the expert witnesses called by each of the parties to testify on a given matter, the court shall appoint a third expert witness.

4.6 What sort of interim remedies are available from the courts?

Interim remedies available in the Commerce Code for commercial proceedings are strictly limited to: (i) the curfew of a person who is feared to be at risk of leaving the jurisdiction without appointing a representative to follow the proceedings; and (ii) the temporary attachment of assets when there is a fear that the same may be wasted, concealed or when the defendant does not own any other assets. Notwithstanding the foregoing, a binding court precedent has expanded the types of interim remedies available under the Federal Civil Procedures Code to include injunctions that, broadly considered, preserve the subject-matter of the litigation whilst the relevant proceedings are conducted.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

There is a right of appeal from the decisions of the courts of first instance. The grounds for appeal are defects in the first instance judgment that are in violation of constitutional rights contemplated in the Mexican Constitution or the statutory requirements that the judge must observe when conducting the proceedings and in reaching his/her conclusions. A party that does not agree with the appeal decision and identifies constitutional violations in which the first instance judge or the court of appeals have incurred (i.e., due process, legality) may start a constitutional action (*amparo directo*) before federal courts against final court decisions that are allegedly against the federal constitution.

It is worth mentioning that decisions made by oral trial courts do not admit appeals.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

The LISF sets forth the rules for calculating interest in respect of insurance claims at a rate of 1.25 multiplied by the index identified as the "cost for attracting liabilities" (*costo de captación de pasivos*) over the amount of the relevant claim converted into UDIS.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

In Mexico, costs refer to attorneys' fees and other expenses incurred in connection with the proceedings (i.e., expert witness fees, notarial fees). Courts are prohibited from charging any fees for conducting the judicial process. Accordingly, the standard rule regarding costs is that they will be awarded against parties

that pursue a frivolous claim or against the party that loses in the first and second instance on consistent grounds. Costs are capped at a rate approved for each local jurisdiction; for example, at Mexico City venues, costs are capped between 6 and 10 per cent depending on the amount of the award at first instance; and between 8 and 12 per cent, depending on the amount of the award at second instance. There are specific caps for declaratory judgments that do not award money amounts.

Cost advantages of making an offer to settle include the possibility of negotiating legal fees actually incurred and not paying out on a percentage of the recovery.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

No, commercial courts entertaining insurance and reinsurance disputes cannot compel the parties to mediate nor engage with any other forms of Alternative Dispute Resolution; however, courts may suggest that the parties take the dispute to arbitration, mediation or any other form of Alternative Dispute Resolution.

4.11 If a party refuses to a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

As outlined in question 4.10 above, the mediation of disputes or engagement with other forms of Alternative Dispute Resolution cannot be compelled, other than in the scenario foreseen in question 3.1.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

The principle of party autonomy is generally respected by Mexican courts. If there is a valid arbitration clause, the matter must be submitted by the court to arbitration at the request of any party. Mexican courts will not intervene in the conduct of an arbitration; however, the courts may assist the arbitration procedure in granting interim measures, appoint arbitrators, production of evidence, and execution or annulment of the arbitral award as set forth in the Commerce Code (*Código de Comercio*).

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

No specific form of words is required. The essential terms of the arbitral clause or arbitral agreement will need to be clearly laid out in writing by expressly submitting the definitive resolution of the dispute to arbitration and without establishing the option to go to courts. It is suggested that other information is included, such as the arbitration rules, appointing the administrator (if any), the number of arbitrators, the seat of the arbitration, the language of the arbitration and the choice of law.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

As explained in question 5.1 above, if there is no ambiguity of the parties' agreement to submit to arbitration, a refusal by a court to enforce such a clause is unlikely unless it is proven that the arbitration agreement is null, ineffective or is impossible to enforce.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

Statutory provisions applicable to arbitration do not limit the forms in which relief may be obtained. Mexican courts may grant the interim relief identified in question 4.6 above.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

The general rule is that the arbitral tribunal is legally bound to give detailed reasons for its award, unless the parties have agreed otherwise, or the parties have reached a settlement. The award shall be given in writing and signed by the arbitrator(s).

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

No, there is no right of appeal to the courts from the decision of an arbitral tribunal. If the seat of the arbitration is within Mexico, a party may request the annulment of the award based on limited grounds stated in the Commercial Code. In any case, there is the right to resist enforcement of an arbitral award on limited grounds before the court where the award is filed for enforcement.

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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

The body responsible for the supervision and regulation of insurance and reinsurance companies is the Financial Supervisory Authority of Norway (FSA). The FSA is an independent government agency which is subject to laws and regulations emanating from the Norwegian Parliament and the Norwegian Government, through the Ministry of Finance. The FSA is also built on international standards for financial supervision and regulation.

The legal framework on insurance is placed within the authority of the Norwegian Ministry of Finance.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

It is an absolute requirement that all insurance (or reinsurance) companies obtain a licence to be permitted to provide insurance services. The company must file a licence application to the FSA. The Ministry of Finance or FSA itself (through delegation) will then process the licence applications within six months.

The applicable requirements vary depending on whether the insurance company is to provide life insurance or not. The company must be granted a licence which reflects the type of insurance services that the company intends to offer.

There are a few requirements that apply regardless of the type of insurance the company intends to provide. The management of the company, e.g. the CEO, the chairman of the board or other persons leading the business, must be sufficiently experienced and capable of managing the insurance business in compliance with the regulatory framework.

For providers of life insurance, or liability insurance related to motor vehicles, aircrafts or vessels, or other liability insurances, it is a requirement that the overall start-up capital is at least equivalent to EUR 3.7 million. Whereas for other insurance undertakings, an overall start-up capital of EUR 2.5 million is required.

An insurance provider is considered a financial institution under Norwegian law, and is thus subject to the requirements under the Financial Institutions Act (FIA). The licence application must therefore include all information which is of relevance for the application process.

Pursuant to Chapter 3 of the FIA, a licence application should include, among other things, information regarding the company's ownership and management structure, governance and control systems, how the capital requirements will be met, capital structure and a forecast of the financial position for the first three running years, budgets, group affiliation, which services the company will offer, how the anti-money laundering requirements will be met and how payment institutions and electronic money institutions will safeguard customer assets.

The licence application must also include what type of insurance the company intends to provide. Normally, the licence is granted only for one specific type of insurance, i.e. either life insurance or liability insurance. The licence may be granted under the condition, e.g., that the insurance is only provided within a particular geographical area, to particular customer groups, or in any other way.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

If a foreign insurer is authorised to provide insurance services in a country which is a member of the European Economic Agreement (EEA), it is permitted to carry out the insurance services in Norway through a branch or on a cross-border basis. The insurance company must, however, inform the regulatory authority in the relevant EEA country of origin.

Insurers from outside the EEA area are not able to write business directly in Norway, unless a Norwegian subsidiary is established which holds an insurance licence for the particular insurance services.

Norwegian law does not require foreign insurers to write reinsurance of a domestic insurer.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

The Norwegian Insurance Contract Act (ICA) includes numerous provisions concerning liability insurance and personal insurance that are mandatory, which means they can only be circumvented if in the interest of the insured.

For some types of commercial liability insurance, the parties are free to contract the terms for the insurance contract. The contractual freedom applies when two of the following conditions are met: the insured enterprise has (i) more than 250 employees, (ii) revenues of more than NOK 100 million based on the last available financial statements, or (iii) assets worth more than NOK 50 million according to its balance sheets. The exception also applies when the insured's business is mainly based in a foreign country, if the insurance concerns vessels or aircrafts, or if the insurance concerns goods under international transportation.

We note that there is an exception from the freedom of contract for the right to direct action claims against an insurer – see question 2.2 below.

1.5 Are companies permitted to indemnify directors and officers under local company law?

Companies are permitted to indemnify directors and officers under Norwegian company law. This applies for both private and public liability companies. Where there has been wilful misconduct or negligence, the director or officer may be held economically and criminally liable for their acts. A typical scenario which leads to liability is if the directors are aware that the company is insolvent, but nevertheless chose to run the company at the creditors' expense.

The company, its shareholders, or affected third parties may, in such cases, indemnify the board of directors. It is quite common among Norwegian directors and officers to have liability insurance related to their position.

1.6 Are there any forms of compulsory insurance?

Norwegian insurance law impose compulsory insurance on numerous sectors where insurance is in the public's interest. This includes third-party liability insurance for motor vehicles, pension insurance and occupational injury insurance for employees. There are certain insurance requirements for vessels and developers within the oil industry, e.g. for loss relating to pollution and wreck removal. Some particular professions also require compulsory liability insurance, e.g. brokers or lawyers.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

As mentioned under question 1.4, the ICA includes several provisions that are mandatory to protect consumers and small commercial actors. The freedom of contract only applies to larger commercial liability insurances – see question 1.4. On this basis, Norwegian insurance law appears to be more favourable to insureds. However, we note that the legal framework is generally deemed by the industry to be well balanced.

2.2 Can a third party bring a direct action against an insurer?

A third party is allowed to bring a direct action against an insurer. Consequently, it is common practice to include the liability insurer as a party in proceedings concerning third-party liability claims. Providers of the large commercial liability insurances mentioned in question 1.4 are, however, free to exclude the third party's right to bring a direct action from the policy terms, provided that the insured is not insolvent.

2.3 Can an insured bring a direct action against a reinsurer?

Whether or not an insured can bring a direct action against a reinsurer is not regulated directly in the ICA. There is limited Norwegian case law concerning the insured's access to present such claims. Therefore, to a large extent the question depends on an interpretation of the terms of the reinsurance contract. If the reinsurance contract opens for a direct action from the insured, the insured may bring such a claim. However, if the reinsurance contract does not allow for direct action from the insured, the insured is not entitled to bring a direct action against the reinsurer. This is in line with the international main principle that the insured is not allowed to bring a direct action against a reinsurer.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

The insurer's remedies depend on the degree or type of misrepresentation or non-disclosure, and the consequences for the insurance contract. Under Norwegian law, the insurer has a right to reduce liability if the misrepresentation or non-disclosure is significant and the insured has acted negligently. In some cases, the insured will be free of liability or may even terminate the insurance policy, e.g. if the insured's misrepresentation or non-disclosure was fraudulent.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

The starting point is that the insured is only required to disclose to insurers correct and detailed answers to the questions asked by the insurer. However, in some cases in which special circumstances affect the insurer's risk assessment, and the insured knows or ought to know this, a duty may be imposed on the insured to disclose the relevant information, even though the insurer has not specifically requested the particular information.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

As a starting point, an insurer does not need a separate clause entitling subrogation, although this is not uncommon. It is a general principle under Norwegian law that the insurer obtains a right of subrogation upon payment of an indemnity. The insurer will then step into the insured's position and undertake a potential claim against the tortfeasor.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

There are no special courts for commercial insurance matters. Such disputes are referred to the ordinary courts. The first instance for disputes of a certain size, i.e. where the claim amount is above NOK 125,000, is the District Courts. If the claim amount is below NOK 125,000 and at least one party is not represented by a lawyer, the dispute could be brought for the Conciliation Board. The District Court's decision may be appealed to the Court of Appeal, and ultimately to the Supreme Court. There is no right to a hearing before a jury.

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

For commercial insurance disputes, the regular court fees in Norwegian courts apply. The system is based on the unit "R",

which as of 1 January 2020 is NOK 1,172. A hearing before the Conciliation Board will cost 1.15 R (NOK 1,347). A one-day hearing before the District Courts starts at 5 R (NOK 5,860) and increases if the hearing lasts for several days. If a case is appealed, the hearing starts at 24 R (NOK 28,128) and increases depending on the duration of the hearing.

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

Norwegian procedural law states that a hearing shall take place no longer than six months from the day the case is brought before the court through the submission of a writ. The main rule is that the court will present the decision two weeks after the hearing.

It may take longer to bring to court commercial cases that are larger or more complex. Depending on the complexity, it usually takes more than two weeks for the courts to present the decision in these cases.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

Norwegian courts have no powers to order the disclosure/discovery and inspection of documents. This applies both to parties to the action, and non-parties to the action. All persons have a general duty to testify about factual circumstances and to grant access to objects, etc., that may constitute evidence in legal proceedings, subject to the limitations in the rules on prohibited and exempted evidence.

Evidence may be secured outside of legal proceedings by judicial examination of parties and witnesses and by providing access to and inspecting real evidence. If there is either a clear risk that the evidence will be lost or considerably weakened, or there are other reasons why it is particularly important to obtain access to the evidence before legal proceedings are initiated, evidence may be secured if it can be of significance in a dispute to which the applicant may become a party or intervener. A petition to secure evidence shall be submitted to the court. The court will then decide whether the conditions for securing evidence is met.

Norwegian procedural law further imposes on the parties to a dispute a duty to present a correct and complete picture of the case in question before the court. This duty may imply that a party is obliged to the unsolicited production of relevant documents, whether the documents are in favour of the party or not.

The parties to a dispute may also request specific documents from the opposing party during the preparatory proceedings. Such requests may concern a specific document or a closer defined class of documents. It is worth noting that the Norwegian Civil Procedure Act includes complementary rules on which documents a party is obliged to produce, and which documents that could be rightfully withheld. This includes, e.g., documents which disclose business or state secrets, or the examples mentioned in question 4.2 below. Pursuant to these rules of evidence, the court may occasionally order a party to produce specific documents, if the party refuses to do so.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

A party may withhold from disclosure documents in relation to advice given by lawyers, provided that the documents have been prepared as legal advice. This also applies for in-house lawyers.

A party cannot, in general, withhold documents from disclosure that have been prepared in contemplation of litigation. If a party rightfully withholds such documents, it is required that the document is otherwise exempted from the general duty of disclosure; see, e.g., (a) above.

The procedural law distinguishes between whether documents produced in the course of settlement negotiations/attempts are presented by the party who made the settlement proposal or not. A party is permitted to produce its own previous settlement offers before the court, provided that the parties have not agreed that such information is to be considered confidential. A party cannot, however, disclose settlement offers made by the opposite party or its counsel during the course of proceedings.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

Norwegian courts may require witnesses to give evidence both before or during the hearing. If a witness refuses to appear at a hearing, the court may impose an obligation for the witness to appear. The witness is, however, free to decide to what extent the witness will give evidence before the court, or whether the witness will actually give a statement at all.

4.4 Is evidence from witnesses allowed even if they are not present?

Norwegian procedural law includes a principle that all evidence is to be presented directly and orally. The principle also applies to witness statements. Accordingly, the main rule is that a witness shall appear before the court to provide their statement. Written statements are, in principle, only permitted as long as the witness is available to give a closer explanation of the contents, in order to assure adversarial proceedings. We note that most courts provide for witnesses to give their statement by phone or video conference, e.g. if the travel time for the witness is disproportionately long.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

The parties to a dispute are free to appoint its own expert witnesses. The court will, however, consider the statement of a party-appointed expert knowing that the statement may not be completely impartial. If the court considers it necessary to bring all the facts to the case, it may also call for a court-appointed expert witness. Generally, it is most common that the parties provide their own expert witnesses, but occasionally the court may appoint an expert in addition to the party-appointed experts. This, of course, depends on the relevant case and whether the court considers that the facts of the case are sufficiently clarified by the parties.

4.6 What sort of interim remedies are available from the courts?

The interim remedies available from Norwegian courts can be categorised as an arrest or a temporary precautionary measure. An arrest involves a freeze of the debtor's assets (any asset could be arrested in relation to a monetary claim). A temporary measure could involve an order for the defendant to perform a duty or stop carrying out a particular act. A temporary measure could also involve an order for the defendant to sell an asset or to place it in the custody of the enforcement office, pending a final decision of the dispute.

There are certain conditions that have to be fulfilled in order for an arrest or a temporary measure to be granted. The plaintiff will have to substantiate the claim and the specific reason for why it is necessary for the court to grant an interim remedy, i.e. either an arrest or a temporary measure. The court may grant an interim remedy under the condition that the plaintiff provide security for any claims that may arise in the event that the interim remedy is erroneous.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

There is a general right to appeal a decision of the courts of the first instance. Save for minor cases that are to be heard before the Conciliation Board (see question 3.1 above), the first instance for cases concerning larger claims is the District Courts (there are a total of 60 District Courts, including Oslo City Court). A decision from the District Courts may be appealed on the basis that a procedural error has influenced the decision, or if the court has simply not proved that it has understood the factual and legal aspects of the case in a correct way. The Court of Appeal (there are a total of six Courts of Appeal) may reject an appeal, e.g. on the basis that it clearly cannot succeed. However, most cases that are appealed are allowed a new hearing by the Court of Appeal. The Supreme Court only admits about 100 cases a year to be heard. The Supreme Court is the final instance in Norway and requires that the case has high precedential value, significant public importance or other strong reasons for the case to be tried by the Supreme Court.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

In general, interest is recoverable in respect of claims. The ICA provides the insured with a right to claim interest on an overdue payment. The current annual rate is 9.5%. The interest rate is adjusted twice a year according to the general interest level.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

If a party wins the dispute completely, the court will order that the losing party pay the opponent's costs. The courts may otherwise decide whether or not to order a party to cover the costs of the dispute, depending on the basis of the degree of success of the party in obtaining the outcome sought. In this assessment, the court may also take into consideration whether the party has refused to accept a reasonable settlement offer. Accordingly, there could be a potential cost advantage in making an offer to settle prior to trial. If the court's decision has been somewhat uncertain, the court will normally order each party to cover its own costs.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

The court may propose that the parties conduct court mediation, if the court considers that the case is suitable for mediation. Court mediation is a voluntary alternative dispute resolution mechanism. The court cannot compel the parties to mediate disputes, but it is normally recommended to try court mediation, if suggested, of course depending on the case in question. Court mediation is conducted with a judge as mediator, and generally has a high success rate. If the parties do not settle during court mediation, the case will proceed to a hearing before a judge who has not been involved in the meditation.

4.11 If a party refuses to a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

There are no consequences for a party that refuses to mediate, other than that it may be taken into consideration by the court when determining the question of cost in a decision.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

Courts respect the parties' autonomy and do not interfere in the conduct of arbitration proceedings if the parties have agreed arbitration as dispute resolution. Court intervention in arbitral proceedings is rare. The Norwegian Arbitration Act does, however, provide some situations in which the courts are able to assist the parties in the conducting of an arbitration. Moreover, a party to an arbitration may bring an annulment action before the regular courts if it is of the opinion that the arbitration tribunal has conducted an erroneous arbitration procedure. The threshold is, however, high, and only in special circumstances does the court annul arbitration awards.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

In general, all arbitration agreements are just as binding regardless of the form the parties chose when entering into the agreement. It is thus not necessary for a form of words to be put into the insurance contract to ensure enforceability of an arbitration clause. However, it is easier to prove the content of the arbitration agreement if it is in written form in the case of a dispute.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

The courts are reluctant to refuse enforcing arbitration clauses. Such refusal will happen if the court declares the arbitration agreement null and void.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

The courts may order the same forms of interim remedies in support of arbitration proceedings as in relation to regular litigation. This includes arrest and temporary measures as mentioned under question 4.6 above.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

According to the Norwegian Arbitration Act, arbitral tribunals are obliged to present a reason for their award. It is a general principle that the reason for the award should be sufficiently thorough, so that the parties may examine the tribunal's assessment and to avoid consecutive annulment actions before the courts on the basis that the tribunal has not taken into consideration all factual and legal aspects of the case in question. However, the parties can waive their demand for a reason, a feature that is sometimes used in ongoing commercial relationships where a reasoned decision may be of disadvantage to the commercial relationship between the parties.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

There is no right to appeal an arbitration award to the courts. There are, however, some limited grounds on which the courts may be competent to set aside an arbitration award. This applies if the award is to be considered invalid. Invalidating factors could be that the arbitration agreement is invalid, that the award falls outside the scope of the jurisdiction of the tribunal, the composition of the tribunal was incorrect or other procedural errors that may have affected the outcome of the award. However, the threshold is high and reserved for the few and clear cases where the decision ought to be set aside as invalid.

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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

The *Superintendencia de Banca, Seguros y AFP* – SBS – regulates insurance and reinsurance companies in Peru.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

The requirements to set up a new insurance or reinsurance company are as follows:

1. To incorporate an SAA (*Sociedad Anónima Abierta* – a publicly held corporation), whose main object is to perform (re)insurance business.
2. To obtain a licence from SBS.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Foreign insurers are only able to write business directly in certain cases not forbidden by law (see question 1.6). Further, they cannot act through a broker. Otherwise, they have to write reinsurance of a domestic insurance.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

There are no implied extraneous terms for contracts of insurance except for the general rules contained in Law No. 29946 – the Law of Insurance.

1.5 Are companies permitted to indemnify directors and officers under local company law?

Yes, companies are permitted to indemnify directors and officers, but this must be in accordance with the Law of Insurance.

1.6 Are there any forms of compulsory insurance?

Yes, there are three forms of compulsory insurance, which can only be offered and written by Peruvian insurance companies. These forms are: the SOAT covering third parties liabilities regarding road vehicles; Payroll Life Insurance; and the SCTR for risk-involved activities.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

The law in Peru is balanced in terms of insurers and insureds.

2.2 Can a third party bring a direct action against an insurer?

No, they cannot. Exception is made on matters related to pollution of the seas.

2.3 Can an insured bring a direct action against a reinsurer?

Yes. The most recent modification to the law states that direct action may be brought when there is a 100% cession of the risk and it is agreed that the reinsurer will pay the indemnity directly to the insured (in force from August 2018).

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

According to insurance law, if there is misrepresentation and/or non-disclosure, the contract is null and void if it involves wilful misconduct or gross negligence by the insured. If there are none, the insurance contract may remain in force, provided the insured notifies the insurer and offers an adjustment of the premium. The insurer can reject such offer and terminate the contract.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

Yes, assureds have a duty to disclose all matters material to a risk.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

The right of subrogation is automatic according to the law. Should the parties wish to incorporate such right, they can do so.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

Commercial courts hear commercial insurance disputes. A jury system does not exist in Peru.

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

Court fees depend on the quantum of the claim and the annual chart published every year. For 2019, the minimum fee was USD 12.60 and the maximum USD 170.00 for claims over USD 333,000.

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

Commercial cases usually take between three to nine months to reach the Court.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

All evidence has to be offered and submitted together with the lawsuit. Courts have the power to order the disclosure/discovery and inspection of any evidence requested by any party.

Further and exceptionally, the Courts may order additional probatory means for them to be satisfied, provided that the source of evidence has always been quoted by some of the parties, taking care not to replace the parties' probatory obligation.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

(a) Yes.
(b) Yes.
(c) Yes, provided it is marked as on a "without prejudice" basis.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

No, they do not.

4.4 Is evidence from witnesses allowed even if they are not present?

Yes, evidence from witnesses may be given if they are not present.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

There is no restriction on calling expert witnesses. It is uncommon for the court to nominate an expert in the described circumstances.

4.6 What sort of interim remedies are available from the courts?

Available interim remedies in Peru include embargo (arrest) of goods or obtaining a bank guarantee.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

Yes, appeals may be made based on points of claims or defence, or in case of non-correct application of the law. There is only one stage of appeal available in Peru.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Yes; the rate is 0.83% *per annum*.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

The losing party pays the costs of the trial and any monetary awards granted to the winning party (including attorney fees) at the discretion of the Court.

No, since interests and costs applicable to a case are immaterial.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

There is a compulsory conciliation hearing before any court action. Without it, parties cannot bring action to the Courts of Justice of Peru.

4.11 If a party refuses to a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

See the answer to question 4.10 above.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

The law is clear as to arbitral jurisdiction autonomy. Courts will intervene in arbitration only to analyse the fulfilment of the arbitration tribunal or sole arbitrator of the compulsory grounds set out by law.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

No. General wording evidencing the intention to arbitrate suffices. Nonetheless, as per the situation generated in question 2.3 above, it would be advisable to have a form of evidence by which the insured accepts arbitration in writing in respect of the reinsurance contract.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

No, there is no such possibility.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

The courts may grant an embargo on goods or a bank guarantee as forms of interim relief.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

Yes, the arbitral tribunal or single arbitrator must give reasons for its award.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

Please refer to question 4.7 above.

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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

The main share of the functions of and powers over the regulation of the insurance and reinsurance market belongs to the Bank of Russia.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

Only a legal entity can act as an insurer in the Russian Federation.

Both individuals and Russian and foreign legal entities can be founders of an insurance company.

One of the main measures of the State Regulations is licensing, i.e. registration of insurance companies for insurance activity. No insurance company may operate in the Russian Federation without a duly issued licence.

The law also provides for the minimum amount of authorised capital of insurance companies.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

According to Art. 6 of the Law of the Russian Federation "On Organization of Insurance Activity", only legal entities that are licensed to carry out insurance activities in the Russian Federation are recognised as insurers. Licences for carrying out insurance activities in the territory of the Russian Federation are not issued to foreign legal entities. In addition, according to Art. 4 of the Law, insurance of property interests of legal entities located in the territory of the Russian Federation (except for reinsurance and mutual insurance) and property interests of individuals – residents of the Russian Federation – can only be carried out by Russian insurers.

The implementation of insurance activities by foreign insurance companies in the Russian Federation through insurance agents, brokers and other intermediaries (financial consultants) does not comply with the legislation of the Russian Federation either.

Foreign insurance companies are able to work freely throughout the territory of the Russian Federation, although only through their subsidiaries. However, foreign insurance companies cannot participate in activity providing for life insurance, compulsory (including state) insurance, in property insurance related to supplies and work for state needs, as well as in insurance of property interests of the State and Municipal Bodies.

The Ministry of Finance has announced the development of a draft law that would make it possible to work in Russia for affiliates of insurance and reinsurance companies from other member countries of the World Trade Organization. The Law will come into force on August 22, 2021.

Currently the work of foreign insurance companies in Russia is prohibited by the law. Foreign insurers can enter the Russian market only by reinsurance via a Russian insurer.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

Russian insurance law contains several imperative provisions that restrict the parties' freedom of contract by implying extraneous terms into contracts of insurance. Usually such provisions contain a direct prohibition to prevent parties from avoiding prescribed regulation by using extraneous terms, or declare terms and conditions of contracts construed to allow the prohibited relations as null and void. Among them is Art. 928 of the Civil Code of the Russian Federation providing that insurance of unlawful interests is not allowed. Insurance of losses from participation in games, lotteries and betting is not allowed. Insurance of expenses to which a person may be forced to release hostages shall not be allowed. Terms and conditions of insurance contracts contrary to these provisions shall be void.

Another example is Art. 933 of the Civil Code which provides that under the contract of insurance of entrepreneurial risk, the latter can be insured only for the insured himself and only in his favour. The insurance contract providing the insurance of entrepreneurial risk of a person who is not the insured shall be void. The contract of insurance of entrepreneurial risk in favour of a person who is not the insured is considered concluded in favour of the insured.

Further, part 1 of Art. 940 of the Russian Civil Code provides that the insurance contract must be concluded in writing. Failure to comply with the written form entails invalidity of the insurance contract, with the exception of a contract of compulsory state insurance.

There are two provisions in Merchant Shipping Insurance Legislation restricting the parties' freedom of contract, both concerning the abandoning by the insured of all rights for the ship and cargo to the insurer in order to claim the full insured amount. Agreement of the parties contrary to these rules shall be void.

There are some other imperative provisions of civil legislation, such as time bars. Russian law establishes that the parties to any contract, including the contract of insurance, cannot change the order of calculating and applying the time bar, and the time bar issue cannot be covered by the agreement of the parties.

1.5 Are companies permitted to indemnify directors and officers under local company law?

Generally, insurance of unlawful interests is not allowed under Russian Law (Art. 928 of the Russian Civil Code). Therefore, such interests as payments of penalties and fines imputed on directors and officers may not be lawfully insured.

Meantime, the companies may indemnify directors and officers stipulating it in their labour contracts. These indemnifications, however, shall be made strictly in compliance with the tax law of the Russian Federation.

1.6 Are there any forms of compulsory insurance?

Under Russian law, compulsory insurance is a form of insurance in which insurance relations between the insurer and the insured arise by virtue of law.

Types of compulsory insurance: personal insurance of passengers (tourists, sightseers); state insurance of employees of tax authorities; state life and health; insurance of state civil servants and persons equivalent to them; liability insurance of vehicle owners; civil liability insurance of the carrier in respect of passengers of the aircraft; and obligatory insurance of civil liability of the owner of hazardous objects.

There is also an "imputed" insurance for which the rules of insurance and insurance rates are not established by law, but the existence of an insurance policy is necessary for carrying out an activity. The imputed insurance includes liability insurance of tourist tour operators, insurance of professional liability of notaries and some other types of insurance.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

Insurance is carried out on the basis of an insurance contract concluded by the insurer and the insured. Concluding an insurance contract, the insurer and the insured may negotiate and achieve well-balanced mutual rights and obligations. The imperative provisions imposed by law are quite limited (see question 1.4 above).

2.2 Can a third party bring a direct action against an insurer?

The property insurance contract may be concluded between the insurer and the insured either in his favour or in favour of another person (beneficiary).

The beneficiaries, i.e. the persons in whose favour the contract was concluded, are entitled to bring direct action against the insurer.

There may be insurance contracts where the beneficiary is not specified, but implied.

According to Section 3 of Art. 931 of the Civil Code, a contract on the risk of liability for causing harm shall be considered as concluded for the benefit of persons to whom harm was caused (beneficiaries), even if the contract is actually concluded for the benefit of the policyholder or another person responsible for causing harm, or the contract does not specify in whose favour it was concluded.

In the case where liability for causing harm is insured due to the fact that its insurance is compulsory, and also in other cases specified by the law or provided by the insurance contract, the person for whose benefit the contract of insurance is considered to be concluded has the right of direct claim against the insurer for compensation of damage within the insured amount (part 4 of Art. 931).

2.3 Can an insured bring a direct action against a reinsurer?

Under Art. 967 of the Civil Code, the insurer under an insurance contract (main contract) who has entered into a reinsurance contract is considered an insured in this last contract. In case of reinsurance, the insurer under this contract remains liable to the insured under the main insurance contract for the payment of insurance compensation or the insured amount. The insured is neither a party to the reinsurance contract, nor a beneficiary. The insurer under the main contract remains the person in charge to the originally insured. Therefore, the insured cannot bring direct action against the reinsurer.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

The insured is obliged to inform the insurer of circumstances that are essential for determining the probability of the occurrence of the insured event and the insured amount if such circumstances are unknown and should not be known to the insurer. If this is not done, the insurer may refuse to enter into a contract. And if, after its conclusion, it turns out that the policyholder has not disclosed to the insurer some material circumstances, this may be a reason for the insurer to terminate the contract or to demand to recognise it invalid.

When the parties have entered into an insurance contract and during its execution it turns out that the policyholder has concealed essential circumstances, the insurer may request the invalidity of the contract.

This provision is valid with the exception that the insurer does not have the right to demand that the insurance contract be recognised invalid if the circumstances that the insured had concealed have already disappeared.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

The insured shall disclose all essential information as to a risk either known to him, stipulated in the standard form of an insurance contract or in a written request of an insurer.

In marine insurance, if at the time of conclusion of the marine insurance contract the insured did not reply to the queries of the insurer, the latter cannot subsequently refuse to execute the marine insurance contract on the basis that such information had not been provided to him.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

A separate clause entitling subrogation is not needed, but the subrogation right may be excluded by the contract of insurance, as Art. 967 of the Civil Code states that unless otherwise provided by the property insurance contract, the insurer who

paid the insurance indemnity obtains the right of claim that the policyholder (beneficiary) had to the person responsible for the losses compensated by the insurer.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

Article 35 of the Law of the Russian Federation "On the Organization of Insurance Activity" states that "disputes related to insurance are resolved by a court, arbitration (commercial) court in accordance with their competence". If a dispute arises on an insurance contract in which the insured is a legal entity, then this dispute shall be considered by the Commercial Court. Disputes where the insured is an individual and the price of a claim does not exceed 500 minimum wages established by the law shall be under the jurisdiction of a local Justice Court Judge.

Procedure of hearing before a jury on commercial cases does not exist in Russian law.

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

The amount of court fees depends on the amount of claim and should be calculated accordingly. The minimum sum is established as 400.00 RUB and the maximum amount of court fees is 200,000.00 RUB. In any particular case, the amount should be calculated accordingly depending on the amount and the essence of claim (property or non-property dispute).

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

The time limit for consideration of initial claims by insurance companies is not specified by law. The term for consideration of claims shall either be specified in the insurance contract, or it should be reasonable. The reasonable period for consideration of a claim is considered as 10–30 days.

There is a compulsory so-called 'pre-court claim procedure' to be followed before the claim is brought to court. The law specifies that the response time to a pre-trial claim on disputes deriving from Compulsory Insurance of Civil Liability of Vehicle Owners shall not exceed 10 business days.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

Each party shall bring evidence in support of the statements made. The court may order the parties to submit additional evidence or invite them to disclose additional evidence if required. In the event that the presentation of the necessary evidence for these persons is difficult, the court may assist in the collection and solicitation of evidence by issuing respective orders obliging the person who possesses the required evidence to send it to the court.

Officials or citizens unable to present the requested evidence in general or within the time limit established by the court must notify the court of this within five days from the date of receipt of the request, indicating the reasons. In the event of non-notification of the court, as well as in case of non-fulfillment of the court's requirement to present the evidence, for reasons recognised by the court as disrespectful, the guilty officials or citizens who are not persons participating in the case may be fined by the court.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

In civil proceedings, if the documents are not the evidence described in question 4.1 above, there is no requirement to disclose them. Practically, neither documents relating to advice given by lawyers, nor prepared in contemplation of litigation or produced in the course of settlement negotiations/attempts, are disclosed and may be withheld, if the disclosure is not favourable for the party's position in the proceedings.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

Witnesses may be brought to court at the hearing on the merits of the case at the stage of investigating the evidence. The information given by the witness is not accepted as evidence if he cannot name the source from which the information provided to the court was obtained.

4.4 Is evidence from witnesses allowed even if they are not present?

The witness testifies orally in the form of a "free narration". This testimony is recorded in the Statement of the Court Session.

However, by the court's decision, the witness may put his testimony in writing, which is attached to the Court Statement. If a witness cannot be present at the hearing, his written statement may be obtained by the court and investigated as evidence.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

Parties may take an expert conclusion on their own initiative and bring it to the court as evidence. However, a court expert is an independent procedural person who has special knowledge in matters relating to the case under consideration, and is always appointed by the court to give an opinion in cases in a special manner provided for by procedural legislation.

The court expert is criminally liable for giving a deliberately false conclusion.

4.6 What sort of interim remedies are available from the courts?

On request of a person participating in the case, the court may take measures to secure the claim. Securing the claim is allowed at any stage of procedure if failure to take measures to secure the claim may make it difficult or impossible to execute the court's decision. The claim is secured by the court at request of the persons participating in the case. The courts are allowed to simultaneously take several measures to secure the claim.

When adequate security is issued by the respondent and obtained by the court, the measure to secure the claim shall be lifted.

The court, depending on the merits of the case and the amount of the claim, has the right to order for counter-security from the person requesting for application of security measures.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

The persons participating in the case, as well as other persons, have the right to appeal the decision of the court of first instance and cassational and high court instances.

The appeal to the appellate court shall be made within one month from the issuance of the Decision in writing, and may not contain new claims that were not the subject of consideration in the court of first instance.

A cassation complaint may be filed within a period not exceeding two months from the date on which the Decision of the First Instance or the Decision of the Appeal Instance came into legal force.

The appeals shall contain grounds on which the person appeals the decision, referring to laws, circumstances of the case and the evidence in the case. The cassation appeal shall contain the grounds explaining how the appealed acts breached the procedural or material law, and the cassation court has the right not to re-consider the evidence.

The decisions can be further appealed to the Judicial Collegium of the Supreme Court of the Russian Federation in cassation proceedings.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Art. 395 of the Civil Code of the Russian Federation provides that in case the financial obligation is not fulfilled, interest on the amount of the obligation shall be accrued on the basis of the average rates of the bank interest on deposits of individuals (physical persons) at the place of residence of the creditor or, if the creditor is a legal entity, at the place of its location.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

The procedural legislation in Russia shares the principle of collecting the costs from the defeated party. There can be an agreement of the parties regarding division of costs, especially when the parties decide to settle. Pre-court settlement allows the parties to avoid costs related to court fees and other related procedural costs.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

The court cannot force the parties to mediate. Mediation (either at the court or elsewhere) is subject to discretion of the parties. However, one of the judge's main functions in the dispute at the stage of preliminary hearings is to collaborate on the amicable settlement of the case.

4.11 If a party refuses to a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

In preparing the case for trial, the judge explains to the parties their right to refer the dispute to the resolution of the mediator.

If the parties failed or refused to refer the dispute to mediation, the court will consider the case on the merits.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

The parties have the right to conclude a valid arbitration agreement referring all disputes to arbitration alternatively to the state court, except for those disputes that are lawfully assigned to the competence of state courts.

The court cannot intervene in the conduct of arbitration unless the parties apply to the court for resolution of a dispute going beyond the arbitration clause or the competence of a concrete arbitration regarding the dispute and/or at the stage of enforcement of the award.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

The arbitration agreement may be concluded in the form of an arbitration clause in the contract, in a supplementary agreement to the existing contract or in the form of a separate written agreement at any stage of the dispute, including when the case is already in a state court, but before the decision on merits is taken by the court of first instance.

The arbitration agreement shall contain the exact name of the institutional arbitration or the order for formation of the arbitral tribunal, the place of arbitration and the procedure to be applied.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

The courts may refuse to enforce the arbitration clause in case the arbitration agreement is void on the grounds provided for by federal law.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

If the valid arbitration clause was concluded by the parties and the dispute is not referred by law to the exclusive competence of the state, the dispute shall be referred to arbitration.

The arbitral tribunal may decide to secure the claim, but in order to enforce such a decision the interested party shall submit the application to the competent State Court.

In cases subject to consideration by the Maritime Arbitration Commission, the Chairman may, at the request of the party,

determine the size and form of security for the claim and, in particular, issue a decree on imposing arrest on the vessel or cargo of the other party located in the Russian port.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

The award shall be made in writing and signed by the members of the arbitral tribunal. The award shall contain the circumstances of the case, the conclusions of the arbitral tribunal and the laws that the arbitral tribunal applied.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

The award may not be contested in state courts and reconsidered on the merits of the case. However, certain procedural breaches may create grounds for refusal to recognise and enforce the award in state courts (see question 5.1 above).

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Jurinflot International Law Firm is Russia's oldest and one of the leading firms specialising in maritime law. Having been originally founded in 1929 as an in-house law department of the Soviet state-owned ship agent/broker "Sovfracht", Jurinflot started as a separate entity in 1991. At present, with 12 lawyers in the Moscow office, Jurinflot is a recommended law firm for shipping and transport sectors in the Russian national and several foreign legal ratings. The firm's practice is diverse and covers most maritime law topics from marine insurance, dispute resolution and accident response to maritime labour, compliance and ship finance.

South Africa


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ENSafrica

1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

South Africa has a sophisticated system of financial sector regulation known as the "Twin Peaks" system of regulation, similar to the Australian Twin Peaks model.

The prudential regulator, known as the Prudential Authority (the "**PA**"), is responsible for the first peak, and is charged with the regulation of banks, insurers, cooperative financial conglomerates and certain market infrastructure. In essence, the first peak is dedicated to the maintenance and enhancement of financial stability in the South African financial services sector.

The second peak of regulation is the market conduct regulator known as the Financial Sector Conduct Authority ("**FSCA**"), which regulates the conduct of financial institutions. The main task of this separate and independent body is the deterrence of misconduct and protection of consumers of financial products and services.

While the PA and FSCA are the key insurance regulators, there are other regulators, such as the Competition Commission, the Takeover Regulation Panel and the Johannesburg Stock Exchange, that also regulate companies in the insurance sector, where applicable.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

The Insurance Act 18 of 2017 ("**the Insurance Act**") governs the issuing of insurance licences, in relation to non-life, life, reinsurance and microinsurance business. Application is made to the PA.

There are three categories of insurance licence, namely: a licence for microinsurance business (for both life and non-life insurance business, but with the policy benefits limited to a prescribed maximum); a licence for all other classes of life and non-life insurance business; and a licence for reinsurance business.

An applicant for a microinsurance licence must be a profit company or a non-profit company registered under the Companies Act 71 of 2008 ("**Companies Act**"), or a co-operative registered under the Co-operatives Act 14 of 2005 ("**Co-operatives Act**"). Applicants for life, non-life and reinsurance business licences must be a public company or a state-owned company registered under the Companies Act, a co-operative registered under the Co-operatives Act, or a branch of a foreign reinsurer.

An applicant must be able to demonstrate the following:

- its primary business activity must be the conduct of insurance business and operations arising directly therefrom;
- its key persons and significant owners must meet the prescribed fit and proper requirements; and
- it must have a sound business plan. In particular:
  - it must have a plan to meet its stated commitments in terms of transformation of the insurance sector, including meeting the targets envisaged by the Financial Sector Code (which is an empowerment code governing the financial services industry);
  - it must have adequate operational management capabilities to conduct the classes and sub-classes of insurance business that it wishes to conduct;
  - where it is a branch of a foreign reinsurer, the regulatory framework to which it is subject must be equivalent to the Insurance Act;
  - where it is part of an insurance group, its controlling company must be able to meet the requirements for insurance groups as set out in the Insurance Act;
  - it must be able to comply with the governance framework requirements, financial soundness requirements and reporting and public disclosure requirements of the Insurance Act; and
  - its licensing must not be contrary to the interests of prospective policyholders or the public interest.

State-owned insurers must be created by statute, and be authorised by statute to apply for a licence under the Insurance Act.

The Insurance Act requires licence-holders to maintain certain minimum capital requirements.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Generally, no entity, including a foreign insurer or its South African-based subsidiary, may "conduct insurance business" in South Africa unless that entity is licensed under the Insurance Act.

The Insurance Act provides that a foreign insurer will be regarded as conducting insurance business in South Africa where that insurer conducts business similar to insurance business outside of South Africa, and directly or indirectly solicits business in or from South Africa, or influences in any way the placement of insurance business from the South African market to the foreign jurisdiction.

Where a South African-based commercial entity itself seeks and secures insurance for its business or parts thereof with a foreign insurer, the foreign insurer will not be "carrying on insurance business" in South Africa and will accordingly not be required to obtain an insurance licence. This is most often

the case in the context of coverage under a global insurance programme (issued in a foreign jurisdiction by a foreign insurer) of a South African subsidiary company. Such covers are nonetheless subject to certain regulatory compliance aspects.

Lloyds, and numerous Lloyds underwriters, are licensed to conduct certain classes of insurance business.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

Any provision in a contract of insurance that is contrary to public policy is generally unenforceable.

Legislative restrictions have also been imposed by the Policyholder Protection Rules for all life policies, and the Policyholder Protection Rules for non-life policies owned by natural policyholders and juristic policyholders with an annual turnover or asset value less than ZAR2 million, promulgated in terms of the Insurance Act. The rules provide for comprehensive requirements regarding the content (mandatory and impermissible provisions), language, notification and disclosure requirements for the applicable insurance contracts. Generally, the insurance contract must be fair to the insured, and for instance must:

- include a premium payment grace period (usually 15 days from the due date), during which the insurer cannot reject a claim on the basis of non-payment of premium;
- include a cooling-off period (usually 31 days from receipt of the insurance contract); and
- include the necessary disclosures including insurance limits, exclusions, insurer and intermediary contact information, remuneration and commission details, claims details and complaint details.

1.5 Are companies permitted to indemnify directors and officers under local company law?

Except to the extent that a company's Memorandum of Incorporation provides otherwise, a company may indemnify a director/officer, and may purchase insurance to protect a director/officer against any liability, except in the following instances:

1. In respect of liability to the company itself.
2. Where the director:
   a. acted in the name of the company, signed anything on behalf of the company, or purported to bind the company or authorise the taking of any action by or on behalf of the company, despite knowing that the director lacked the authority to do so;
   b. acquiesced in the carrying on of the company's business despite knowing that it was being conducted in a reckless manner;
   c. was a party to an act or omission by the company despite knowing that the intention was to defraud the creditor, employee or shareholder of the company, being part of an act having or which had any other fraudulent purpose;
   d. incurred any liability arising from wilful misconduct or wilful breach of trust; or
   e. incurred a fine as a result of a conviction of an offence in terms of national legislation.

1.6 Are there any forms of compulsory insurance?

Yes, various legislation has been enacted which provides for compulsory insurance through the establishment and operation of certain funds, for example, the Road Accident Fund ("**RAF**"), the Workmen's Compensation Fund, and the Unemployment Insurance Fund ("**UIF**").

Certain professional bodies, for instance those in respect the auditing and engineering professions, require that their members carry professional indemnity insurance cover.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

The South African substantive law relating to insurance does not favour either the insurer or the insured.

2.2 Can a third party bring a direct action against an insurer?

In the case of assets and life insurance covers, where a third party is a beneficiary or has a noted interest, such third party may bring an action directly against the insurer.

In the case of liability insurance covers, a third party may bring an action directly against an insurer in respect of any liability incurred by the insured towards a third party, but then only in the event of the sequestration or insolvency of the insured.

2.3 Can an insured bring a direct action against a reinsurer?

No, unless the insurance contract contains a clause which allows the insured to approach the reinsurer directly in certain circumstances (commonly known as a cut-through clause), thereby creating a contractual nexus with the reinsurer in the circumstances contemplated.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

In the event of a material misrepresentation or a material non-disclosure by the insured, the insurance contract may be rendered voidable at the election of the insurer.

The insurer may therefore, at its election, rescind the insurance contract, which will result in the termination of the insurance contract, and the setting aside of all its legal consequences, which generally includes a refund of any premiums paid.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

Yes, as a general rule, with limited exceptions.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

Subrogation arises automatically as a matter of common law, and applies to all contracts of indemnity insurance. An insurer is, however, not subrogated to an insured's right of action until it has paid the claim under the policy.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

In principle, commercial insurance disputes are capable of being resolved in any court of law of competent jurisdiction.

The most relevant courts are the High Courts of South Africa, the Magistrates' Courts and the Small Claims Courts. A special "Commercial Court" has also recently been set up to try to resolve commercial litigation matters in the High Courts, quickly, cheaply, fairly and with acuity.

Save for the type of matters which the different courts can deal with, the main distinction between the courts is their respective monetary jurisdiction.

The lower courts have a maximum monetary limit, as published from time to time. The current monetary jurisdiction is as follows:

- The Regional Magistrates' Courts: R400,000.00 (four hundred thousand rand).
- The District Magistrates' Courts: R200,000.00 (two hundred thousand rand).
- The small claims courts: R15,000.00 (fifteen thousand rand).

Parties can submit or consent (at the time proceedings are instituted or in advance) to the jurisdiction of the Magistrates' Courts even if the value of the claim falls outside the monetary jurisdiction of that court.

The High Courts do not have a prescribed monetary jurisdictional limit in respect of the value of the claims over which they exercise jurisdiction. However, if the party instituting proceedings elects to institute proceedings in a High Court, even though the monetary value falls within a lower court's jurisdiction, the court has a discretion to award costs on the scale of a lower court where the party is successful.

Accordingly, in which court a litigant institutes proceedings will largely depend on the monetary value of the claim.

South Africa does not have a jury system.

Mention must be made of the office of the Ombudsman for Long Term Insurance and the Ombudsman for Short Term Insurance, which are regulated by the Financial Services Ombudsman Schemes Act. Subject to certain jurisdictional restrictions, the Insurance Ombudsman offices provide the insuring public and the insurance industry with a free, efficient and fair dispute resolution mechanism, through an alternative dispute resolution process, applying the law and principles of fairness and equity.

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

None. However, incidental costs are payable to, *inter alia*, the sheriff, who charges a set fee for effecting service of legal process.

Furthermore, where the party instituting proceedings is not resident within the court's jurisdiction (a *peregrinus*), such a party may, in certain circumstances, be required to furnish security for the costs of the other party to the proceedings.

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

Anywhere from three months to three years depending on various factors, including the type of procedure used, complexity of the matter and conduct of the parties.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

(a) In respect of parties to an action, the courts have the power to order discovery/disclosure of documents when one of the parties has failed to discover and/or disclose (produce) all relevant documents, as required by the Rules of Court. If any party fails to make proper discovery of evidence, or fails to allow for inspection and/or copies of the relevant documents in accordance with the Rules of Court, the party requiring discovery or inspection/copies may apply to a court for an order compelling compliance, and failing such compliance, the court may, on application, dismiss the action or strike out the action or defence, as the case may be.

The court can also of its own accord order discovery (within the parameters of the Rules of Court relating to discovery).

(b) Persons who are not parties to the proceedings, but who have in their possession documents relevant to the proceedings, can be required to produce such documents, and allow copies to be made, by way of a *subpoena duces tecum*. If a party fails to comply with the subpoena, such party may be found by a court to be in contempt of court, and may be liable for a fine or imprisonment.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

(a) A party can withhold disclosure of documents relating to advice given by lawyers in terms of legal advice privilege, which forms part of legal professional privilege.

- The general rule is that communications/documents between a legal adviser and his or her client are privileged if:
  (1) the legal adviser was acting in a professional capacity at the time;
  (2) the communication/disclosure was made in confidence;
  (3) for the purpose of obtaining legal advice or for the purposes of litigation; and
  (4) the advice does not facilitate the commission of a crime or fraud.

(b) A party can withhold from disclosure documents prepared in contemplation of litigation in terms of litigation privilege which forms part of legal professional privilege.

- Litigation privilege protects communications/documents between a litigant or his/her legal advisor and third parties, if such communications/documents are made for the purpose of pending or contemplated litigation. In general, the communication/document will be privileged if:
  (1) the communication/document was obtained or brought into existence for the purpose of a litigant's submission to a legal advisor for legal advice; and
  (2) that litigation was pending or contemplated as being likely or probable at the time.

(c) A party can withhold from disclosure documents produced in the course of *bona fide* settlement negotiations – known as "without prejudice" statements.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

Generally no, but may do so in certain circumstances where the court is requested by one of the parties, or with the consent of the parties.

4.4 Is evidence from witnesses allowed even if they are not present?

Although as a general rule, evidence is given orally in open court by sworn witnesses, in certain circumstances evidence can be provided by way of affidavit.

In terms of the Rules of Court, a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit, or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it may meet. However, where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can attend, the evidence of such witness shall not be given on affidavit.

Furthermore, a court may, on application, in any matter where it appears convenient or necessary for the purposes of justice, make an order for taking the evidence of a witness before or during the trial before a commissioner of the court, and permit any party to any such matter to use such deposition in evidence on such terms, if any, as determined by the court.

The court's discretion to allow evidence to be given on affidavit or before a commissioner must be exercised judicially after a consideration of all of the facts.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

In terms of the Rules of Court, no person shall, save with leave of the court or consent of all of the parties to the suit, be entitled to call an expert witness, unless notice of intention to do so and a summary of the expert's opinion and reasons therefor, are provided timeously in accordance with the Rules of Court.

In general, the court is not of its own accord permitted to appoint or require expert evidence to be presented. However, in limited circumstances and where the interests of justice requires the court to do so, the court may advise or request a party to present expert evidence, provided that the court is mindful of the dangers associated with the judge intervening in the calling of witnesses, and there is no objection. However, it has not been decided by our courts, whether the court can require such evidence where the other party objects to such evidence being produced.

4.6 What sort of interim remedies are available from the courts?

Typically, a wide range of interim remedies are granted in urgent proceedings.

Some examples of interim orders that may be granted by courts in legal proceedings include:

(1) Interim attachment orders to preserve assets pending judgment or a final order:
- a Mareva injunction (an order freezing a party's assets);
- an Anton Piller order (an order preserving evidence where there is fear or risk of destruction); and
- an anti-dissipation interdict (an order preventing or restraining a party from dissipating or concealing assets pending the final outcome).

(2) Interim orders to enforce/compel compliance with the Rules of Court.

(3) Other interim orders that are available are the following:
- rule *nisi*: a court order which provides for a return date on which date the parties have an opportunity to show cause why the order should not become final;
- orders for the stay of proceedings: court orders suspending court proceedings; and
- interdicts: prohibitory interdict order (to prevent an act); mandatory interdict/mandamus order (to compel the carrying out of a particular act); and restitutionary interdict (to compel the return of property).

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

The appeal process and the stages of appeal depend on which court is the court of first instance.

Parties generally have an automatic right to appeal a civil judgment/order of a Magistrate's Court, as a court of first instance, to the High Court.

In respect of a High Court decision:
- There is no automatic right to appeal a decision of the High Court. Parties wishing to appeal such a decision must first seek and obtain leave or permission to appeal.
- Leave may be granted if:
  (a) the appeal would have a reasonable prospect of success; or
  (b) there is some other compelling reason why the appeal should be heard.
- If the court consisted of a single judge, parties may either appeal to a full bench of that High Court, or appeal to the Supreme Court of Appeal.
- If the court consisted of more than one judge, parties may appeal to the Supreme Court of Appeal.

A decision of the Supreme Court of Appeal, or in exceptional circumstances a decision of the High Court, may be appealed to the Constitutional Court. Leave may be granted by the Constitutional Court on the grounds that a matter raises a point of law which is of general public importance.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Interest is generally recoverable in respect of claims, unless interest is expressly, plainly and unambiguously excluded by agreement between the parties.

In terms of the common law *in duplum* rule, interest on a debt will cease to accrue where the total amount of arrears interest that has accrued equals the total outstanding principal debt.

Parties may also agree to the rate of interest to be applied.

In terms of the Prescribed of Interest Act 55 of 1975, where the interest rate is not governed by any other law or by an agreement or a trade custom or in any other manner, interest shall be calculated at the prescribed rate of interest as determined by the Minister from time to time, as at the date interest starts to accrue. The current prescribed rate of interest is 9.75% with effect from 16 January 2020, and is calculated as the repo rate plus 3.5%.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

The overarching rule is that all awards of costs are in the discretion of the court. This discretion must be exercised judicially and after a consideration of all of the facts.

The general rule is that costs follow the outcome – the successful party should be awarded costs. This rule should be departed from only where good grounds for doing so exist.

Costs are awarded on a tariff basis and calculated in terms of fixed court tariff scales.

Furthermore, in terms of the Rules of Court, a defendant may at any time unconditionally or without prejudice make a written offer to settle the plaintiff's claim. The effect of the offer is to place the plaintiff in a position where, if the plaintiff rejects it, the plaintiff will run the risk of having to pay the costs subsequently incurred, unless the plaintiff is able to prove an amount in excess of the amount tendered.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

Mediation is currently still voluntary in terms of South African Law, and therefore courts cannot compel parties to mediate disputes or engage in Alternative Dispute Resolution in the absence of an agreement between the parties.

In any pre-trial conference the parties are, however, required to consider whether the dispute should be referred for possible settlement by mediation.

4.11 If a party refuses to a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

A court may award a punitive costs order against a party who/which refused to mediate and/or engage in Alternative Dispute Resolution methods, where the court finds that the parties ought to have done so.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

The courts favour the principle of party autonomy in relation to arbitration proceedings, and will generally uphold arbitration agreements and be reluctant to set aside or review an arbitration award.

The South African domestic law of arbitration is governed by the Arbitration Act. South Africa has recently introduced an International Arbitration Act, based on the UNCITRAL model law.

The courts are able to intervene in the conduct of an arbitration, but then only in limited instances, as provided for in the respective Arbitration Acts.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

In order for a dispute in relation to a contract of (re) insurance to be subjected to arbitration, it is necessary to include an arbitration agreement in the (re) insurance contract, or to have a separate agreement/document, which contains an agreement to arbitrate and is incorporated into the contract of (re) insurance by reference.

No specific form of words is required, although in terms of the Arbitration Act the wording should provide for the referral to arbitration of any existing dispute or future dispute relating into any matter specified in the contract.

The Policyholder Protection Rules (refer to question 1.4 above) provide that an arbitration clause in a non-life insurance contract, which provides that any dispute arising in respect of such contract of insurance can be resolved only by arbitration and by no other means, shall be void.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

A court will generally enforce an arbitration agreement in a contract of (re) insurance, subject to the provisions of the Policyholder Protection Rules (refer to question 5.2 above). A court will only refuse to enforce an arbitration agreement where there is sufficient reason for doing so, for instance in order to avoid a multiplicity of proceedings dealing with the same issues of law/fact.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

Under the Arbitration Act, a court may grant interim relief by making orders in respect of:

(a) security for costs;
(b) discovery of documents and interrogatories;
(c) the examination of any witness before a commissioner;
(d) giving of evidence by affidavit;
(e) the inspection or the interim custody or the preservation or the sale of goods or property;
(f) an interim interdict or similar relief;
(g) securing the amount in dispute;
(h) substituted service of notices; and
(i) the appointment of a receiver.

Under the International Arbitration Act, a court may only grant interim relief if the arbitral tribunal, being competent to grant the order, has not already determined the matter, and if:

(a) the arbitral tribunal has not yet been appointed and the matter is urgent;
(b) the arbitral tribunal is not competent to grant the order; or
(c) the urgency of the matter makes it impractical to seek such order from the arbitral tribunal.

The court may also only grant interim relief in respect of:

- orders for the preservation, interim custody or sale of any goods which are the subject matter of the dispute;
- an order securing the amount in dispute but not an order for security for costs;
- an order appointing a liquidator;

- any other orders to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual; and
- an interim interdict or other interim order.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

In terms of the International Arbitration Act, adequate reasons must be given for an award.

The Arbitration Act does not provide for the giving of reasons. However, in practice, the parties usually agree that a reasoned award must be provided, and make provision for this in the procedural rules adopted by the parties for the arbitration proceedings.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

In the absence of an agreement between the parties conferring a right of appeal, an arbitration award is final and binding.

An arbitration award made in terms of the Arbitration Act or the International Arbitration Act may, however, be set aside or reviewed on limited procedural irregularity grounds, and as more specifically set out in the said Acts respectively.

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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

The Spanish regulatory body that regulates the (re)insurance sector (including distribution and pension funds) is the Spanish General Directorate for Insurance and Pension Funds ("*Dirección General de Seguros y Fondos de Pensiones*", "**DGSFP**") that also has supervisory powers.

The DGSFP operates under the State Secretariat for Economic Affairs and Business Support, which is attached to the Ministry of Economic Affairs and Digital Transformation.

Amongst other functions, the DGSFP is responsible for: (i) handling the authorisation requests and documents of the (re) insurance companies; (ii) conducting financial supervision of the (re)insurance companies; (iii) ensuring the market conduct of the (re)insurance companies; (iv) forbidding the use of policies or premiums which do not comply with the applicable regulations; (v) handling the administrative regime where, *inter alia*, the Spanish insurance and reinsurance entities are registered as well as those entities that operate under a freedom to provide services regime ("**FPS**") and the freedom of establishment regime ("**FOE**"); and (vi) to handle the queries, claims and complaints submitted by the users in relation to their legally recognised interests and rights, and which derive from alleged failures by the (re)insurance companies, etc.

To carry out supervisory powers, the DGSFP has the right to request relevant information or documents to the (re)insurers as well as to proceed with on-site inspections, being able to impose disciplinary sanctions (including fines) to the (re)insurance companies.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

Spain as an EU Member State has adapted its legislation to the applicable Directives in insurance-related matters.

Hence, in order to operate in Spain, the (re)insurance company shall obtain a licence from the Ministry of Economic Affairs and Digital Transformation prior to starting any (re)insurance business in Spain. The licence will be granted for specific classes of insurance activities. However, generally speaking and with some exceptions, insurance companies may not underwrite both life and non-life insurance business. On the other hand, reinsurance companies can underwrite both life and non-life reinsurance business.

To obtain the licence, the (re)insurance company shall submit a request to the DGSFP, complying with, amongst others, the following requirements: (i) providing certain documents (*i.e.* an activities programme, authorised copy of the deed of incorporation, etc.); (ii) limiting its company purpose to the (re)insurance activity; (iii) complying with minimum capital requirements; (iv) complying with minimum solvency requirements; (v) having close links with other individuals or entities; and (vi) having an effective system of governance, etc.

The Ministry of Economic Affairs and Digital Transformation will have a six-month period to decide whether or not to grant the licence.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Generally speaking, direct business shall be written by insurers domiciled in Spain. However, Spanish insurers can cede, through reinsurance, the risks written by them.

Notwithstanding the above, to write insurance in Spain, an insurance company must either operate through the FOE or FPS regimes in Spain.

To operate under the FOE or FPS regimes in Spain, the insurance entities shall follow the requirements imposed by the relevant EU Directives and the Management, Supervision and Solvency of Insurance and Reinsurance Companies Act ("**MSSIRA**"), as well as comply with the specialities applicable to certain classes of insurance (*i.e.* motor vehicle liability).

For example, to operate under the FOE regime, which means that the insurer will have permanent presence in Spain, an application to the home Member State supervisor of the insurer shall be made, who, in turn will notify the DGSFP about the insurer's wish to operate under the FOE regime in Spain. Thereafter, the DGSFP will have two months to agree or to inform the home Member State supervisory authority of the conditions under which, in the interest of the general good, that business must be pursued in Spain. If the period elapses with no communication, the insurance entity will be entitled to start its activity in Spain.

An insurance entity domiciled in another EU Member State will be able to start operating under the FPS regime in Spain once they receive the communication of its home Member State supervisory authority informing them that they have provided the relevant communication to the DGSFP.

Third-country (re)insurers will be able to operate in Spain insofar they set up a branch in Spain and obtain the authorisation to operate from the Ministry of Economic Affairs and Digital Transformation.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

The Insurance Contract Act ("**ICA**") states the law that shall apply to insurance contracts, in general, when the risks are located in Spanish territory and the policyholder has its habitual residence in Spain if a natural person, or place of business and management if a legal entity, and when the insurance contract is concluded in compliance with the obligation to insure imposed by Spanish law. However, the ICA might apply in further circumstances if the requirements are met.

Section 2 ICA states that the provisions stated therein are mandatory in nature unless otherwise stated and, consequently, will prevail over the terms of the policy unless those are more favourable to the insured. Hence, the freedom of contract will be valid as far as it does not contravene ICA mandatory provisions.

For large risks insurance, the freedom of contract prevails as the provisions of the ICA are not mandatory for such large risks, although the parties can abide by such provisions.

1.5 Are companies permitted to indemnify directors and officers under local company law?

It is not specifically permitted by the Spanish Companies Act for companies to indemnify directors and officers.

However, in practice, Directors and Officers Liability Insurance (D&O Insurance) is usually taken out to cover directors' and officers' professional liability. Nevertheless, there are restrictions when liability is the consequence of bad faith.

1.6 Are there any forms of compulsory insurance?

Yes; under Spanish law there are some several forms of compulsory insurance, such as clinical trials liability, liability caused by motor vehicles, hunters liability insurance, nuclear damages, insurance, etc. Consequently, performing any of the above activities without having obtained the compulsory insurance could result in penalties being imposed.

The figure of the Insurance Compensation Consortium ("*Consorcio de Compensación de Seguros*") should be highlighted, which has functions related to the compensation of losses arising from extraordinary events occurring in Spain. Hence, insurance contracts may be subject to surcharges legally established in favour of the Insurance Compensation Consortium.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

Generally speaking, the ICA is more favourable to insureds, as they are considered to be the weaker party in the relationship. Spanish case law and doctrine have also followed this pro-insured interpretation.

2.2 Can a third party bring a direct action against an insurer?

Yes, Article 76 ICA, for insurance liability claims, establishes the possibility of the prejudiced party or its heirs to bring a direct action against the insurer to comply with its obligation to pay the compensation. The action can be brought either directly to the insurer or both against the insured and the insurer, because the insured and the insurer are deemed to be as jointly and severally liable to the prejudiced party or its heirs.

It shall be noted that the insurer will have the right to recover from the insured if the damages have been caused by the insured's wilful misconduct. Notwithstanding the aforementioned, direct action is immune from the exceptions that the insurer might have against the insured.

The insurer may, however, invoke the exclusive fault of the prejudiced party and the personal defences it has against the prejudiced party.

In this sense, the insured shall be obliged to declare to the prejudiced party or his heirs the existence of the insurance contract and its contents. Anyhow, the Spanish Civil Procedural Act ("**SCPA**") foresees preliminary proceedings to request the insured or the insurer to disclose the policy before bringing an action for damages.

2.3 Can an insured bring a direct action against a reinsurer?

No, it is specifically foreseen in Article 78 ICA that the insured cannot directly claim to the reinsurer for any indemnity or any compensation. Having said this, in the event of voluntary or forced liquidation of the insurer, the insured shall have a special privilege over the credit balance arising from the account of the said insurer with the reinsurer.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

Article 10 ICA states the policyholder's duty, prior to taking out the insurance policy, to declare to the insurer, based on the questionnaire submitted by the insurer, all the circumstances that might have an influence on the assessment of the risk. Very relevantly, the policyholder shall be relieved of this duty if the insurer does not submit a questionnaire or, even if submitted, the circumstances that have an influence on the risk assessment were not covered within the questionnaire.

In case of misrepresentation, the insurer will be entitled to exercise its right to rescind the policy within one month from being aware of the secrecy or inaccuracy and retain the premiums for the period in progress, unless there is a wilful misconduct or gross negligence on the part of the insurer.

The indemnity shall be proportionally reduced should the loss occur before the insurer exercised its right to rescind the policy. In the event of wilful misconduct or gross negligence on the part of the policyholder, the insurer will be released from its payment obligation.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

No, the duty contained in Article 10 ICA is to answer the questionnaire submitted by the insured and to not disclose to the insurers all matters material to a risk. Hence, the duty of disclosure is limited to the questions or terms raised in the questionnaire sent by the insurer to the policyholder.

Nevertheless, whilst the policy is in effect, either the policyholder or the insured must inform the insurer as soon as possible about any alteration to factors and circumstances declared in the questionnaire that aggravate the risks and are of such a nature

that if known by the insurer prior to the conclusion of the policy, the insurer would have not entered into the agreement or would have done it on more onerous terms.

Likewise, the policyholder or the insured may, during the effect of the policy, inform the insurer about the circumstances that might reduce the risk and are of such a nature that if they had been known to the insurer at the time of conclusion of the policy, the insurer would have concluded it on more favourable terms.

Relevantly, and specifically to health issues in case of personal insurance, under no circumstances can a change in the state of health of the insured shall be considered as an aggravation of the risk.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

Article 43 ICA allows the insurer, once the indemnity has been paid, to subrogate the rights and actions of the insured against any third party liable for the loss within the limit of the indemnity paid to the insured.

However, the insurer shall not be able to exercise, in prejudice of the insured, the rights to which the insurer has been subrogated. Notwithstanding the aforementioned, the insured will be liable for those damages that, by its acts or omissions, might be caused to the insurer while pursuing its subrogation rights.

The ICA also provides determinate exclusions for the insurer to pursue its subrogation right, which will not be applicable if the liability arises due to wilful misconduct or if liability is covered by an insurance contract; hence the subrogation shall be limited to the terms of such contract. There are further requirements to be met in case there is concurrence of the insurer and the insured against the liable third party.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

Civil courts are usually those which hear commercial insurance disputes. In the scope of civil courts, commercial courts also deal with some kind of insurance-related dispute (*i.e.* marine, aviation, transport disputes, D&O, etc.). Moreover, other courts can also be competent for specific insurance liability-related matters, such as criminal, administrative or labour courts, depending on the circumstances and consequences of the loss.

Section 24 ICA states that the judge competent to hear any action arising from the insurance contract shall be the one of the jurisdiction of the insured, with any agreement to the contrary made null and void.

The jurisdiction where the proceedings will be handled does not depend on the value of the dispute, whereas the specific type of proceedings to be followed may depend, for example, on the value of the claim. As an example, in the civil jurisdiction, if the proceedings value exceeds €6,000, the dispute shall be resolved through "ordinary proceedings"; but if the amount is lower, it will be handled through "oral proceedings".

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

The court fees will depend on the jurisdiction. Some events are taxable under civil, administrative and labour jurisdictions. However, there are also exemptions to taxable events.

For example, in the civil jurisdiction, the submission of a judicial claim would imply court fees which amount to €300 in case of "ordinary proceedings" and €150 for "oral proceedings". Should the first instance judgment be appealed before the Appeal Courts, the court fees will amount to €800 irrespective of the proceedings being ordinary or oral proceedings.

Under Spanish law, there are some undertakings exempt from paying court fees, such as natural persons, legal entities with access to free legal aid recognised, the Spanish public prosecutor, etc.

No court fees are payable in the criminal jurisdiction.

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

Generally speaking, this depends on the court's workload and on the complexity of the dispute brought to court.

However, according to the General Council of the Judiciary ("*Consejo General del Poder Judicial*") in 2018, in civil proceedings, the average time in first instance courts was around seven months. If the judgment was appealed, the Court of Appeals phase would usually take around eight months itself. Should the claim be heard before the Supreme Court judgment, it will take more than a year and a half for this phase only.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

The SCPA does not contains a specific obligation for the parties to disclose to the proceedings all the documents relevant to the disputes. The parties themselves are the ones who restrict the subject-matter of the procedure by providing the documents and information that they deem necessary and relevant for their defence, keeping other documents related to the dispute for them.

This said, the relevant moment to submit the documents is at the very start of the procedure with the submission of the claim for the plaintiff and with the defence by the defendant.

If any party tries to submit a document once the period to submit the documents has ended, such documents will be rejected by the court, unless the document was dated after the judicial claim/defence was submitted, if it was unknown to the party or if it was unavailable to the party (lack of knowledge and unavailability must be evidenced).

The SCPA does establish a mechanism to request from the other parties the disclosure of original documents that the claimant does not have. To request these, the party shall either provide a copy of the document or a detailed description of the document from which the original is being requested.

The parties to the dispute may request non-parties to the proceedings to submit to the court any relevant document in their possession, when such disclosure would be relevant for the final judgment.

The SCPA also contains the figure of the preliminary measures, by means of which the requesting party shall request the disclosure of some specific documents to prepare the initialisation of judicial actions.

Additionally, parties may be requested to submit some document under pretrial proceedings, in order to prepare the process.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

Yes. Spanish law protects the relationship between the client and the lawyer through the obligation of professional secrecy (confidentiality). Hence anything that has been revealed within the scope of such relationship must be kept secret and is strictly protected. This duty of confidentiality is imposed on the lawyer and continues after the relationship has finalised.

Under Spanish law, lawyers are not allowed to provide to the court or their clients any sent or received communication from the other party's lawyer, unless such lawyer has authorised its submission. Additionally, unless expressly authorised, lawyers cannot record any communication or conversation with clients or with opposing parties and their clients.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

The SCPA's general rule is for the witnesses to be examined at the trial hearing. However, the SCPA also allows the parties to request the court to carry out an anticipated examination of evidence. This is only possible where there exists a duly justified reason that, due to the person's or thing's conditions and circumstances, such evidence will not be able to be examined at the appropriate procedural time.

There is also the possibility, after the trial, for the court to analyse the evidence after the trial hearing in exceptional circumstances, by means of final measures.

It is mandatory for the witnesses summoned to appear at the trial hearing; those that do not appear on the scheduled day could be sanctioned by the Court with a fine of between €180 and €600.

4.4 Is evidence from witnesses allowed even if they are not present?

The general rule under Spanish law is that the witness statements shall be given at court.

Nevertheless, it is also possible that, due to the witness' illness or other special personal circumstances, such witness statement can be carried out at the witness domicile or residence, before the judge and the court clerk, or by electronic means. Also, public administrations are allowed to testify through electronic means.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

There are no restrictions on calling expert witnesses.

The SCPA allows expert witnesses to be challenged if (i) they are relatives or spouses of the parties, (ii) they have a direct or indirect interest in the dispute, (iii) they have been in a situation of dependency with any of the parties, (iv) they have an intimate friendship or enmity with any of the parties or their lawyers, and (v) there are any other circumstances that may undermine their professional value.

It is also possible for the parties to request the court to appoint a judicial expert if they deem it necessary; in these cases, the court shall appoint an independent expert within five days. In limited times, the parties, despite having their own expert witness, can request the court to appoint a judicial expert to solve a specific discrepancy in the reports submitted.

As regards the costs, the general rule is that each party bears the cost of its own expert and the parties jointly assume the costs of the judicial expert. However, this might vary should an award on costs be rendered by the court.

It shall be noted that the experts who have been summoned to appear to the trial hearing and do not appear on the scheduled day could be sanctioned by the Court with a fine of between €180 and €600.

4.6 What sort of interim remedies are available from the courts?

The SCPA provides for a number of interim remedies and injunctions, amongst others the following:

(i) the pre-judgment attachment or seizure of assets, aimed at ensuring the enforcement of judgments;
(ii) the intervention or court-ordered receivership of productive assets;
(iii) the deposit of movable assets;
(iv) the drawing-up of inventories of assets in accordance with the conditions to be specified by the court;
(v) the precautionary registry notation of the claim when the latter refers to assets or rights subject to inscription in public registries;
(vi) other registry notations;
(vii) the order to provisionally cease an activity, that of temporarily abstaining from carrying out certain conduct, or the temporary prohibition to suspend or to cease carrying out a provision that was being carried out;
(viii) the intervention and deposit of income obtained through an activity considered illicit;
(ix) the temporary intervention and deposit of the work or objects allegedly produced contrary to the rules on intellectual and industrial property, as well as the deposit of the material employed for their production;
(x) the suspension of challenged corporate agreements when the claimants hold at least 1% or 5% of the share capital, depending on whether or not the defendant is or is not a listed company; and
(xi) any other measure expressly established by the law for the protection of certain rights or deemed necessary to ensure the effectiveness of the judicial protection that may be granted in the affirmative judgment that may be issued.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

Yes; generally speaking, first instance courts can be appealed by the parties before the Court of Appeals. This said, in "oral proceedings", when the claim is value based and the value is lower than €3,000, the judgment cannot be appealed.

Despite the above, no new allegation nor amendments can be made to the nature and to the legal basis of the claim or the defence by the party that is appealing. Some limited exceptions do exist.

The parties can also appeal the judgments rendered by the Court of Appeals before the Supreme Court only when the value of the claim is over €600,000, any fundamental right has been violated or procedural infringement has taken place, or if their judgment is contrary to the Supreme Court case law in similar cases.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Yes; generally speaking, interest is recoverable in respect of claims when the court has awarded the interests in its judgment. The legal interest rate is currently 3%. However, in some circumstances the legal interest can be increased.

In relation to insurance-related disputes, article 20 ICA provides a specific interest for those cases where there has been an unjustified late payment of the indemnity by the insurer. The applicable interest in insurance-related matters will be the legal rate on interest increased by 50% for the first two years from the loss and 20% per each year onwards.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

The general rule in the CPA is that each party pays the legal costs incurred in civil proceedings, except where the losing party's claim has been rejected by the court. Hence, the court may issue a judgment imposing an award on costs against the losing party unless the court did not consider that the case raised reasonable doubts.

Under Spanish legal practice, if the parties reach an out-of-court agreement within the proceedings, each party will bear its own costs.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

The Mediation in Civil and Commercial Matters Act states that mediation is voluntary. However, courts, during the preliminary hearing, have the obligation to inform the parties about their right to mediate the dispute and might even encourage them to mediate the dispute. That said, courts cannot compel the parties to opt for this mechanism.

4.11 If a party refuses to a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

The proceeding would continue with no consequences for any of the parties until the court issues its final judgment.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

The Spanish Arbitration Act ("**SAA**") is based on the primacy of the parties' autonomy, allowing them to opt for this mechanism independently, which, as with the conduct of the arbitrators of the arbitration proceedings, is subject to the right to defence and principle of equality. The courts will not intervene in the conduct of an arbitration except when provided in the SAA. Courts will assist in the appointment or dismissal of arbitrators, in providing court assistance, in adopting interim measures, in enforcing arbitral awards or decisions, recognising foreign arbitral awards and to declare the annulment of an arbitral award.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

No, there is no specific form of words to be put in the agreements to ensure that they are subject to arbitration. Nevertheless, the SAA establishes that the arbitration clause to be included in the agreement shall express the parties' willingness to submit to arbitration all or part of the disputes that may arise between them.

The arbitration clause shall be in writing and shall be incorporated into a document signed by both parties or in an exchange of letters, telegram, telex, fax or other electronic means that provide evidence of the agreement.

It is also understood that both parties agree on the arbitration clause when, in the exchange of the claim and in its response, its existence is asserted by one of the parties and the other party would not deny it.

It is essential that the will of the parties to submit any dispute to arbitration is clear and undoubted.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

Yes, the courts may refuse to enforce an arbitration and declare it invalid if the clause does not comply with the requirements met in the SAA.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

The SAA allows both the arbitrators and the court to order interim measures.

The court competent to adopt interim measures is the one of the jurisdiction where the award is to be enforced, and in its absence, the jurisdiction where the measures will have legal consequences.

Arbitrators are allowed to adopt, when requested by any of the parties, the interim forms of relief that they deem necessary, and are also allowed to require bail.

The interim forms of relief that can be adopted are the same ones as those established for civil procedures (please see the answer to question 4.6 above), which include, amongst others, preventive seizure of goods, of movable property, or establishing asset inventories, etc.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

Yes. The arbitral award must always be duly justified and with detailed reasons. The award must be in writing and signed by the arbitrators. It is understood that the award is in a written form when its content and signatures appear and stay available for its ulterior consultation in an electronic or any other way.

Nevertheless, if during the arbitral process the parties reach an agreement that puts an end to all or part of the dispute, the award of the arbitrators shall state the terms of the agreement reached by the parties.

If an arbitral award has not been duly motivated, it may even be annulled as it can be considered contrary to public policy.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

Yes; even though awards acquire the "*res judicata*" effect, annulment actions can be brought against them within two months from the notification of the award. Likewise, in exceptional cases, awards may be subject to revision.

The award will be annulled if, in order to submit an annulment action against the award, any of the following reasons must be brought:

(i) the arbitration agreement does not exist or is not valid;
(ii) the party has not been duly notified of the arbitrator appointment or of the arbitral proceeding;
(iii) the arbitrators have ruled on matters not submitted to their competence;
(iv) the arbitrators' appointment or the arbitration procedure was not in accordance with the agreement between the parties, unless such agreement was contrary to a mandatory provision of the SAA or, failing such agreement, was not in accordance with the SAA;
(v) the arbitrators have ruled on matters that are not capable of being arbitrated; or
(vi) the award is contrary to public policy.

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Since its formation back in 1987, KPMG Abogados has been one of Spain's leading tax and legal advisory firms, with more than 800 professionals. It is a firm of choice thanks to its technical and industry-specific expertise, as well as the experience and quality of its team of highly renowned lawyers and economists, offering a high added-value service.
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KPMG Abogados has been internationally recognised over the last few years as one of the best firms by *Best Lawyers*, *Chambers Europe* and *Lawyers Global Awards*, *The Legal 500* and *IFLR1000* among other guides. *Best Lawyers* also recognised Francisco Uría as "Best Lawyer 2020", and the Regulatory and Financial Services practice as the leading practice in Spain.

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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

The Swedish Financial Supervisory Authority (Sw. *Finansinspektionen*) (the "Swedish FSA") is responsible for the supervision of insurance and reinsurance undertakings in Sweden. The Swedish FSA, *inter alia*, authorises insurance and reinsurance undertakings to conduct insurance or reinsurance business, supervises the business and may impose sanctions in case the undertaking fails to comply with the Swedish Insurance Business Act (Sw. *Försäkringsrörelselag (2010:2043)*) (the "IBA") or other laws and regulations applicable to the insurance business. The Swedish Consumer Agency (Sw. *Konsumentverket*) may also impose sanctions in case the undertaking fails to comply with Swedish consumer protection laws.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

Insurance business may only be carried on by an undertaking which has been granted an authorisation by the Swedish FSA. Authorisation may only be granted to a company limited by shares (Sw. *aktiebolag*), a mutual insurance undertaking (Sw. *ömsesidigt försäkringsbolag*) or an insurance association (Sw. *försäkringsförening*). If the application for authorisation is complete, the application will generally be processed by the Swedish FSA within five months.

The IBA, the Swedish Companies Act (Sw. *aktiebolagslag (2005:551)*) and the Economic Association Act (Sw. *lag (1987:667) om ekonomiska föreningar*) set out the relevant provisions regarding the formation and incorporation of an insurance undertaking.

As of 15 December 2019, authorisation may also be granted to Institutions for Occupational Retirement Provisions ("IORP undertakings") pursuant to a new act for IORP undertakings ("the IORP Act") that implements the IORP II directive. An IORP undertaking may be an IORP company limited by shares, a mutual IORP company or an IORP association.

An undertaking may only be granted an authorisation to conduct insurance business if it satisfies the following criteria:

- The articles of association or the by-laws are compliant with the IBA or the IORP Act and other laws and regulations, and otherwise include provisions which are required having regard to the scope and nature of the proposed business.
- The proposed business is deemed to be compliant with the requirements under the IBA, the IORP Act and other laws and regulations governing the business of the undertaking.
- The qualifying holder of shares in an insurance company or IORP undertaking is deemed to be suitable to exercise a significant influence over the management of the insurance company, which would include considerations regarding the good standing and capital strength of the qualifying holder.
- The persons who shall be involved in the management of the undertaking (including deputies) or be responsible for any key function have sufficient knowledge and experience and are otherwise fit and proper for the assignment.

Insurance or IORP undertakings which are not limited by shares must be established in accordance with the regulations of the IBA or the IORP Act. Existing mutual companies or other associations may thus not be granted authorisation to conduct insurance or IORP business. However, subject to certain conditions, any already authorised life insurance undertaking may become an IORP undertaking and *vice versa*.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

1.3.1 Foreign insurers authorised and established within the EEA

Foreign insurers' and IORP undertakings' insurance business in Sweden are regulated by the Act on Foreign Insurers and Institutions for Occupational Retirement Provision in Sweden (Sw. *Lag (1998:293) om utländska försäkringsgivares och tjänstepensionsinstituts verksamhet i Sverige*).

A foreign insurer or an IORP established and authorised within the EEA – and which is not a reinsurance undertaking – may establish a branch or general agency (secondary establishment) or carry on business on a cross-border basis in Sweden without applying for an authorisation; however, before doing so, the undertaking must notify its home supervisory authority. Passive provision of services would also require a prior notification.

A foreign insurer intending to carry on motor insurance business in Sweden must certify that it is a member of the Swedish Association of Motor Insurers (Sw. *Trafikförsäkringsföreningen*). A foreign insurer intending to carry on motor insurance business on a cross-border basis must also appoint a representative in Sweden.

A foreign insurer authorised and established within the EEA may carry on reinsurance business in Sweden from a branch or general agency or write business on a cross-border basis without applying for an authorisation or notifying its home supervisory authority.

1.3.2 Foreign insurers authorised and established outside the EEA

A foreign insurer authorised and established outside the EEA may not write insurance or reinsurance business concerning risks situated in Sweden without authorisation by the Swedish FSA.

The foreign insurer may apply for an authorisation from the Swedish FSA to:

- carry on insurance business in Sweden by establishing a branch or general agency in Sweden (whereby the foreign insurer becomes authorised to carry on insurance business in Sweden); or
- market insurances (a form of provision of services on a cross-border basis) concerning risks situated in Sweden, if the insurances are mediated by an insurer which has been granted an authorisation in Sweden and is either affiliated with the foreign insurer or has entered into a cooperation agreement with the foreign insurer.

An insurer, authorised and established in Switzerland, may benefit from the terms of the Agreement between the European Economic Community and the Swiss Confederation on direct insurance other than life assurance (as amended). An insurer, authorised and established in Switzerland, which intends to carry on direct non-life insurance business in Sweden by establishing a branch or general agency in Sweden, may be exempted from certain requirements which are imposed on foreign insurers authorised outside the EEA. This does not apply to the provision of services on a cross-border basis.

A foreign insurer from a third country is, however, not required to apply for an authorisation in order to passively provide services concerning risks situated in Sweden to policyholders who have approached the foreign insurer, on their own initiative, to procure the insurance cover. In addition, insurance business should be of a "certain scope and duration". Thus, a foreign insurer would not be required to apply for an authorisation in respect of one single insurance policy (whether "passive" or not).

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

The insurance activities would be subject to mandatory Swedish laws on marketing, consumer protection, data protection, insurance contracts, good insurance mediation practice, etc.

The Swedish Insurance Contracts Act (Sw. *försäkringsavtalslag (2005:104)*) (the "ICA") is applicable to insurance contracts and includes various provisions which are mandatory in favour of the policyholder, its assignee or the insured (unless otherwise provided in the ICA). The same applies to contracts issued by IORPs. This means that the ICA may restrict the terms of an insurance contract or disallow certain types of exclusion clauses. The Discrimination Act (Sw. *diskrimineringslag (2008:567)*) may also prohibit certain discriminatory terms in an insurance contract or IORP contract. Insurance contracts concerning risks situated in Sweden would be governed by Regulation (EC) No 593/2008 (Rome I Regulation), which restricts the right of the parties to choose the applicable law to the insurance contract.

Various mandatory provisions of the ICA, the Swedish Distance and Off Premises Contracts Act (Sw. *lag (2005:59) om distansavtal och avtal utanför affärslokaler*) (the "DDSA") and regulations issued by the Swedish FSA would, for example, apply regarding the obligation to provide pre-contractual or contractual information to customers and policyholders. An insurance undertaking or IORP undertaking are under an obligation to provide sufficient information to a customer before he or she enters into an insurance contract. The information shall include a description of the main terms of the insurance contract or IORP contract, which the customer should be aware of in order to assess the costs for, and the scope of, the insurance. The information shall also, *inter alia*, set out limitations in the insurance cover or important exclusion clauses. Failure to provide adequate information could result in a declaration by the court that the relevant exclusion clause is void.

On 1 October 2018, the Insurance Distribution Act (the "IDA") (Sw. *lag (2018:1219) om försäkringsdistribution*) entered into force. The IDA alongside other regulations implements the Insurance Distribution Directive, directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (the "IDD").

The IDD applies to all distributors of insurance products, including insurance and IORP undertakings, and all distribution channels. The same applies to the IDA. The provisions set forth in the IDD and the IDA are more comprehensive than its predecessors.

The main object of the IDD is to harmonise national provisions concerning insurance and reinsurance distribution. It also aims to increase customer protection. The IDD does not preclude Member States from maintaining or introducing more stringent provisions. The IDA includes a few provisions that go beyond the IDD's provisions. Such deviations pertain to, *inter alia*, remuneration from third parties and marketing.

In addition, Sweden has introduced stricter regulations than the IDD prescribes for occupational pensions that are exposed to market volatility, which are subjected to the requirements set out for insurance-based investment products. This entails, *inter alia*, conflicts that originate from remuneration or other benefits from anyone other than the customer or the distributor's own remuneration system or other incentives.

Insurance distributors may only receive remuneration from any party other than the customer to the extent it does not conflict with good insurance distribution practice or does not give rise to any conflicts of interest which impair its duty to act in the best interest of the customers. Good insurance distribution practice entails that the distributor must act honourably, fairly, professionally and in the best interest of the customers.

If the advice is given on the basis of a fair and personal analysis, the distributor may not receive remuneration from any party other than the customer. The IDA requires insurance distributors to disclose information to the customer prior to the conclusion of an insurance contract. The extent of the information that must be provided to the customer is dependent on the complexity of the insurance product being proposed and the type of customer. The demands and requirements must be fulfilled by the entity that meets the customer.

1.5 Are companies permitted to indemnify directors and officers under local company law?

There may be some restrictions under Swedish company law, but a company would generally be permitted to indemnify a director or other officer in case the relevant director or officer is liable to pay damages for any loss suffered by a shareholder, creditor or any other third party resulting from any breach of duty. Even though it is not an express requirement, an agreement to indemnify directors or officers should be approved by the shareholders in a general meeting. However, it is unclear whether an agreement to indemnify a director or officer for acts or omissions caused by gross negligence or wilful intent would be enforceable under Swedish law. This topic is currently being debated and discussed within the legal community.

1.6 Are there any forms of compulsory insurance?

There are several forms of compulsory insurance, i.e., insurance cover which is mandatory under law.

Owners of motor vehicles must be covered by traffic insurance. Insurance intermediaries, real estate agents and accountants must maintain professional indemnity insurance. There are also obligations to maintain compulsory insurance under the provisions of, for example, the Nuclear Plant Liability Act (1968:45), Air Traffic Act (1957:297), Railway Traffic Act (2004:519), Sea Traffic Act (1994:1009), Insurance Intermediary Act (2005:405), Estate Agents Act (2011:666) or Public Accountants Act (2001:883).

An employer may be under an obligation to provide insurance benefits under the terms of a collective bargaining agreement, such as occupational old age pension, sick pay pension, occupational injury insurance, etc.

Lawyers are required to be covered by a professional indemnity insurance in accordance with the rules of the Swedish Bar Association.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

Any contract (including insurance and reinsurance contracts and contracts issued by IORPs) may be modified or set aside pursuant to the Swedish Contracts Act (Sw. *lag (1915:218) om avtal och andra rättshandlingar på förmögenhetsrättens område*) and general equitable principles if the terms of the contract are deemed unreasonable, even if the circumstances giving rise thereto have arisen after the contract was entered into.

The substantive laws of Sweden are generally more favourable to the insured. The ICA includes various provisions which are mandatory in favour of the policyholder, its assignee or the insured (unless otherwise provided in the ICA). This means that the ICA may restrict the terms of an insurance contract or contracts issued by IORPs or disallow certain types of exclusion clauses. Any term of an insurance contract or contracts issued by IORPs which is contrary to any mandatory provision under the ICA is void. Unless a provision is mandatory, the parties, however, have complete freedom of contract. Insurance contracts concerning risks situated in Sweden would be governed by the Rome I Regulation, which restricts the right of the parties to choose applicable law to the insurance contract.

Reinsurance is exempted from the application of the ICA and the parties have complete freedom of contract. Provisions of the ICA may, however, according to the preparatory works, if deemed appropriate, be implied in a reinsurance contract.

2.2 Can a third party bring a direct action against an insurer?

A person who has suffered damage has a statutory right to make a claim directly against the insurer for indemnity (direct action) under a liability insurance policy in the following circumstances:

(a) the insured is under a legal obligation to maintain the liability insurance cover (i.e. a compulsory liability insurance policy);
(b) the insured is declared insolvent or is subject to a public composition; or
(c) the insured is a legal person which has been dissolved.

A person, who is a consumer and who has suffered damage, has a statutory right to claim directly against the insurer to the extent the insured is unable to indemnify the claimant.

2.3 Can an insured bring a direct action against a reinsurer?

The insured is not a party to a reinsurance contract and would be prevented from bringing a claim directly against the reinsurer, unless there is a cut-through indemnification endorsement in favour of the insured. A cut-through indemnification endorsement is a separate agreement between the insured and the reinsurer whereby the insured becomes a party of the reinsurance contract. The insured would then have a right to make a claim directly against the reinsurer instead of making a claim at its (insolvent) insurer. It should, however, be noted that the administrator of the bankruptcy estate may not recognise the validity of the endorsement and that it potentially could be challenged in court.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

In the case that the policyholder has acted fraudulently or contrary to good faith in connection with an obligation to disclose information in accordance with the provision of the ICA, the insurance policy may be void.

In the case of a consumer insurance policy, if the policyholder has otherwise acted with wilful intent or by negligence in connection with any duty to disclose information, the indemnity payment may be reduced by a reasonable amount, showing regard to the importance of the information in relation to the risk assessment and other relevant circumstances. This means that the indemnity payment may be reduced in proportion to the failure to disclose the relevant information (for example, 50 per cent of what the policyholder would have been entitled to had he or she not failed to provide the information). The indemnity payment may be reduced to zero.

In the case of a business insurance policy, if the policyholder with wilful intent or by negligence has disregarded its obligation to disclose information, and where the insurer can demonstrate that the policy would not have been issued had the policyholder complied with its obligation, the insurer may be released from its obligation for any insured event which occurs. If the insurer can demonstrate that the insurance policy would have been issued at a higher premium or with modified terms, the obligation shall be limited to the amount reflected by the premium and other terms agreed to. The terms of the insurance contract may provide that the insurer, as an alternative, is only liable to the extent it is demonstrated that the inaccurate information had no significance for the occurrence of the insured event or for the extent of the damage.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

A person intending to enter into an insurance contract (or renew or vary an insurance contract) is – if requested by the insurer – under an obligation to disclose information which may be relevant to the issuance of the insurance contract. The policyholder must provide accurate and complete answers to any questions of the insurer. The policyholder is generally not under a positive duty to provide the information, unless requested by the insurer to do so, except in some circumstances:

(a) If the policyholder becomes aware that any information previously disclosed was inaccurate regarding matters of

material importance to the risk assessment, then the policyholder is under a duty to disclose correct information to the insurer.

(b) In the case of a business insurance contract, the policyholder is under a positive duty to disclose such information which is of material importance to the risk assessment of the insurer, also where the insurer has not requested the policyholder to provide the information.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

The insurer has a statutory right of subrogation to the insured's claim for damages arising from a loss, to the extent such claim is covered by the insurance policy and has been indemnified by the insurer. In the case of life insurance, the statutory right of subrogation is, however, limited to compensation for medical care costs and other expenses paid by the insurer under the insurance contract.

Claims are brought by the insurer and not in the name of the insured, but the insurer can never achieve a better position in relation to the defendant than the insured.

The right of subrogation of an insurer may, however, be limited under the terms of the insurance contract or under the terms of the so-called Subrogation Agreement (Sw. *Regressöverenskommelsen*), which applies between many, but not all, Swedish insurance companies.

An insured is under an obligation to assist the insurer, for example, by providing evidence against the defendant, and the insured may not settle the case without the consent of the insurer.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

In Sweden, there are no courts that are specialised in insurance disputes. Instead, commercial insurance disputes are, as for all civil actions, commenced at the competent local District Court, regardless of the value of the dispute. However, as a general rule, the Swedish Procedural Code permits agreements on exclusive jurisdiction of a specific court in a jurisdiction clause. Jury hearings do not exist in insurance disputes.

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

In proceedings where the disputed value is clearly expected to be less than half of a basic price amount (i.e. an official index), the application fee for commencing a commercial insurance dispute before a local district court is SEK 900. Currently, the basic price amount is SEK 46,500 and thus the limit is SEK 23,520. Such proceedings will typically be handled as a "small claim proceeding" and fall under slightly different, simplified, procedural rules. For example, in such proceedings, the parties can generally only invoke one (1) hour of legal advice in a claim for reimbursement for litigation costs, whereas in normal proceedings the winning party can generally have all its litigation costs covered by the losing party.

In commercial insurance disputes with claims exceeding the limit of SEK 23,250, the application fee is SEK 2,800 and the standard procedural rules will apply.

In the event the claim does not concern a specific amount, the application fee is SEK 2,800.

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

It is not easy to indicate the average length of a commercial case and the duration of the proceeding could vary from court to court. However, unless the case is settled prior to the final hearing, it is common for it to take one to one-and-a-half years to get a judgment in the first instance. The courts adopt measures to speed up the process, such as making the parties agree to a rather tight plan for exchanging pleadings and by scheduling oral preparation as well as the final hearing at an early stage.

A leave to appeal is required for a civil case to be tried in the second instance by the Court of Appeal, as well as in the last instance by the Supreme Court. Statistics from 2015 show that a leave to appeal was granted in approximately 60 per cent of all commercial disputes which were appealed to the Stockholm Court of Appeal (Sw. *Svea hovrätt*).

In the Supreme Court, however, the possibilities to be granted a leave of appeal in a commercial case are limited, as a leave to appeal will only be granted for such cases which are of interest in terms of constituting a precedent.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

Under Swedish law, the court's means to *ex officio*, on its own initiative, order disclosure or discovery and inspection of documents are limited. However, on the request of a party, the courts may issue an order for production of documents (Sw. *edition*), directed towards anyone in possession of documents that can be assumed to have significance as evidence in the dispute, i.e. towards both parties and non-parties to the proceedings. The parties can also be ordered to disclose documents that are not supporting their case. However, documents that include professional secrets would not need to be produced unless the party requesting production shows that there are extraordinary reasons (Sw. *synnerlig anledning*) for disclosing the documents.

In general, the party requesting disclosure of certain documents must identify the documents carefully and specify the evidentiary importance of the documents. An order for production of documents may be sanctioned by a conditional fine. The general view under Swedish law is that disclosure should not be ordered until a case has commenced.

Under Swedish law, the request for production of documents normally needs to be quite narrow and specific. Thus, *discovery* actions are generally not allowed.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

A party is entitled to withhold from disclosure documents that relate to advice from lawyers, documents prepared in contemplation of litigation or produced in the course of settlement negotiations or attempts.

Further, the obligation to produce written documents does not extend to memoranda or any other personal notes prepared

exclusively for private use, unless extraordinary reasons exist for their production.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

Witnesses are normally called by the courts to give evidence at the final hearing. Witnesses that are summoned to appear in court have a duty to give evidence and, as a general rule, written witness statements cannot be submitted. If, however, it is not possible for a witness to attend the final hearing or if his or her attendance at the final hearing should occasion costs or inconvenience not in proportion to the importance of the examination being held at the main hearing, the witness may give the testimony outside of the final hearing. In such events, the taking of evidence may take place at a special meeting at the competent court or at a foreign court.

For witnesses refusing to give evidence, the courts have the possibility to take compulsory measures, such as imposing a conditional fine, summoning the witness to court or ultimately detaining the witness in custody.

4.4 Is evidence from witnesses allowed even if they are not present?

Please see the response to question 4.3 above.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

There are no restrictions for a party on providing evidence by expert opinion, besides the fact that an expert witness should not be related to the matter in dispute or to any of the parties in such a way that the reliability of his testimony can be questioned. However, prior to the hearing of the expert witness, the party stating the evidence must file an expert report with the court, which should be communicated with the adversary party.

In our experience, court-appointed experts are in general uncommon, especially in civil cases. The fees for court-appointed experts are paid out of public funds.

4.6 What sort of interim remedies are available from the courts?

There are several forms of interim remedies available. The courts may order provisional attachment (Sw. *kvarstad*) of so much of the adversary's property that the relevant money claim may be assumed to be secured on execution, provided that the party requesting it shows probable cause (Sw. *sannolika skäl*) to believe that he has a money claim that is or can be made the basis of legal proceedings or determined by another similar procedure. The courts may also order provisional attachment on certain property, if a party shows probable cause that he has a superior right to that property.

Provisional attachment requires that the party requesting it shows that it is reasonable to expect that the adverse party would evade payment of the debt by absconding, removing property or other means, or, in relation to certain property, that the adversary party will conceal, substantially deteriorate or otherwise deal with or dispose of the property to the detriment of the applicant.

A court may also, if requested by a party, make an order for measures suitable to secure the applicant's right, such as a prohibition, under penalty of a fine, of carrying on a certain activity or performing an act or an order. This would require that the party requesting it shows that it is reasonable to expect that the adverse party, by carrying on a certain activity, by performing or refraining from performing a certain act, or by other means, will prevent or render more difficult the exercise or realisation of the claimant's right or substantially diminish its value.

Generally, a request for provisional attachment or other sanction may not be granted unless the adverse party has been given the opportunity to express his opinion. However, in cases where there is an imminent danger, the courts may order such sanctions provisionally without hearing the adverse party.

In cases where a provisional attachment or other sanctions have been ordered separately to a legal proceeding, the claimant is required to bring an action before the court or initiate an arbitration within one month of the order; otherwise, the order will lapse.

A requirement for interim remedies is that the claimant deposits sufficient security with the court to compensate the adversary party for the potential losses he may suffer. Exceptions from this requirement can be made if the claimant is unable to provide such security and is able to show that he has extraordinary reasons for his claim.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

In Sweden, there are two stages of appeal from decisions of the courts of first instance: the Court of Appeal (Sw. *Svea hovrätt*); and the Supreme Court (Sw. *Högsta Domstolen*).

All final judgments or judicial decisions of the courts of first instance may be appealed at the Court of Appeal, the second instance. As for intermediate decisions of the first instance, some decisions may be appealed independently, and certain types of decisions may only be appealed in connection with the appeal of a final judgment or decision.

A leave to appeal is required for any judgment or decision in a civil case to be tried in the second instance. The general grounds for a leave to appeal in the second instance are that:

(a) there are reasons to doubt the accuracy of the judgment;
(b) the accuracy of the judgment cannot be judged on the basis of the reasons for the judgment;
(c) the case is of interest in terms of constituting a precedent; or, alternatively
(d) there are extraordinary reasons for the case to be tried in the second instance.

Statistics from 2015 show that a leave to appeal was granted in approximately 60 per cent of all commercial disputes which were appealed to the Stockholm Court of Appeal.

For any judgment of the Court of Appeal to be tried by the Supreme Court, the Supreme Court must grant a leave to appeal. In civil cases, the only ground for a leave to appeal is that the case is of interest in terms of constituting a precedent.

A decision by the Court of Appeal not to grant a leave to appeal may also be appealed to the Supreme Court.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Interest of a claim must be requested in order to be recoverable.

If a claim with a fixed due date is not paid in time, interest will run from the due date. In other events, interest will start running

30 days after the claimant has sent an invoice or otherwise made a claim which sets out that non-payment will cause interest to run, unless both debtor and creditor are proprietors of business and the debt is originated within their business activity, in which case, it is not necessary to specify that non-payment will cause interest to run. However, the debtor is not obliged to pay interest in relation to the time prior to him receiving the claim.

The rate of interest for one year corresponds to the current reference rate (currently 0.0 per cent), with an addition of eight (8) percentage units.

Interest in respect of litigation expenses will run from the date of judgment, regardless of whether interest has been claimed.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

The standard rule regarding litigation costs is that the losing party must pay the costs of the winning party. However, if the claimant only wins partially, the costs should, in principle, be proportionally allocated in relation to the degree of success. Additionally, actions of the parties or their respective counsel during the proceedings which have caused additional costs (e.g. negligent litigation) could affect the allocation of the costs.

The reimbursement of litigation expenses should fully cover the party's costs for preparing and performing the action, such as attorneys' fees and expenses for witnesses. However, a party would only be ordered to compensate the opposite party's costs if the costs are considered reasonable.

If the parties in a dispute are reconciled prior to trial, the parties would, in general, carry their own litigation costs. Yet, how to apportion the litigation costs could, of course, be a part of the settlement agreement.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

No, the courts have no power to compel the parties to mediate disputes nor may the courts engage the parties with other forms of Alternative Dispute Resolution. That being said, the court is obliged to ask the parties if a settlement could be reached and if so, assist the parties in such negotiations. The court cannot, however, force the parties to take part in any settlement discussions.

4.11 If a party refuses to a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

This is not applicable; please see the response to question 4.10 above.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

A valid arbitration agreement serves as a bar to court proceedings. The courts are also prevented from hearing certain types of disputes which must be determined by arbitration exclusively.

However, if a dispute between a business enterprise and a consumer concerns goods, services, or other products supplied principally for private use, an arbitration agreement may not be invoked if it was entered into prior to the dispute. However, this restriction does not apply where the dispute regards an agreement between an insurer and a policyholder concerning insurance based on a collective agreement or a group agreement which is handled by a representative of the group. Nor does this restriction on agreeing to settle disputes through arbitration apply where Sweden's international obligations provide the contrary.

The Swedish Arbitration Act (Sw. *lag (1999:116) om skiljeförfarande*) states that a court may not, over an objection of a party, rule on an issue which, pursuant to an arbitration agreement, must be decided by arbitrators. It should be noted that a party must invoke an arbitration agreement on the first occasion that a party pleads his case on the merits in the court. Invocation of an arbitration agreement raised on a later occasion has no effect unless the party had a legal excuse and invoked the arbitration agreement as soon as the excuse ceased to exist.

Irrespective of the arbitration procedure, the courts are not prevented from deciding certain matters with respect to the arbitration agreement, such as the arbitrators' jurisdiction to decide the dispute. The arbitrators may rule on their own jurisdiction to decide the dispute. However, this does not prevent a court from determining such a question at the request of a party. Previously, a party could initiate a separate court proceeding challenging the arbitrators' jurisdiction while the arbitral proceedings continued – and many arbitral awards were rendered before the court could produce a final ruling (which could be appealed) on the question of the arbitrators' jurisdiction.

As the Swedish Arbitration Act was amended in 2019, one of the major changes is that a party that wishes to challenge the arbitrators' jurisdiction can now, without initiating a separate legal claim in a court proceeding, raise objections against the arbitrators' jurisdiction *within* the arbitral proceeding. Thus, the arbitrators first rule on their jurisdiction. If the arbitrators conclude that they have jurisdiction, a party may within 30 days challenge this ruling directly before the Court of Appeals. The arbitrators may continue the arbitral proceedings pending the determination by the court. This procedure is similar to the provision laid down in article 16.3 of the UNCITRAL Model Law.

Under certain circumstances, the courts are also entitled to appoint arbitrators or appoint new arbitrators where an arbitrator resigns or is discharged. For example, if the respondent fails to appoint an arbitrator within the stipulated time, the District Court may make the appointment upon request by the claimant. Nor does the arbitration agreement prevent a court from, upon request by a party, deciding on security measures with respect to claims under consideration by the arbitral tribunal.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

Since general contractual principles apply to the arbitration clause, involving freedom of contract, no specific form of words is required. The parties are free to agree on the arbitral agreement, with the exception of disputes relating to consumers (please see question 5.3 below).

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

Generally, Swedish courts recognise and enforce arbitration agreements, and a valid arbitration clause serves as a bar to court proceedings. That being said, Swedish courts sometimes tend to have a somewhat more restrictive approach when interpreting the scope of an arbitration agreement compared to the interpretation in other countries.

Parties may agree on arbitration prior to, as well as after, the dispute.

As provided in section 5 of the Arbitration Act, a party may, however, lose its right to rely on the arbitration agreement if it has:

(a) opposed a request for arbitration by the other party;
(b) failed to appoint an arbitrator in time; or
(c) failed to pay, within due time, his share of requested security for compensation to the arbitrators.

These circumstances can be characterised as breaches of the arbitration agreement, which allows the other party to treat the agreement as terminated.

A situation not specified in section 5 which entitles a party to treat the arbitration agreement as terminated, and to initiate court proceedings instead of arbitration, is that the adversary party during the procedure has asserted that no valid arbitration agreement exists. It is possible that there are other material breaches of the arbitration agreement which would entitle the opposite party to terminate the arbitration agreement. However, as the Arbitration Act is silent on this matter, it would probably be difficult to terminate the agreement on other grounds which are not specified in section 5, and which do not relate to general grounds for invalidity of contract, such as fraud or duress.

An arbitration clause may also be set aside pursuant to section 36 of the Contracts Act if it is considered to be unconscionable, having regard to the contents of the agreement, the circumstances prevailing at the time the agreement was entered into, subsequent circumstances and circumstances in general. It should, however, be stressed that although section 36 is often asserted in various kinds of relationships, it is most rare that the article will be applied between equal commercial parties.

As mentioned under question 5.1 above, arbitration agreements between business enterprises and consumers are generally not legally binding unless entered into after the dispute has occurred.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

Both a court and an arbitral tribunal may, at the request of a party, order provisional measures. There are several reasons why it is more advantageous for a claimant to turn to a court if he wants to be secured without delay. Firstly, the court's decision is enforceable, in contrast to the decision made by arbitral tribunals. Additionally, a court can order conditional fines or otherwise use compulsory measures to secure the claimant's right. Further, the court can order provisional measures, such as attachment, without hearing the opposite party in case there is an imminent danger. The provisions of the Code of Judicial Procedure determine what types of provisional measures that can be ordered (please see our response to question 4.6 above).

A party may obtain an attachment order or other interim measures when it is foreseen or there is proof that the adverse party will remove his assets and make them inaccessible for future attachment. A Swedish District Court is competent to order provisional attachment if the respondent is domiciled in Sweden.

Another example of obtainable interim measures is that the court, in case there is a risk of a contractor cancelling work that must be completed to avoid more extensive damage, may decide on suitable provisional measures to safeguard the claimant's legal rights.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

The Arbitration Act does not require that an arbitration tribunal give reasons for its award or decision. The parties can agree that a reasoned award is required, both in the arbitration clause and subsequently. However, even without such an agreement, it has become common practice in Sweden to give detailed reasons for awards and decisions of arbitral tribunals.

It shall be noted that the Arbitration Rules of the Stockholm Chamber of Commerce (SCC) sets forth that, unless the parties have agreed otherwise, the award shall state "the reasons upon which the award is based" (Article 42 of the 2017 SCC Arbitration Rules).

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

Generally speaking, arbitral awards are final and the merits of the case may not be appealed.

However, under certain circumstances provided in the Arbitration Act, an award could be regarded as either invalid or challengeable. Invalid awards are *ab initio* and forever, which means that no activity from any of the parties is required for the award to be invalid. Challengeable awards may be set aside by a court of law under certain circumstances, at the request of a party. In such cases, an action must be brought by a party within three months from the date the party received the award in its final wording.

Under the Arbitration Act, there are three exhaustive grounds for invalidity of an arbitral award:

(a) it includes determination of an issue which may not be decided by arbitrators;
(b) the award or the manner in which the award has been rendered violates Swedish public policy; or
(c) the award has not been made in writing and it has not been signed by the arbitrators.

As to challengeable awards, an arbitral award will, at the motion of a party, be wholly or partially set aside if:

(a) it is not covered by a valid arbitration agreement;
(b) the arbitrators have rendered the award after the expiration of the period decided on by the parties;
(c) the arbitrators have exceeded their mandate in a manner which is likely to have influenced the outcome of the case;
(d) arbitral proceedings should not have taken place in Sweden;
(e) an arbitrator has been appointed contrary to the agreement between the parties or the Arbitration Act;
(f) an arbitrator was unauthorised; or
(g) without fault of the party, there otherwise occurred an irregularity in the course of the proceedings which is likely to have influenced the outcome of the case.

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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

The regulatory body in Switzerland is the Swiss Financial Market Authority (FINMA). Its mandate is to supervise banks, insurers, insurance intermediaries, collective funds and the financial markets. To ensure its institutional independence, FINMA was established as a public law institution in its own right.

On the other hand, the Swiss Federal Office of Social Insurance is competent for social insurance business (in particular old age and survivors' insurance, disability insurance, mandatory health and accident insurance as well as occupational pension funds).

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

All insurance companies are obliged to obtain a licence from FINMA for their business activities. Each company must submit a business plan as part of the application. The insurers can commence their activities as soon as they have been licensed by FINMA.

The Insurance Supervision Act (ISA) determines the basic requirements for the licensing of an insurance company. Further requirements and provisions are described in more detail in the Insurance Supervision Ordinance (ISO) and FINMA's circulars. The basic requirements include:

- **legal form**: limited company or cooperative;
- **minimum capital requirement**: CHF 3 to 20 million, depending on the sector;
- **equity capital**: sufficient free and unencumbered equity capital (solvency);
- **establishment fund**: covered costs of foundation, organisation and extraordinary expansion of business activities; and
- **object of the company**: activities directly associated with insurance.

Whereas non-tied insurance intermediaries who offer or conclude insurance contracts on behalf of insurance companies or other individuals must be registered in the public register of insurance intermediaries, registration for tied insurance intermediaries is voluntary.

To register (see Article 44 ISA), tied and non-tied insurance intermediaries must:

- meet the personal requirements set out in Article 185 ISO;
- demonstrate that they hold appropriate professional qualifications (Article 184 ISO); and
- hold professional indemnity insurance or provide an equivalent financial surety (Article 186 ISO).

Once registered, insurance intermediaries are then not subject to ongoing monitoring. However, FINMA will conduct spot checks to verify whether the intermediaries comply with the regulatory requirements.

The operation of reinsurance in Switzerland also requires a licence from FINMA. Insurance supervision law treats, with some exceptions (such as the renunciation of tied assets), reinsurers in the same way as primary insurers. FINMA applies the provisions accordingly, which gives them a certain margin of discretion to take account of the special features of reinsurance business.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Under Swiss insurance supervisory law, the freedom to provide services between Switzerland and abroad is only possible in reinsurance and in some limited areas of direct insurance, as well as under the FL/CH Convention on direct insurance and insurance mediation in the exchange of services between Switzerland and the Principality of Liechtenstein.

This means that foreign insurance companies must establish a branch office in Switzerland, appoint a general agent as their head, deposit a surety and apply for authorisation, as according to Article 15 ISA.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

The Federal Act on Insurance Contracts (ICA) governs the civil law relationship between insurers and insureds. The ICA contains provisions which must not be modified by contractual agreement or by general conditions of insurance (Article 97 ICA), provisions which must not be modified to the disadvantage of the insured (Article 98 ICA), and provisions which may be modified at will. The characteristic of the absolutely imperative provisions (Article 97 ICA) is that they completely deprive the parties of their freedom of contract. Articles 97 and 98 ICA list several provisions which are to be assigned to the respective category. However, these lists are not exhaustive.

1.5 Are companies permitted to indemnify directors and officers under local company law?

Yes. Today, scholars and the courts unanimously agree that this is allowed. However, this was discussed in the past.

1.6 Are there any forms of compulsory insurance?

The following types of insurance are legally required in Switzerland:

- basic health and accident insurance;
- cars and other vehicles must be insured to operate legally;
- building insurance (property owners only);
- fire insurance (usually part of building insurance);
- social security and unemployment insurance (AI/AVS/EO/APG) as well as the occupational pension (directly deducted from salary);
- insurance for railways;
- marine insurance;
- aviation insurance; and
- various professional liability insurances, etc.

However, this is only an exemplary list and there are over 100 additional compulsory insurances at both federal and cantonal level in individual special fields.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

Since 2016, the EU "Insurance Distribution" Directive has come into force to strengthen consumer protection. In Switzerland, on the other hand, various insurance law revisions with more consumer protection have failed in Parliament. Accordingly, consumer protection at the EU level is certainly more developed than it is currently under Swiss law.

2.2 Can a third party bring a direct action against an insurer?

In the event of damage caused by a vehicle, there is a direct right of claim against the liable insurance company (Article 65 of the Road Traffic Act). Every registered vehicle is compulsorily insured against liability.

Also, the beneficiary from collective accident or health insurance is entitled to an independent claim against the insurer (Article 87 ICA). In addition, the attorney has a direct reason for claiming against the insured's legal protection insurance.

A direct action against an insurer is not yet foreseen for business or private liability claims yet. However, the current revision of the insurance law, which should be debated in Parliament this year, provides for a direct claim of the injured party against liability insurance also in the area of liability law.

2.3 Can an insured bring a direct action against a reinsurer?

No, it is the key principle of reinsurance that the policyholder of the primary insurer is not entitled to any direct claims against the reinsurer. This also applies if the primary insurer is insolvent or is unable to meet the coverage obligation for other reasons.

In some cases, however, deviating contractual clauses are agreed (so-called "cut-through" clauses). Such clauses shall, in principle, qualify as payment instructions or security assignments.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

If, at the time of taking out the insurance, the notifiable person has incorrectly disclosed or concealed a significant risk which he knew or had to know, the insurer is not bound by the contract if he or she withdraws from the contract within four weeks after he or she has become aware of the breach of the notification obligation (see Article 6 ICA). Since the obligation to notify is relatively mandatory, the insurer may at any time, i.e. also in advance, waive the assertion of its right of withdrawal.

If the contract is terminated in accordance with Article 6 para. 1 ICA, the insurer's obligation to indemnify shall also lapse in the event of damage that has already occurred and the occurrence or extent of this damage has been influenced by the significant risk fact not or incorrectly notified (Article 6 para. 3 ICA). If the obligation has already been fulfilled, the insurer is entitled to restitution.

Under certain circumstances, the contract perpetuates despite the violation of the obligation to notify. These exceptions are listed in Article 8 ICA.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

The legislature rejects the applicant's independent declaration obligation. The insurer does not have to point out any other hazardous facts which he considers important, but which the insurer has not asked for (Article 4 ICA). The applicant only has to inform the insurer of this insofar or to the extent that the insurer asks a question and as far as the insurer's questions go. The questions must be asked in a sufficiently clear and unambiguous manner.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

Article 72 ICA provides a right of subrogation of the insurer. According to the provision, the claim for compensation which the beneficiary has against a third party based on tort is assigned to the insurer insofar as it paid indemnification. This provision does not apply if the damage was caused, in a slightly negligent way, by a person who lives in the same household with the beneficiary or for whose acts the beneficiary is responsible.

Article 72 VVG is not applicable if the insured person has only a contractual claim for damages against the third party. In addition, the insurer does not subrogate into the position of the insured person against a causally liable party.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

The cantons may designate a special court (as in Zurich, Berne, Aargau and St. Gallen) that has jurisdiction as sole cantonal

instance for commercial disputes (so-called Commercial Court). Commercial proceedings are considered insurance matters if the value in dispute is of at least CHF 30,000 and involves parties registered in the Swiss Commercial Registry or in an equivalent foreign registry. If only the defendant is registered and the abovementioned dispute value is reached, the claimant may choose between the Commercial Court and the ordinary court.

Commercial Court and High Court final decisions are subject to appeal to the Federal Supreme Court if the dispute value is at least CHF 30,000.

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

As a general rule, the court may demand that the plaintiff make an advance payment up to the amount of the expected court costs (Article 98 of the Swiss Code of Civil Procedure – CPC). The cantons set the tariffs for the procedural costs (Article 96 CPC), which means wherever the commercial dispute is carried out, that cantonal law with regard to the advance payment is to be applied. The amount of the advance payment further depends on the kind of proceedings (e.g. conciliation proceedings, summary proceedings, simplified proceedings, ordinary proceedings) and the amount in dispute.

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

Depending on the complexity of the case and the workload of the particular court, it normally takes between three to six months to bring to court.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

Article 160 CPC provides in principle that both parties and non-parties have a duty to cooperate in the taking of evidence; in particular they have the duty to produce physical records upon request by the court.

A party to the action may refuse to cooperate under certain circumstances pursuant to Article 163 CPC; for example, if the taking of evidence would expose a close associate. But if a party refuses to cooperate without valid reasons, the court will take this into account when appraising the evidence (Article 164 CPC). However, the court may not impose any constraints on the parties.

Third parties have, however, an absolute right to refuse to cooperate as well as a limited right to refuse according to Articles 165 and 166 CPC. If a non-party refuses to cooperate without justification pursuant to these Articles, the court may impose a disciplinary fine of up to CHF 1,000, threaten sanctions under Article 262 of the Swiss Criminal Code, order the use of compulsory measures or charge the third party the costs caused by the refusal (Article 167 CPC).

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

The lawyer shall, due to professional secrecy, not disclose any facts which the client has entrusted to the lawyer in order to enable him to exercise a mandate or which the lawyer has received in the exercise of his mandate. This professional secrecy is provided for in Article 13 of the Lawyers Act and protected under criminal law by Article 321 of the Swiss Penal Code.

Statements from out-of-court settlement negotiations cannot be used later in court proceedings.

In Switzerland, litigation shall in general be preceded by an attempt at conciliation before a conciliation authority (Article 197 *et seq.* CPC) to agree on a settlement and to avoid unnecessary litigation. The parties' statements may not be recorded in the hearing before the conciliation authority, nor may they be used later in court proceedings. "Statements" means all declarations made by the parties during the conciliation proceedings (Article 205 CPC).

A similar prohibition of exploitation is also provided in the context of mediation. Confidentiality refers to the mediation interviews, all information related to the mediation as well as all documents (protocols, video and audio recordings, etc.) that are produced within the framework of mediation.

The parties' statements may not be recorded in the actual arbitration procedure, nor may they be used later in the arbitration procedure. "Statements" means all declarations made by the parties during the arbitration proceedings (Article 205 CPC). A similar prohibition of exploitation is also provided in the context of mediation. Confidentiality refers to mediation interviews, all information related to the mediation as well as all documents (protocols, video and audio recordings, etc.) that are produced within the framework of mediation.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

The court may agree on a witness as a precautionary measure according to Articles 158 and 261 *et seq.* CPC.

Otherwise, witnesses are generally heard during the taking of evidence and not only in the final hearing. Parties and third parties have a duty to cooperate in the taking of evidence. In particular, they have the duty to make a truthful deposition as a party or a witness (Article 160 para. 1 CPC). The conditions and procedure for taking witnesses are regulated in Article 171 CPC.

4.4 Is evidence from witnesses allowed even if they are not present?

This is possible in the context of an interrogation by way of legal assistance, which has to be declared as such. In addition, it is permissible under Article 170 para. 3 CPC that the witness may be questioned at his or her place of residence. The parties must be notified thereof in advance.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

At the request of a person or *ex officio*, the court may obtain an opinion from one or more experts (Article 183 CPC). The court must hear the parties first but there are no further restrictions. However, in proceedings subject to the principle of production of evidence, the court should exercise restraint in order not to give unjustified preference to a party who has not sufficiently substantiated the facts of the case or who has not requested an expert opinion in time.

An expert witness is often involved in the process if two party opinions contradict each other or if the court misses the necessary knowledge for the perception or assessment of legally relevant facts.

4.6 What sort of interim remedies are available from the courts?

One of the most important legal remedies is a precautionary taking of evidence pursuant to Article 158 CPC. According to this provision, the court shall take evidence at any time if the law grants the right to do so or if the applicant shows credibly that the evidence is at risk or that it has a legitimate interest.

In connection with a damage claim, this means, e.g., that a certain behaviour may be ordered by the court upon request of a party in order to ensure that the damage does not increase, or evidence is at risk if a witness wants to leave the country and his statement is relevant for the vehicle insurance.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

Pursuant to Article 308 *et seq.* CPC, an appeal before the High Court is admissible against final and interim decisions of first instance if the value for the claim in the most recent prayers for relief is at least CHF 10,000.

The appeal may be filed on grounds of incorrect application of law or incorrect establishment of the facts.

High Court final decisions are subject to appeal to the Federal Supreme Court if the dispute value is at least CHF 30,000.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

The interest on damages starts from the time when the damaging event has a financial impact and ends with the invoice date (judgment date). From the invoice date (judgment date) onward, an interest of 5% on the damage and on the interest on damages shall be charged. The 5% represents a presumption and can be adjusted by proving that the injured party has incurred higher interest costs (e.g. due to actual credit costs).

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

The procedural costs include court costs and party costs. The court awards party costs according to the cantonal tariffs, while court costs are determined and allocated *ex officio* (Article 105 CPC). The costs are charged to the unsuccessful party (Article 106 CPC).

The court may diverge from the general principles of allocation and allocate the costs at its own discretion; e.g., if an action has been upheld in principle but not the full amount claimed, if the party was caused to litigate in good faith or if there are extraordinary circumstances (*cf.* Article 107 CPC).

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

In commercial matters especially (including insurance and reinsurance), mediation as well as other forms of Alternative Dispute Resolution are not very established in Switzerland.

The Swiss courts authorities do not force the parties to try mediation or ADR in advance, but they may recommend it to the parties at any time (Article 213 *et seq.* CPC).

Furthermore, the parties may at any time make a joint request for mediation (Article 214 para. 2 CPC). The parties will be responsible for organising and conducting the mediation.

4.11 If a party refuses to a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

The recommendation of the court is not binding. In the event of non-observance, the court may not order any substitute performance or disadvantage with regard to the outcome of the proceedings, nor with regard to the distribution of costs.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

The questions under this section will be answered in the light of both national and international situations. The CPC is applied for domestic matters, whereas the Federal Act on International Private Law (IPLA) is applied for international matters. However, the parties may also exclude the application of the IPLA provision in international arbitration proceedings and declare the provisions of the CPC applicable (Article 176 para. 2 IPLA).

The parties may at any time appoint arbitral tribunals as private courts of arbitration in place of state courts to rule on a civil dispute. Although arbitral tribunals generally take the place of state courts, they cannot completely replace their functions. This may be the case if the arbitral tribunal is blocked by the disputing parties or in the case of functions which the State wishes to reserve for its own bodies. In some cases, for example, the state court appoints the members of the arbitral tribunal, decides on their rejection and dismissal, participates in the provision of evidence, adopts precautionary measures and assesses appeals against arbitration decisions.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

The arbitration agreement must be done in writing or in any other form allowing it to be evidenced by text (Article 358 CPC, Article 178 IPLA). The Swiss law does not provide any further formal requirements.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

In the case of internal relations, only such legal relationships may be submitted to an arbitral tribunal, over which the parties may freely dispose (Article 354 CPC). Arbitration proceedings concerning personal and family relationships are therefore

excluded. The IPLA does not provide such a condition regarding free disposition, but pursuant to Article 177 IPLA, only disputes involving an economic interest may be the subject of an international arbitration.

The validity of an arbitration agreement may not be contested on the ground that the principal contract is invalid (Article 178 para. 3 IPLA).

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

Legal remedies are quite limited and Swiss national courts exercise restraint in interfering with private proceedings. The parties may, however, ask the state court to adopt a precautionary measure (Article 374 CPC). On the one hand, it comprises the precautionary measures regulated in Article 261 *et seq.* CPC and, on the other hand, the protective measures of the Federal Act on Debt Enforcement and Bankruptcy (DEBA), including attachment (Article 271 para. 1 DEBA), as well as any interim measures of interim legal protection provided in other laws.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

Article 384 para. 1 (e) CPC provides that, unless the parties have explicitly dispensed with this requirement, the award must contain details of the statement of the facts, the legal consideration and, if applicable, the considerations in equity.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

Article 390 CPC provides that the parties may agree by express declaration, or in a subsequent agreement, that the arbitral award may be contested by way of objection to the cantonal court that has jurisdiction under Article 356 para. 1 CPC. Unless the parties have agreed otherwise, an arbitral award is subject to objection to the Federal Supreme Court (Article 389 CPC).

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Taiwan


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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

The insurance regulator in Taiwan is the Financial Supervisory Commission ("FSC").

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

With the view to establishing a new insurance company or reinsurance company, the following steps are required to be taken:

A. apply with the Ministry of Economic Affairs ("MOEA") for reservation of the new company's Chinese name and business scope;
B. apply with the Investment Commission ("IC") for a foreign investment approval ("FIA") for foreign shareholders' equity investment in the new company (please note that this step is only required for investments funded by foreigners or foreign entities);
C. apply with the FSC for a special permit to establish a new insurance company or reinsurance company in the ROC ("Special Permit");
D. apply with the IC for verification of the new company's capital;
E. apply with the MOEA for incorporation registration;
F. apply with the FSC for the issuance of a business licence;
G. apply for business registration with the local tax authority;
H. apply for membership of the Life Insurance Association of Republic of China ("Life Insurance Association")/the Non-Life Insurance Association of Republic of China ("Non-Life Insurance Association") in Taiwan; and
I. apply for the issuance of a certificate to operate foreign exchange business ("FX License") from the Central Bank of Republic of China (Taiwan) ("CBC") (if the new company will sell insurance policy denominated in foreign currency).

Please note that certain restrictions are imposed upon the shareholding structure of an insurance/reinsurance company. According to Article 7 of the Regulations Governing the Same Person or the Same Concerned Person Holding a Certain Percentage or More of the Outstanding Voting Shares of Insurance Company, the same person or same concerned person who plans to solely, jointly or collectively hold more than 10, 25 or 50 per cent of an insurance/reinsurance company's outstanding voting shares must meet certain requirements or obtain the approval from the FSC, or both. A shareholder who holds more than 50 per cent (major shareholder) must: (1) guarantee the rights and benefits of the insurance company's policyholders and employees; (2) comply with applicable laws and regulations in Taiwan with regard to his, her or its funding sources; (3) be equipped with the professional ability to operate an insurance/reinsurance company; and (4) indicate its intent of long-term operations (including a long-term operation commitment and adequate financial ability to meet the capital injection needs of the company in the next 10 years).

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

The foreign insurers that have not completed the registration process above and deposit the sum of the operating bond cannot write business directly in Taiwan. Such foreign insurers, however, could write reinsurance of a domestic insurer.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

Article 144 of the Insurance Act provides that the competent authority may, taking the development conditions of each insurance enterprise into consideration, regulate the provisions contained in insurance policies by implementing regulations governing matters, such as procedures to be carried out before a policy is marketed; product review; and the actions to be taken when the content of a policy is incorrect, false, or in violation of the law. Such regulations include "Regulations Governing Pre-sale Procedures for Insurance Products", "Guidelines for the Examination of Non-life Insurance Products" and "Guidelines for the Examination of Life Insurance Products". Under such regulations, the insurer is required to specify certain clauses and provisions in the policy. Such restrictions limit the parties' freedom of contract.

1.5 Are companies permitted to indemnify directors and officers under local company law?

Companies are not prohibited from indemnifying directors and officers under Taiwan's Company Act. In fact, under Article 199 of the Company Act, in the case that a director is discharged during the term of his/her office as a director without a reasonable cause, the said director may make a claim against the company for any and all damages sustained by him/her as a result of such discharge.

1.6 Are there any forms of compulsory insurance?

In principle, there are two types of compulsory insurance in Taiwan. One is social insurance, such as national health insurance, labour insurance, and farmer health insurance; the other is policy insurance, such as compulsory motor liability and residential earthquake insurance. In addition, some particular enterprises are required to hold public liability insurance and travel agencies are required to have travel agency multiple liability.

Regarding compulsory automobile liability insurance, to protect victims of car accidents and efficiently and directly indemnify the victims, the Compulsory Automobile Liability Insurance Act was promulgated on 27 December 1996 and took effect on 1 January 1998. The "automobile traffic accident" referred to in the Act means an accident in which an automobile is used or manoeuvred in such a manner as to cause injury or loss of life to a passenger or to a third party outside the vehicle.

In respect to compulsory public liability insurance, many local regulators have issued regulations governing compulsory public liability insurance applicable in individual counties or cities. For example, Taipei City government listed the public places which shall be covered by compulsory public liability insurance. Such places include: performance or public venues that contain an audience space and stage area (such as cinemas); places for entertainment (such as karaoke bars); places whose total floor area exceeds 500 square metres for exhibitions or commerce and in which commercial tenants change frequently (such as department stores); and places for serving food and drinks to the public (such as restaurants), etc. Any entity violating such regulations may be subject to administrative fines or even ordered to suspend its business activities.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

Generally speaking, the law of Taiwan relating to insurance is more to the insureds' advantage. Article 54 of the Insurance Act provides that interpretation of insurance contracts shall seek the true intent of the parties, and may not adhere blindly to the language employed; where there is doubt, interpretations should, in principle, be favourable to the insured. Further based on Article 54-1, in the cases that an insurance contract contains any term or condition that is unfavourable towards the consumers, or in the event that such contract contains provisions that are unreasonably advantageous towards the insurance company, such part of the contract shall be void. Therefore, although under most circumstances, interpretation of insurance contracts shall be made to seek the true intent of the parties, and the policyholders should not adhere blindly to the language employed, the provisions of the insurance contract should be interpreted in favour of the consumers when there is any ambiguity within such contract.

2.2 Can a third party bring a direct action against an insurer?

Generally speaking, a third party that is not a contractual party to the insurance contract is not permitted to bring a direct action against an insurer. There is an exception under such rule, however, which is the case of liability insurance. Paragraph 2 of Article 94 of the Insurance Act provides, where the insured has been determined liable to indemnify a third party for loss, the third party may claim for payment of indemnification, within the scope of the insured amount and based on the ratio to which the third party is entitled, directly from the insurer. That is to say, under the circumstances, that if the insured is liable for a third party's damages, such third party may demand the insurer provides indemnification for the damage it has suffered. Please note, however, the scope of such indemnification is restricted to the sum that the insurer has agreed to undertake under the liability insurance.

2.3 Can an insured bring a direct action against a reinsurer?

According to Article 40 of the Insurance Act, unless otherwise stipulated under the original insurance contract and the reinsurance contract, the insured of the original insurance contract has no right to claim indemnification from a reinsurer under the laws of Taiwan. However, if the insurer is delayed in fulfilling its obligation to the insured, after meeting with certain requirements, the insured may file the lawsuit against the reinsurer on behalf of the insurer based on Article 242 of the Civil Code.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

Except in the case that the proposer is able to prove that the occurrence of the risk was not based upon any fact that it falsely provided or failed to provide, Article 64 of the Insurance Act rules that if the insured has made any concealment, and such concealment, nondisclosure, or misrepresentation is sufficient to alter or diminish the insurer's estimation of the risk to be undertaken, the insurer may rescind the contract. The same shall apply even after the risk has occurred. Please be mindful, however, that the insurer must rescind the contract within a month after learning the insured's involvement in concealment, nondisclosure, or misrepresentation. In addition, once two years have elapsed since the execution of such contract, the contract may not be rescinded regardless of whether the cause for rescission exists.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

The "Written Inquiry Principle" is the established practice in Taiwan. In other words, the policyholder is only obliged to truthfully answer the questions raised by the insurer but does not have imposed the positive duty to disclose facts not inquired by the insurer. According to Article 64 of the Insurance Act, a policyholder is obliged to answer questions posed by the insurer in writing (i.e., insurance application or proposal). A policyholder is, however, not obliged to disclose any information not specifically and reasonably requested by the insurer.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

The insurer has an automatic right of subrogation upon payment of an indemnity by the insurer. Article 53 of the Insurance Act provides in the case that an insured has a right to claim indemnification from a third party due to the occurrence of loss for

which the insurer bears insurance liability, the insurer may, after paying indemnification, be subrogated to the insured's right of claim against the third party. However, the amount of the subrogated claim which the insurer may claim shall not exceed the amount of the indemnification paid to the insured.

In addition, it is also ruled that in the case that the aforementioned third party causing the loss or damage suffered by the insured is a family member or employee of such insured, the insurer does not have the right of subrogation upon payment. However, in the case that such loss or damage resulted from the wilful misconduct of such family member or employee, the aforementioned rule does not apply and thus the insurer has the right of claim by subrogation.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

In general, the court covering the domicile of the proposer (insurance policy buyer) or the insured is the court having jurisdiction over commercial insurance disputes. The value of the dispute is not a factor in deciding the competent court. In Taiwan, there is no jury in the judicial system.

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

The court fee for the first instance is around 1.1% of the claimed amount (the exact amount will be decided by the court). Please refer to question 4.9 for details.

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

According to Article 34 of the Insurance Act, the insurer has to pay indemnification within the period of time stipulated in the insurance policy after a proposer or insured has submitted all supporting documents for a claim. Where no period of time is stipulated, payment has to be effected within 15 days after the receipt of notification.

It really depends on the insured regarding when to file a lawsuit with the court, and it may be several months or even years after the insurer has rejected its application for insurance indemnification. Nevertheless, it usually will not be longer than two years, since the statute of limitation for an insurance claim is two years. The first hearing will generally be held within one to two months once the lawsuit is filed with the court.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

Article 343 of the Code of Civil Procedure ("CCP") provides that, where the document is in the possession of the opposing party, the court may order the opposing party to produce such document by a ruling, provided the court considers the disputed fact to be proved by such document material and the party's motion reasonable.

Article 345 (1) of the CCP further provides that, where a party refuses to comply with an order for the production of document without any justifiable reason, the court may, under its discretion, deem the allegation of the opposing party regarding such document or the fact to be proved by such document as truth. Nevertheless, in practice, the court usually will persuade the party to produce the document instead of exercising such discretion.

Article 347 (1) of the CCP provides that, where the document is in the possession of a third party, the court may order the third party to produce such document by a ruling, provided that the court considers the disputed fact to be proved by such document material and the party's motion reasonable. In addition, pursuant to Article 349 (1) of the CCP, where a third party refuses to comply with an order for the production of a document without any justifiable reason, the court may, by a ruling, impose a fine not exceeding NT$30,000 on the third party, or where necessary, take compulsory measures to order the third party to provide the documents. However, such measure is not common, and the court will usually impose the fine or ask the party to provide other evidence.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

Article 344 (1) of the CCP provides that a party has the duty to produce the following documents:

1. documents which the party has made reference to in the course of the legal action;
2. documents which the opposing party may request for production or inspection in accordance with the applicable laws;
3. documents which are made in the interests of the opposing party;
4. commercial accounting books; and
5. documents which are made for the matters relating to the legal action.

Article 344 (2) of the CCP further provides that, where the document provided in item 5 concerns the privacy or business secret of a party or a third party, the party may refuse the production of such document if the disclosure may result in material damage to the party or the third party.

In practice, we have not seen any case in which the court would order the party to provide the documents (a) relating to the advice given by lawyers, (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts. Some scholars consider it a result of the principle of client-lawyer privilege and the principle of without prejudice. Nevertheless, we believe this is due to the discretion of the court. Since there is no explicit rule in Taiwan, it is therefore difficult to predict any future development.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

It is a part of the evidence investigation to order the witnesses to provide evidence, which the court has the power to effect. In addition, as it is often the case that the witnesses do not bring evidence with them when testifying before the court, it is quite common for the court to request the witnesses to submit the evidence before the final hearing. Furthermore, the parties will also be given the opportunity to present their

argument regarding the evidence provided by the witnesses. If the evidence is provided to the court after the final hearing, the court would have the discretion to reopen the oral argument and allow the parties to address their opinion on the evidence as well as investigate the evidence.

4.4 Is evidence from witnesses allowed even if they are not present?

Evidence from witnesses not presented in court is so-called hearsay evidence. In a civil lawsuit, hearsay evidence is not absolutely inadmissible. The probative value of the hearsay evidence may not be given the same weight as compared to the testimony given in court. However, the court may still accept the hearsay evidence if there is other ancillary evidence to justify the admissibility. That is, the probative value of the hearsay evidence will be determined by the judge at their discretion based on the ancillary evidence, their own knowledge and experience.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

It is quite common in Taiwan for a court to appoint an expert where special knowledge or experience is required.

As a part of the evidence investigation, the party who wishes to call an expert should first file the application to the court. Further, since the party-appointed expert usually would receive remuneration from such party, the other party may therefore question the credibility or validity of testimony provided by the party-appointed expert. Accordingly, the court may prefer to have a court-appointed expert selected from an independent institute.

According to Articles 32 and 330 of the CCP, a person shall not act as an expert witness in any of the following circumstances except where no other appropriate person may be appointed or such person has been designated by the parties by agreement:

1. where the expert witness, or the expert witness's spouse, former spouse, or fiancé/fiancée is a party to the proceeding;
2. where the expert witness is or was either a blood relative within the eighth degree or a relative by marriage within the fifth degree, to a party to the proceeding;
3. where the expert witness, or the expert witness's spouse, former spouse, or fiancé/fiancée is a co-obligee, co-obligor with, or an indemnifier to, a party to the proceeding;
4. where the expert witness is or was the statutory representative of a party to the proceeding, or the head or member of the party's household; or
5. where the expert witness is acting or acted as the advocate or assistant of a party to the proceeding.

4.6 What sort of interim remedies are available from the courts?

For monetary claims or claims changeable for monetary claims, a creditor may apply for provisional attachment to freeze the assets of the debtor to some extent for the purposes of securing the compulsory enforcement of a final judgment in the future. However, pursuant to Article 523 of the CCP, no provisional attachment may be granted unless there is a demonstration of the impossibility or extreme difficulty to satisfy the claim by compulsory enforcement in the future. In addition, the court usually will ask the applicant to deposit the bond with the court before the execution of the provisional attachment. The creditor may also apply for the provisional measure (injunction) to order the debtor to temporarily act or not to act in a certain manner. The provisional measure also requires the bond to be deposited with the court.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

In Taiwan, there are three instances for the court system (district courts, high courts, and the Supreme Court). In principle, the district courts are the court of the first instance. Judgments made by the district courts can be appealed to the high courts (the second instance). The losing party of the first instance may pay for the court fee and appeal to the second instance if it finds the judgment unfavourable.

Same as in the first instance, the court in the second instance will review and investigate the fact as well as the legal issues. The court in the second instance will also allow the parties to submit new evidence and present new arguments except under exceptional circumstances. However, the losing party of the second instance may only appeal to the third instance (the Supreme Court) on the ground that the judgment made by the second instance is in contravention of the laws. Furthermore, only cases with a claim amount that exceeds NT$1.5 million (approximately US$50,000) can be appealed to the Supreme Court.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Interest is generally recoverable in respect of claims. Regarding insurance claims, Article 34 of the Insurance Act provides that the insurer must pay indemnification within the stipulated period of time after a proposer or insured has submitted all supporting documents for a claim. Where no period of time is stipulated, payment must be effected within 15 days after the receipt of notification. If the insurer fails to make payment within the time period for reasons attributable to it, it must pay the default interest at the rate of 10% *per annum*.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

The court fee for the first instance is around 1.1% of the claimed amount, and the court fee for the second instance and the third instance are both around 1.65% of the claimed amount (the exact amount will be decided by the court). In principle, the court fee shall be borne by the party losing the lawsuit. However, if the result of the judgment is not completely favourable to one party, the court will distribute the court fee to the parties in proportion.

Article 420-1(3) of the CCP provides that, in the event of a successful mediation, the plaintiff may move for the return of two-thirds of the court fee paid for the current court instance within three months from the day when an agreement is made in the mediation. In addition, Article 84 (2) of the CCP provides that, where a settlement is reached, the parties may, within three months after the settlement is made, move for the return of two-thirds of the court costs paid for the current court instance.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

According to Article 403 of the CCP, except as otherwise provided in the CCP, disputes arising from proprietary rights where the price or value of the object in dispute is less than NT$ 500,000, the parties are obliged to mediate before initiating a lawsuit. In addition, if the party files the lawsuit directly, the filing thereof will be deemed as the application for mediation according to Article 424 of the CCP. Under such circumstances, the court will not commence the procedure of the lawsuit unless and until the mediation failed.

Furthermore, according to Article 377 of the CCP, the court may try to assist the parties to reach a settlement at any time during the proceeding. Besides, a third party may, with the approval of the court, participate in the settlement; the court may also instruct a third party to participate in the settlement, if necessary. In addition, pursuant to Article 377-1 of the CCP, where a settlement is closed to be reached, the parties may jointly move the court to provide a settlement proposal within the scope agreed and specified by the parties. The settlement is deemed to be reached upon the parties' receipt of such settlement proposal.

4.11 If a party refuses to a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

For cases where mediation is mandatory, the filing of a lawsuit will be deemed as an application for mediation for those specific cases. Nevertheless, the mediation would not succeed if either party explicitly refuses to mediate. If one party fails to appear in the meditation meeting, the court may consider the mediation as unsuccessful or convene another meeting according to Article 420 of the CCP. If the mediation is not successful, the date of the application for mediation will be deemed as the date of filing the lawsuit according to Article 419 of the CCP, and the court will proceed with the lawsuit.

The parties are not obliged to negotiate for a settlement. However, in practice, the party who refused the reasonable settlement offer may be considered by the judge as a trouble maker and might thus incur adverse influence on the trial.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

Since the arbitration clause is based on the mutual consent of the parties, the court, in principle, would not intervene except under certain circumstances such as the application of interim relief, application for the withdrawal of a sole arbitrator and the arbitral award revocation procedure.

Nevertheless, Article 40 of the Arbitration Act provides that, in the event that one party to an arbitration agreement commences a legal action despite the existence of the arbitration agreement, the court shall, upon application of the other party, suspend the legal action and order the party to apply for arbitration within a specified time, provided that the other party has not responded to the merit of the case in the legal action. If the party fails to apply for arbitration within the specified period of time, the court shall dismiss the legal action by a ruling. If the party applies for arbitration within the specified period of time, the suspended legal action shall be deemed to have been withdrawn once the arbitral award is rendered.

However, under the circumstances that the arbitration clause only provides arbitration as one of the dispute resolution mechanisms (i.e. the party may choose either to apply for arbitration or commence the legal action), in principle, the court tends to consider that the party who first initiates the procedure (arbitration or legal action) has the discretion to decide the means of dispute resolution.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

There is no specific form of words required by law to make an arbitration clause in a (re)insurance contract enforceable. Nevertheless, to avoid having a pathological arbitration clause that would affect its validity, it is suggested to include the following particulars into the arbitration clause: (1) the arbitration institution; (2) the number of arbitrators; (3) the language of the arbitration; (4) the place of arbitration; and (5) the applicable law.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

If a policyholder is considered a consumer under the Consumer Protection Act, an arbitration clause that designates arbitration as the sole dispute resolution mechanism might be considered as unfair and thus be rendered null and void by the court under certain circumstances. However, if the arbitration clause only provides arbitration as one of the dispute resolution mechanisms (i.e., the policyholder has the options), such provision is less likely to be considered as unfair.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

The interim forms of relief that can be obtained from the courts in arbitration are the same with those in a lawsuit. There are two forms of interim relief that are usually used in Taiwan; that is, provisional attachment and injunction. Provisional attachment is to temporarily freeze the assets of the defendant in order to secure compulsory enforcement later on, and injunction is to temporarily force the defendant to act or not to act in a specific way.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

According to Article 33 (2) of the Arbitration Act, an arbitral award shall contain the relevant facts and reasons on which the arbitral award is made, except where the parties have agreed otherwise. Accordingly, the arbitral tribunal, in principle, is legally bound to provide the reasons for the arbitral award.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

In principle, an arbitral award is binding on the parties and has the same force as a final judgment of the court. However, the parties may appeal to the court for the revocation of the arbitral award under certain circumstances (the successful rate is lower than 5%).

Article 40 of the Arbitration Act provides that a party may apply to a court to set aside the arbitral award in any one of the following circumstances:

1. the existence of any circumstance stated in Article 38 (such as that the arbitral award has nothing to do with the dispute, the arbitral award is beyond the scope of arbitration agreement, or the award orders the party to do what is not allowed under the laws);
2. the arbitration agreement is not concluded, invalid or it has yet come into effect or has become invalid before the conclusion of the arbitral proceedings;
3. if the arbitral tribunal fails to give any party an opportunity to present its statement prior to the conclusion of the arbitral proceedings, or if any party is not lawfully represented in the arbitral proceedings;
4. the composition of the arbitral tribunal or the proceedings of the arbitration is in violation of the arbitration agreement or laws;
5. an arbitrator fails to fulfill its duty of disclosure prescribed in paragraph 2 of Article 15 herein and appears to be partial, or has been requested to withdraw but continues to participate in the arbitration, provided that the request for withdrawal has not been dismissed by the court;
6. an arbitrator violates any duty in the entrusted arbitration and such violation carries criminal liability;
7. a party or its representative thereof commits a criminal offence in relation to the arbitration;
8. if any evidence or translation upon which the arbitration award relies is forged or fraudulently altered or contains any misrepresentation;
9. if a criminal or civil judgment, other ruling or an administrative sanction upon which the arbitration award relies, has been reversed or materially altered by a subsequent final judgment or administrative ruling.

The preceding items 6 to 8 are only applied to circumstances where the final criminal conviction has been rendered or the criminal proceeding may not be commenced or continued for reasons other than having insufficient evidence.

The preceding item 4 concerning the violation of the arbitration agreement, and items 5 to 9 are only referred to circumstances where it is sufficient to alter the arbitral award.

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As one of the leading law practices in the world, Lee and Li has been recognised as the leading advisor of insurance law in Taiwan. Lee and Li has a practice that focuses on insurance law, with expertise and extensive experience in handling establishment of insurance companies, the legal compliance of insurance companies, compensation under insurance or reinsurance, dispute resolution, etc. We provide effective representation and strategic advice and have successfully represented local and international clients in most of the landmark cases in Taiwan.
Lee and Li has unmatched capabilities and experience in insurance practice in Taiwan and has handled many cases, worth a total of more than US$ 200 million within a five-year period, for various multinational companies and Taiwanese companies on insurance and related deals and litigations.

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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

Since 2007, in Thailand, insurance/reinsurance and insurance/reinsurance-related businesses/activities undertaken by insurance companies/reinsurance companies, licensed to operate their insurance/reinsurance businesses, are regulated by the Office of Insurance Commission ("OIC"), which was established by the Office of Insurance Act B.E. 2550 ("A.D. 2007") ("OIC Act").

Unlike its predecessor, the Insurance Department, OIC is not considered a government body under the Government Administration Act B.E. 2534 (A.D. 1991), but an independent government agency, carrying a juristic person status within the meaning of domestic corporate law. Nor is OIC considered, under OIC Act, a state enterprise established by and subject to specific law establishing it.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

Under the Non-life Insurance Act B.E. 2535 (A.D. 1992) (as amended) ("NLIA"), which is the specific body of law governing the insurance/reinsurance and insurance/reinsurance-related businesses/activities in the country, only a licensed insurance company, Thai or foreign, may operate a non-life insurance and reinsurance business.

A licence may only be obtained from the Finance Minister through the advice of the Cabinet. The licence, if granted, will include a licence to operate both the insurance business and reinsurance business.

If an applicant is a Thai company, in order to obtain a licence, that company must first be incorporated in the form of a public limited company under the Public Company Limited Act B.E. 2535 (A.D. 1992) (as amended).

One third of the directors must be Thai individuals, and the shareholding structure between Thai shareholders and foreign shareholders must be at least 76:24% (out of shares eligible to vote and already sold). Deviation from the 76:24% shareholding ratios may be granted by the Finance Minister through the advice of the Cabinet, only in the circumstance where a licensed company's status or operation may be detrimental to the insured's or public's interest; however, to the maximum extent of 49% shares (eligible to vote and already sold) being held by foreigners.

If an applicant is a foreign insurance company in whatsoever corporate form – e.g. limited or public limited company or else – depending on the laws of the country in which it is incorporated, a licence may be granted to its branch office in Thailand by the Finance Minister through the advice of the Cabinet.

Both the public limited company or foreign insurer's branch office must a place security deposit (cash, Thai government bond, or otherwise) and maintain the fund at the amount determined.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

As discussed in question 1.2 above, foreign insurers, without their branch office in Thailand being licensed by the OIC, may not directly underwrite insurance or reinsurance in Thailand.

They may, however, do so if the underwriting of insurance or reinsurance does not take place in Thailand. In that circumstance, insureds and insurers (cedents) in Thailand will take their own risks in not being indemnified if foreign insurers fail to honour insurance contracts or reinsurance contracts. Nonetheless, since certain types of policies are not available on the Thai market, e.g. P&I insurance (mutual insurance), except for Institute Protection and Indemnity – Hull CL344 – which is available locally, it is inevitable for insureds and insurers (cedents) to take out those policies from foreign insurers.

That said, in order to protect insureds and the market overall, OIC requires licensed insurers to allocate their risks, through treaty reinsurance or facultative reinsurance, to foreign reinsurers with good standing credit scores.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

In principle, NLIA requires OIC's pre-approval of any insurance policy before issue (under both direct reinsurance and reinsurance), and it must be in OIC's form and wordings.

A type of insurance policy with wording different from that first approved by OIC will result in an insured's choice of wording, either ones with OIC's pre-approval or ones without. In either case, an insurer must be bound by the wordings of an insured's choice.

A type of insurance policy having yet to be approved by OIC will result in an insured's choice of an insurer being bound by such policy, or cancellation thereof with an insurer's return of premiums.

This pre-approval regime has recently been relaxed on account of the Registrar's Orders and No. 53/2561 and No. 54/2561, both issued in 2018.

Under the Registrar's Order No. 53/2561, OIC will, on the date of its receipt of the request, approve the wordings of "international

carriage of goods insurance policy", "domestic carriage of goods insurance policy", "hull policy", and "marine and logistics liability insurance policy" – if an insurer issues a certificate to OIC that the type and wordings of that policy have been reviewed and approved by the International Underwriting Association of London ("IUA") or the Lloyd's Market Association ("LMA"), a joint committee of IUA and LMA, other similar committees, other organisations with the same level of credentials approved of by OIC, or by the Marine Insurance and Logistics Committee, Thai General Insurance Association.

Under the Registrar's Order No. 54/2561, OIC adopts the so-called "File and Use" regime. A licensed insurer or reinsurer may petition for approval of a type and wordings of policy from OIC, and the petition will be deemed approved upon the lapse of 30 days from OIC's receipt of petition without the Registrar's otherwise objection or notice for clarification/additional information.

This "File and Use" regime applies to certain types of policies which are specific and contain wording different from OIC's pre-approved standard polices, or which have never been approved by OIC. Those specific policies are marine and logistics types of insurance policies under the Registrar's Order No. 53/2561, as well as certain other insurance policies, e.g. "all risks insurance policy", "engineering insurance policy", "aviation insurance and aircraft insurance", and "liability insurance".

This "File and Use" regime allows only certain insureds to benefit therefrom. An insured of these specific policies under this regime must either have at least Baht 2 billion worth of its property value in operating business, be a multinational company operating business in Thailand of which the headquarter requires worldwide insurance policy to be taken out, or an individual or juristic person desirous of taking out insurance policy with special coverage for certain types of risks not having yet been standardised by OIC.

An insurer or a reinsurer seeking approval under this "File and Use" regime must either present an insured's request to use a specific insurance policy (in a form determined by OIC), or present an insured's letter acknowledging that type and wordings of such specific insurance policy is not OIC's standard policy and wanting to benefit from and be bound by it.

1.5 Are companies permitted to indemnify directors and officers under local company law?

Where insured companies are liable to compensate their directors, officers, or employees for the latter's death, injury or illness from work, whether through or not through the fault of the insured companies' fault, insured companies will have to provide such compensation (or, indemnify), or reimburse directors, officers, or employees for whatever expenses advanced.

In this regard, a workmen compensation policy would be a good way to cope with this type of risk to which insured companies are exposed.

1.6 Are there any forms of compulsory insurance?

In Thailand, compulsory insurance is required when liability to the public is involved. A good example is motor insurance.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

An insurance claim is largely considered a consumer case under the Consumer Protection Act B.E. 2522 (A.D. 1979) ("CPA") and the Consumer Case Procedure Act B.E. 2551 (A.D. 2008) ("CCPA"), inasmuch that an individual insured will earn a status of consumer and benefit therefrom, while a corporate insured and a reinsurer (cedant) will be considered a business operator and excluded from benefits.

Benefits from a consumer case is an insured (plaintiff)'s immunity from court fees, save where the court exercises its discretion to otherwise order a plaintiff to pay court fees. Grounds for the court's discretion to so order are, *inter alia*, the plaintiff's filing of a lawsuit (consumer case) without reasonable grounds or with excessive quantum, improper behaviour, intentional delay of the proceedings, or any other causes deemed appropriate by the court.

More importantly, there have been Supreme Court's precedents from which interpretation of policy clauses were made leading to rulings being in favour of insureds. This is also true where the disputed insurance claim is being arbitrated under OIC's auspices and rules.

2.2 Can a third party bring a direct action against an insurer?

In Thailand, according to the Civil and Commercial Code ("CCC"), which is a general law governing insurance principle, a third party may bring an insurance claim directly against an insurer under guarantee insurance or third-party liability insurance.

Under the CCC, with or without a third party's direct claim against an insurer, an insurer will not be released from liability, even if it has indemnified an insured, until a third party has actually been compensated.

This direct claim is different to UK's Third Parties (Rights Against Insurers) Act 2010, in which a third party's direct claim against an insurer is conditional upon an insured's insolvency, injury or death.

2.3 Can an insured bring a direct action against a reinsurer?

Although there is no contractual relationship between an insured and a reinsurer, as the first is not a party to the reinsurance contract and the latter is not a party to the insurance contract, Thai court accepts the universal "freedom of contract" principle and will enforce a contractual arrangement in an insurance policy allowing an insured's direct action against a reinsurer, the so-called "Cut Through" clause.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

Under the CCC, an insured's non-disclosure of any and all material facts giving rise to an insurer's increase of premiums or refusal to underwrite, or an insured's misrepresentation of any and all facts, will result in a voidable insurance contract. A duty to disclose and present all material facts is not conditional upon an insurer's request.

An insurer has one month from the date of its knowledge of such non-disclosure or misrepresentation to exercise its right to void an insurance contract, otherwise such right will be extinguished. Such right will also be extinguished after the lapse of five years from the date of the insurance contract, absent an insurer's exercise thereof.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

As discussed in question 2.4 above. A duty to disclose and present all material facts is not conditional upon an insurer's request.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

Under the CCC, an insurer's right of subrogation is automatically created by the application of law upon payment of indemnity. There is no need to incorporate a separate clause entitling subrogation. Nor is there need for a creation of any instrument or deed between an insured and an insurer, transferring the right of claim (against a third-party wrongdoer) from an insured and an insurer.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

Under the Civil Procedure Code ("CPC"), where a defendant is domiciled or cause of action occurs in Thailand, a court of competent jurisdiction to hear an insurance dispute is the court in which a defendant is domiciled or a cause of action occurs within its territorial jurisdiction.

Where a defendant is domiciled outside Thailand or a cause of action occurs outside Thailand, if a plaintiff is of Thai nationality or domiciled in Thailand, a court of competent jurisdiction to hear an insurance dispute is the court in which the plaintiff is domiciled within its territorial jurisdiction.

On the other hand, where a defendant is domiciled outside Thailand or a cause of action occurs outside Thailand, if a defendant has property in Thailand which may be executed, whether temporarily or permanently, a court of competent jurisdiction is the court in which such property is located, within its territorial jurisdiction.

The value of dispute or quantum of claim will definitely determine whether an insurance dispute will be tried and heard in a provincial court or district court of jurisdiction.

Kindly note that Thailand is a codified law country, and there is no jury system.

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

If an insurance dispute is filed as a consumer case, there are no court fees applicable, as discussed in question 2.1 above.

If, however, an insurance dispute is filed as a normal civil lawsuit, and its quantum is up to Baht 50,000,000, it is subject to a court fee at the amount of 2% thereof. Any civil lawsuit with quantum more than Baht 50,000,000 will be subject to a court fee at the amount of 0.1% thereof.

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

Currently, there are three levels of court, with the Supreme Court having the highest rank of hierarchy, followed by the Appellate Court and the First Court, respectively.

Grounds for appealing the First Court's decision are either legal issue, factual issue, or both. If, however, appealing against the First Court's decision is made on factual issue, a quantum must be at least Baht 50,000 – otherwise the First Court's decision must be dissented or certified by one of the First Court's judges hearing the case, or approved by the Chief Judge of the First Court or the Chief Judge of the Regional Court.

All cases, civil or consumer, will end at the Appellate Court level. An escalation of the Appellate Court's decision to the Supreme Court's review must first obtain approval of the Supreme Court's Chief Justice. Upon approval, the Appellate Court's decision may be appealed against either on legal issue, factual issue, or both.

How much time is consumed prior to the decision of the First Court, the Appellate Court, or the Supreme Court will depend on the complexity of the case.

As a general idea, however, it would take approximately one to one-and-a-half years for the First Court to render its decision. The Appellate Court's decision may take approximately one to two years. The Supreme Court's decision may take approximately three to five years.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

In a civil lawsuit, there is no provision under the CPC empowering the court to order disclosure/discovery and inspection of documents on parties to the action or non-parties to the action, or on any issue. The court, in a civil lawsuit, must hear only evidence and documents adduced by the parties.

However, in a consumer case, the CCPA allows the court to exercise its discretion to summon any documents or witnesses to prove any issue in a case at hand, and such discretion may be exercised at will any time during the proceedings.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

Under the CPC and CCPA, there is no provision which requires any party to a civil lawsuit or a consumer case to disclose or refrain from disclosing any documents.

By logic, a party asserting any issue must provide proof thereof, and producing documents attesting or witnesses testifying thereto is a way to go. It would be to the party's own detriment to not produce documents or witnesses that could prove its case.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

As discussed in question 4.1, in a civil lawsuit, there is no provision under the CPC empowering the court to summon any documents or witnesses. In a consumer case, however, the CCPA allows the court to so summon any documents or witnesses to prove any issue.

4.4 Is evidence from witnesses allowed even if they are not present?

Under the CPC and CCPA, evidence from a witnesses (whose name is in a list of witness produced by a party) who does not testify is allowed. However, since such witness does not testify, the credibility

of the witness statements will be considerably reduced or even ruled inadmissible, depending on the court's discretion.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

Under the CPC and CCPA, there is no provision restricting calling expert witnesses, and parties are free to call their own expert witnesses.

4.6 What sort of interim remedies are available from the courts?

Under the CPC and CCPA, interim remedies are available for both the plaintiff and defendant against each other party's certain act or omission alleged to be detrimental to a party seeking interim remedies.

A plaintiff may file an *ex parte* petition for the court's injunctive relief order to: (i) seize or attach property of a defendant upon proof of a defendant's intention to remove, sell, or distribute its property out of the court's jurisdiction; (ii) prohibit a defendant from undertaking any acts upon proof that a plaintiff will continue to suffer from a defendant's repeating or continuing act; (iii) order a government official or registrar to suspend, change, or revoke any registration of the defendant's property or any act given rise to litigation; or (iv) arrest and temporarily detain the defendant. Proof must be to the extent of adequately presenting cause to the court's satisfaction in all cases.

A defendant may also file an *ex parte* petition for the court's injunctive relief order, demanding a plaintiff to place security or deposit money if a plaintiff has no domicile or office in Thailand and has no property (to be enforced against) in Thailand, or if it is plausible that upon the court's judgment in the defendant's favour, a plaintiff will invariably fail to pay court fees and expenses. Proof requires a test of reasonableness and plausibility, relatively less in degree than a plaintiff's *ex parte* petition for the court's injunctive relief order.

A petition for a court's injunctive relief order may be made urgently, either by a plaintiff or a defendant, and granted any time prior to judgment.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

Please refer to question 3.3 above.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Under the CCC, default interest is presently 7.5% per year.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

There are no such standard rules regarding costs. These all depend on the parties' case and bargaining power.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

Under the CPA, there is a provision giving the court discretion to mediate disputes at any time prior to judgment. It is court practice for parties to be directed to mediate prior to hearings. Under the CCPA, the court must direct parties to mediate prior to hearings.

4.11 If a party refuses to a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

A party's failure to mediate or refusal to mediate in a civil lawsuit or a consumer case will result in the resumption of the proceedings accordingly. Parties, however, may agree to other forms of alternative dispute resolution, and petition the court for a suspension of the proceedings, even after such failure to mediate or refusal to mediate.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

OIC has, since 2008, set a rule that any insurance policy issued by an insurer licensed to operate businesses in Thailand must contain a clause entitling an insured (alone) to choose either arbitration or litigation of any dispute between an insured and an insurer. Any insurance policy issued prior to 2008, without such a clause, will be deemed to have been so. This, however, does not apply to "marine hull policy" and "marine cargo policy".

OIC has set standard wording in relation to an insured's choice of arbitration:

> "*Dispute Resolution by way of Arbitration*
> *In case of any dispute, conflict, or claims under this insurance policy between the claimant and the company, and if the claimant wishes and is resolute that such dispute be resolved by arbitration, the company agrees that [such dispute] shall be decided by arbitration according to the Insurance Department's arbitral rules.*"

This is different from an arbitration clause in a reinsurance contract, to which the Arbitration Act B.E. 2545 (A.D. 2002) (as amended) ("Arbitration Act") applies. In such case, there is no standard wording. And, if any party in dispute files a lawsuit against the other party, the other party may always raise an arbitration clause to and for the court's order to strike out the lawsuit.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

Please refer to question 5.1 above.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

As discussed in question 5.1 above, if any party in dispute files a

lawsuit against the other party, the other party may always raise an arbitration clause to and for the court's order to strike out the lawsuit.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

As discussed in questions 5.1 and 5.3 above, if any party in dispute files a lawsuit against the other party, the other party may always raise an arbitration clause to and for the court's order to strike out the lawsuit.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

The Arbitration Act requires that the arbitral tribunal must date and specify the place of arbitration in their award, and unless otherwise agreed by the parties, the arbitral tribunal must distinctly give reasons for their award and may not render the award outside the scope of the arbitration agreement or the relief sought by the parties.

Once the award is rendered, the arbitral tribunal must arrange a dispatch of the copy of their award to all parties.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

Under the Arbitration Act, the arbitral tribunal's award on the merits of the dispute, rendered in or outside Thailand, is final and binding upon parties, and the Thai court of jurisdiction is required to enforce it upon petition by a party seeking the court's enforcement (following the losing party's failure to pay or perform under award).

While there should be no problem enforcing an award rendered in Thailand, where an award is made in a foreign country, the Thai court of jurisdiction will recognise and enforce it if such foreign country is a signatory country to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the so-called "New York Arbitration Convention" or the "New York Convention".

An appeal against the arbitral tribunal's award may, however, be petitioned to the Thai court of jurisdiction by the losing party only upon proof of the following circumstances:

(i) lack of legal capacity of a party to the arbitration;
(ii) ineffectiveness of the arbitration agreement under the law of the country agreed upon by parties as the governing law, or of the country in which an award is made (absenting the parties' such agreement on the governing law country);
(iii) service of process is not duly served on a losing party concerning the appointment of the arbitral tribunal or the arbitral proceedings;
(iv) an award is rendered outside the scope of the arbitration agreement or of relief sought;
(v) composition of the arbitral tribunal or the arbitral proceedings is not in accordance with parties' agreement or the law of the country in which an award is made (absenting parties' such agreement on the governing law country); or
(vi) an award has yet to become binding or has been revoked or suspended by the competent court of jurisdiction or under the law of the country in which an award is made.

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Pramuanchai Law Office ("PMC") was founded in 1985 and in 1995 was incorporated as a private limited company. The firm is headed by Prof. Pramual Chancheewa and his partners. The firm provides a wide range of high-quality legal services, concentrating on maritime claims, labour disputes, insurance and customs matters, arbitration, commercial dispute, contract drafting including aviation disputes in cargo, passenger and casualty claims. The firm has expanded its services to cover legal consultation in areas of corporate and foreign business laws.

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Turkey

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Selcuk Esenyel

1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

The main governmental body that regulates and supervises the insurance and reinsurance sector is the General Directorate of Insurance acting under the Ministry of Treasury and Finance.

More concretely, the General Directorate of Insurance and the Insurance Supervisory Boards acting under the Ministry are the two main bodies responsible for the regulation and supervision of the insurance and reinsurance sector.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

Insurance and reinsurance companies acting in Turkey should be established as joint stock or cooperative companies.

Furthermore, these companies are not allowed to have any other scope of work that is not directly related to insurance or reinsurance.

The Insurance Code foresees certain requirements for the founders of insurance/reinsurance companies. Accordingly, these requirements are mainly on the reliability of the founders in relation to their financial status and criminal records.

Furthermore, there are also specific requirements for members of the Board of Directors and Auditors related to their financial status, criminal records, education and experience level.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

According to the Council of Ministers' decision, foreign insurance and reinsurance companies cannot directly act as insurance and reinsurance companies in Turkey, but could act as branches.

On the other hand, foreign insurance and reinsurance companies can market their policies by using brokers established and acting in accordance with the Insurance Code and relevant legislation requirements.

Therefore, there is no rule restricting foreign investors, including foreign insurance and reinsurance companies, to establish a Turkish insurance and reinsurance company in accordance with the requirements of the Insurance Code and relevant legislation.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

Even though the freedom of contract is a basic and mandatory rule in the law of contracts according to the Turkish Code of Obligations, the Turkish Commercial Code, Insurance Code and relevant legislation foresee important exceptions for insurance and reinsurance contracts.

Therefore, according to the Insurance Code, all general terms of an insurance contract should be reviewed by the Directorate and Board.

On the other hand, according to the stipulations of the Turkish Commercial Code, stipulations of insurance and reinsurance contracts should be interpreted for the benefit of the insured.

Furthermore, according to the Turkish Code of Obligations, if the contract is composed by general terms prepared by one party and contain disadvantageous obligations for the other party, those terms should be deemed to be unwritten.

1.5 Are companies permitted to indemnify directors and officers under local company law?

According to the Turkish Commercial Code and relevant legislation, the companies may, in some conditions, request the indemnification of their damages from their directors and officers, especially if the directors and officers caused the damage through their own fault. On the other hand, the Turkish Commercial Code foresees important restrictions on the borrowing of the member of the Board of Directors for joint stock companies.

On the other hand, in such cases, other legal and administrative penalties are also foreseen in the Insurance Code.

1.6 Are there any forms of compulsory insurance?

The Turkish Code of Insurance and related legislation foresees some types of compulsory insurance such as traffic liability insurance, professional liability insurance for some professions (such as doctors, lawyers, etc.), personal accident insurance (in case of carriage of person by land, air and sea), liability insurance for dangerous substance and hazardous waste, etc.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

In general terms, the substantive legislation on insurance law is more favourable to insureds. The insureds are protected by insurance legislation on one hand, and by consumer legislation on the other.

2.2 Can a third party bring a direct action against an insurer?

Turkish legislation gives the possibility to third parties to bring direct action against insurers, especially in third-party liability insurance.

2.3 Can an insured bring a direct action against a reinsurer?

According to the second paragraph of article 1403 of the Turkish Commercial Code, an insured does not have the right to bring direct action against a reinsurer.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

According to article 1439 of the Turkish Commercial Code, if the disclosure is not made properly or incorrectly, the insurer may terminate the contract within 15 days or request additional premium. If the requested additional premium is not accepted within 10 days by the policy holder, the insurer shall be discharged of its policy obligations.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

Articles 1435 and 1436 of the Turkish Commercial Code regulates the insured's duty of disclosure.

Accordingly, the insured is under the duty to disclose any important information in relation to the policy. Furthermore, any non-disclosed or incorrectly disclosed information should be deemed important if it could lead to the non-conclusion of the contract or to its conclusion with different terms if correctly disclosed.

Furthermore, according to article 1436 of the Code, if a list of questions is given, the information in relation to the list should be deemed important.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

Articles 1472 and 1481 of the Turkish Commercial Code regulate the automatic right of subrogation for loss and liability insurances upon payment of the indemnity.

Accordingly, the insurer, upon payment of the indemnity, would legally succeed to its insured. Furthermore, if legal action or enforcement proceedings had already been initiated against the relevant party, the insurer may continue these proceedings in accordance with the rule of subrogation without the Court's or defendant's consent upon the proof of payment of the indemnity.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

This is a very controversial issue under Turkish law due to the entry into force of the Turkish Consumer Code in 2013.

According to articles 4 and 5 of the Turkish Commercial Code, any issue stipulated under the Code should be deemed commercial, and commercial courts would be solemnly competent for all kind of disputes raised from these commercial issues. Furthermore, if both parties of a contract are merchants and the contract is related to their commercial activities, the dispute arisen from such contract should also be deemed as a commercial dispute under the solemn authority of the commercial courts.

Therefore, according to paragraph (l) of article 3 of the Turkish Consumer Code that entered into force one year after the Turkish Commercial Code, insurance contracts concluded between consumers and insurers should be deemed as a consumer transaction, and the competent court for such disputes should be consumer courts.

In the light of the legislation explained above, if a dispute arises from an insurance contract concluded between an insurance company and a merchant in relation to the merchant's commercial activities, this should be deemed as a commercial dispute, and the commercial court would be competent; whereas if a dispute arises from an insurance contract concluded between the insurer and insured having any relation to a commercial activity, consumer courts would be competent.

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

In order to commence a commercial dispute, court fees should be calculated on the basis of a percentage of the alleged indemnity and/or claim.

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

Once the claim petition is submitted, examined by the court and notified to the defendant, the defendant would have at least two weeks to submit its responses. This two-week period may be extended by the court to a maximum of one month.

After the submission of the responses, the claimant would have its two-week period for representing its replication petition. This period of two weeks may also be extended for a maximum term of one month.

At the last part of petition exchanges, the defendant would again have its two-week period for presenting its rejoinder petition. This period may also be extended to a maximum of one month.

It usually takes about two months for the court to appoint a hearing date once this exchange of petitions period is terminated.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

First of all, according to the general rule of procedural law on burden of proof (*onus probandi*), each party should submit all kinds of evidence in relation to their claim or defence.

Furthermore, the court may also order the parties or third parties to submit and/or disclose every kind of document that is deemed to be in relation to the dispute.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

First of all, it should be underlined here that lawyers, due to professional secrecy, are under the duty to not disclose any facts or information entrusted to them by their client.

Secondly, according to articles 220 and 221 of the Turkish Code of Civil Procedure, if a party or a third party refuses to submit a required document, the court is obliged to tender an oath to the related party stating that this document does not exist or cannot be found.

Furthermore, if the relevant party does not submit any legally grounded reason for the non-disclosure of a relevant document in conjunction with its claim, the court would assume that the claims of the counterparty are proven or the claim of the relevant party could not be proven.

Additionally, a document produced in the course of settlement negotiations/attempts may not be disclosed on the basis of confidentiality, business secrecy or ethical reasons.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

According to the Turkish Code of Procedure, witnesses may be heard until the decision is given by the court. Therefore, it is possible for the court to hear the witness at the final hearing but before giving the final decision.

4.4 Is evidence from witnesses allowed even if they are not present?

According to the general rule stipulated under the first paragraph of article 258 of the Turkish Code of Procedure, the witness should be heard at the competent court.

Therefore, the court may decide to hear the witness in the place of the litigation or litigated goods.

It is also possible to hear the witness at his/her residence if the witness is ill or disabled to the extent that he/she could not be present at the court house.

Furthermore, according to the fourth paragraph of article 258 of the Turkish Code of Procedure, if the witness does not reside in the judicial locality of the competent court, the witness might be heard by another court within the judicial locality of his/her residence via rogatory court.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

According to Turkish procedural law, there are no restrictions on appointing expert witnesses. The court may appoint experts either on its own or upon a party's request. However, an expert view (or expert report) is not a binding document for the court. More concretely, even with an expert view presented or an expert report submitted, the court would still remain as the final authority to decide on the litigation.

It is possible for the parties to also add an expert view in their submissions. Therefore, a court-appointed expert is a more common expert witness type used under the Turkish litigation procedure.

4.6 What sort of interim remedies are available from the courts?

The Turkish Code of Procedure regulates preliminary injunction under its article 389 for cases where serious damage might occur or where it would be impossible or difficult to obtain rights due to changes in the current situation.

Furthermore, article 257 of the Turkish Enforcement and Bankruptcy Code foresees a precautionary lien for the money receivables on the movable and immovable properties of the debtor.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

Under the three-tier appeal system, accepted also by Turkish procedural law, the Regional Courts of Appeal act as appeal courts (secondary degree courts) for the decisions given by the Courts of First Instance, whereas the Court of Cassation (or Supreme Court) remains the final decision-making authority for appeals that have been made against the Regional Courts of Appeal's decisions.

As a general rule, all final judgments could be appealed. Therefore, judgments on claims amounting under TRY 3,560 are non-appealable before the Regional Courts of Appeal.

Furthermore, Regional Courts of Appeal are the final judicial authorities for judgments on claims not exceeding TRY 47,530 (including this amount).

The appeal period is two weeks for the Regional Courts of Appeal and one month for the Court of Cassation. Therefore, that period of appeal may vary in certain relevant legislation.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Interest is generally recoverable in respect of claims. The interest rates vary according to the nature of the dispute and are yearly reviewed by the Central Bank of Turkey. If an example should be given, the interest rate for a commercial dispute which arose after 1 January 2019 is 21.25% yearly.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

Civil proceedings costs are as follows: application fees; official attorney fees; and litigation expenses.

The Code of Fees and Charges and secondary tariffs determine most of the litigation costs and are reviewed every year.

As a general rule, litigation expenses shall be paid before filing an application. At the end of the proceedings, litigation costs and the official attorney fee determined by the court shall be borne by the losing party.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

The main alternative dispute resolution ("ADR") method used in Turkey is arbitration. Therefore, the court may not *ex officio* compel the parties to arbitrate. The court would compel the parties to arbitrate if there is an arbitration clause in the contract

and one of the contracting parties presented the arbitration objection as a preliminary objection.

Mediation is also one of the ADR methods used in Turkey. Compared to arbitration, the use of mediation is quite limited, but the government encourages its use in order to decrease the files applied before the courts. That is why Turkey has adopted a mandatory mediation mechanism for labour law disputes as of 1 January 2018, and for commercial law disputes as of 1 January 2019. Accordingly, the parties should apply to mediation before filing a claim arising from a labour or commercial law dispute.

Furthermore, in the matter of insurance and reinsurance, the Turkish Insurance Code foresees an insurance arbitration committee as an ADR method. Application to the insurance arbitration committee is not mandatory. Therefore, the court may not compel the parties to apply to the insurance arbitration committee. In addition, for the admissibility of the application, the relevant party should not file a legal action before the commercial or consumer court.

4.11 If a party refuses to a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

Mediation and arbitration are, as obvious as it is by their names, ADR methods. This is why parties are not under the obligation to mediate or arbitrate.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

As stressed in the above paragraphs, arbitration is an ADR system conducted upon the agreement of the parties. That is why the intervention of the courts may happen only in some circumstances and party autonomy is a given priority.

At first, if the parties do not comply with the arbitration clause, the court may not *ex officio* apply the arbitration clause and oblige the parties to arbitrate. In other words, the arbitration clause would be taken into consideration by the courts if presented as a preliminary objection by one of the parties to the court.

On the other hand, the courts may intervene when the parties fail to agree on the appointment of the arbitrators; this may occur upon the application of either party, or the parties may apply to the courts so as to obtain interim relief, or the court may extend the period so that the arbitration process should be concluded upon the application of either party.

Along with this general explanation, the insurance arbitration committee should also be explained here in general, as this is much more of an institutional arbitration system under the control of the General Directorate. That is why, deviating from the arbitration system recognising party autonomy, once the litigation is brought in front of the insurance arbitration committee the parties may neither appoint their arbitrator nor decide on the law to be applied.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

In general rules, an arbitration clause should be put into an insurance and reinsurance contract. Therefore, a specific form of words is foreseen neither under the Turkish Code of Procedure nor the Code of International Arbitration.

Furthermore, according to article 30 of the Turkish Insurance Code and the relevant legislation, even though an arbitration clause is not foreseen in an insurance agreement, the insurer and insured may apply directly to the insurance arbitration committee; the non-existence of an arbitration clause in the contract of insurance may not be objected to in such case. In other words, arbitration competence of the insurance arbitration committee may be foreseen as semi-mandatory only for insurance contracts.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

Except for specific exceptions such as disputes arising out of or in connection with the rights *in rem* in relation to immovable goods in Turkey, the courts may not refuse to enforce a valid and enforceable arbitration clause.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

Regarding an interim measure or determination of evidence, if an arbitration panel or arbitrator issues an interim measure or decides on the determination of evidence, the enforcement of it may be requested by the competent court.

Furthermore, if the issuance of such decision could not be enforceable or would not be realised on time, the party or parties may apply directly to the court for the decision of an interim measure or of the determination of evidence. The interim measure might be a preliminary injunction or precautionary lien as explained under question 4.6 above.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

According to article 436 of the Turkish Code of Procedure setting out the rules, an award ought to contain the legal reasons and grounds upon which the decision is made.

Similarly, article 14 of the Turkish Code of International Arbitration provides that an award should contain the legal reasons and grounds upon which the decision is made and the amount of compensation if requested.

Even though the Turkish Insurance Code does not provide any rules regarding the formal requirements of the award issued by the insurance arbitration committee, the Code itself refers to the Turkish Code of Procedure in the event that there are no specific provisions for a matter. Therefore, where there is an insurance arbitration award, it should also contain the legal reasons and grounds.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

Under Turkish Law, arbitral awards cannot be appealed. Arbitration awards, whether rendered in Turkey or abroad, are binding and enforceable as of the time they are rendered.

Arbitration awards could only be set aside before Turkish Courts of First Instance on very limited grounds.

In addition to that, filing an application to set aside an international arbitration award does not affect the enforceability of the award; whereas for domestic awards, filing an application to set aside does not prevent the award from being enforceable.

Although arbitration awards cannot be appealed, the judgments setting the award aside can be appealed.

When it comes to the award given by the insurance arbitration committee, an appeal system is foreseen in the relevant legislation on insurance arbitration committee within the committee. Therefore, it would be possible also for such arbitration awards to be set aside before Turkish Courts of First Instance on the same limited grounds as normal arbitration awards.

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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

The Insurance Authority regulates and licenses all UAE insurance companies established onshore as per the Federal Law No. 6 of 2007 which establishes the Insurance Authority and regulates its functions. Entities incorporated with free zones, such as the Dubai International Financial Centre and the Abu Dhabi Global Market, are regulated by their respective regulatory authorities.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

In accordance with Decision No. (25) of 2014 pertinent to the Financial Regulations for Traditional Insurance Companies, the minimum capital requirement for incorporating an insurance company within the UAE is AED 100 million, while that of a re-insurance company is AED 250 million. The same capital requirements apply to Takaful operators.

In accordance with Article 24 of the Federal Law No. 6 of 2007 on Establishing the Insurance Authority and the Regulation of its Operations as amended by Federal Law No. 3 of 2018, insurance and reinsurance companies may be established in the form of either a PJSC, a branch of a foreign insurance company, or an insurance agent. In relation to a PJSC, foreign ownership is capped at 49% of the stake of the company, the other 51% being that of a UAE national. Where a company operates an insurance practice through a branch, an agent of the branch, being a UAE national, must be appointed.

As per Article 7 of the Foreign Direct Investment Law, which permits foreign investment of up to 100%, insurance services are on the "negative list" and are therefore excluded from the ambit of the Law.

By virtue of the Chairman of the Insurance Authority Resolution No. 2 of 2009, any insurance company conducting activities within the UAE should be licensed by and registered with the Insurance Authority. This is done through submitting an application to the Authority which would be subject to the approval of the general manager of the Insurance Authority, and ultimately of the Insurance Authority's Board. Supporting documents to be submitted along with the application include the company's memorandum of association, an economic feasibility study and the company's work plan, in addition to a certificate by the actuary. Once the application is accepted by the Board, the licence acceptance resolution shall be published in the official gazette and the competent bodies shall be advised to execute its content.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

By virtue of the Chairman of Insurance Authority Resolution No. 2 of 2009, a foreign insurance company may only be able to conduct its activities within the UAE by incorporating a branch or through a broker (agency). Whether through a broker or a branch, the practice must be registered and licensed by the Insurance Authority.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

Yes, several laws and Board Resolutions issued by the Authority set out Provisions which insurance companies must abide by. Examples include the UAE Civil Code and Federal Law No. 6 of 2007 (as amended), with exclusion clauses and arbitration clauses. There are also obligatory unified insurance terms for certain kinds of insurance, such as motor insurance.

1.5 Are companies permitted to indemnify directors and officers under local company law?

The UAE Commercial Companies Law does not permit onshore companies to exclude directors/managers' liability arising out of the director's error, breach of duties or acting outside his authority. That said, UAE law does not prevent a company from indemnifying its directors/officers from liability arising out of the proper performance of their duties. However, there is nothing in the law that forbids companies from procuring directors' and officers' liability insurance.

1.6 Are there any forms of compulsory insurance?

Construction, motor, and health insurance are compulsory within the UAE, the latter of which is only applicable to companies with a minimum number of employees by virtue of the Dubai Health Insurance Law, Law No. 11 of 2013.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

The law imposes obligations and grant rights to both the insured and the insurer. It cannot be said that the legislator favoured one over the other. For instance, the law requires the insured to disclose information material to assessment of risk by the insurer. If the insured fails to perform this duty toward the insurer, there are remedies available to the insurer. This obligation continues during the insurance term, during which the insured has to disclose all information relevant to the insured risk. The law further imposes certain requirements for the validity of the exclusion of the insurer's liability in the policy. If the insurer complies with them, the relevant will be applied. That said, the practice by the UAE local courts may have been different. In our view, the UAE local courts generally tend to be more sympathetic with the insured than with the insurer when they apply the law.

2.2 Can a third party bring a direct action against an insurer?

In motor insurance, a third party can bring a direct action against an insurer in certain circumstances. In the other lines of insurance, in order for a third party to bring a direct action against an insurer, the third party must be named in the policy as a beneficiary. However, we have seen recent court judgments dealing with liability insurers, where the injured person was able to directly recourse against the insurer although the injured person was not named in the policy as beneficiary.

2.3 Can an insured bring a direct action against a reinsurer?

There is no mechanism for an insured to bring a direct action against a reinsurer. The insured can only pursue his direct insurer. The insurer can in turn pursue his reinsurer. In the relationship between the insurer and the reinsurer, there are no specific reinsurance provisions in the law and the general insurance provisions apply.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

The remedies differ depending on whether: (i) the insured acted in good faith or bad faith; (ii) the risk has materialised or not; and (iii) the non-disclosure was at the time of or after entering into the policy.

If the insured acted in good faith and the risk has not materialised, the remedy may be to seek termination of the policy by means of a court judgment. If the insured acted in good faith and the risk has materialised, the remedy may be a reduction of the indemnity amount. The basis of the reduction will be proportionate reduction with what the insurer would have charged as premium had the insurer been aware of the non-disclosed information. The remedy in the event of good faith non-disclosure is not affected by whether the non-disclosure was at the time of or after entering into the policy.

If the insured acted in bad faith and the non-disclosure was at the time of entering into the policy, the remedy may be avoidance of the risk provided that certain conditions are met. If the insured acted in bad faith and the non-disclosure was after entering into the policy, the remedy may be to seek termination of the policy by means of a court judgment; however, the insurer may still be required to indemnify any risk up to the date of the judgment terminating the policy.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

Yes, there is a positive duty on the insured to disclose information material to a risk. In practice, at the time of entering into the policy, the insurer usually provides a proposal form to the insured and the insured must disclose information in that proposal form. If a response on a particular issue is not addressed in the proposal form but it is relevant to the risk, the insured is still under an obligation to disclose it. After entering into the policy, the insured has a positive obligation to disclose any information material to the risk.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

There is no express automatic right of subrogation in non-marine insurance. In practice, insurers usually obtain a subrogation deed from the insured upon the payment of the indemnity. In marine insurance, there is an automatic right of subrogation upon payment of the indemnity by the insured. However, it is advisable for insurers to evidence subrogation upon payment.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

In 2019, an insurance disputes committee was established to hear and decide insurance disputes. The committee will initially attempt to encourage the insured and the insurer to resolve the dispute amicably. If this is not possible, the committee will decide on the dispute. The committee's decision is appealable to the competent first instance court within 30 days from notification of the committee's decision. There is an automatic right of appeal of the first instance court judgment provided that the claim amount is or exceeds AED 50,000. Further, any judgment of the court of appeal can be appealed to the cassation/federal high court if the claim amount is or exceeds AED 500,000.

There are no cases heard before a jury in the UAE local courts.

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

The court fees depend on whether the case is commenced before a local or a federal court and if commenced before a local court in which Emirate the case is commenced. The UAE consists of

seven Emirates. Out of the seven Emirates, three Emirates (Abu Dhabi, Dubai and Ras Al Khaimah) have separate local courts. The other four Emirates (Sharjah, Ajman, Umm Al Quwain and Fujairah) have federal courts. Generally, most of the courts have a fee cap ranging between AED 30,000 and 40,000.

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

The resolution establishing the insurance disputes committee came into force on 31 October 2019, so the timeframe for preparing and deciding cases before this committee remains to be tested. In terms of the local courts, following submission of the claim to the court, a hearing is scheduled within one to three weeks from its submission. There will be several hearings at which each party will be entitled to submit memoranda and documents. The number of hearings is in the court's discretion. When the court considers that the case is ready for a judgment, the court will reserve the case for judgment. After reserving the case for judgment, the parties are generally not permitted to submit memoranda and documents; however, on certain occasions, the court may permit the parties to submit memoranda only. It commonly takes one to three years from submission of the case with the first instance court for a final decision to be issued by the cassation/federal high court.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

Before the local courts, there is no discovery process nor disclosure obligation on the parties, except where the court orders a party or a governmental authority to disclose a particular document upon request of the other party under certain circumstances. It is not possible for the court to order the non-party to the action to disclose documents; however, the parties can adjoin third parties into the action with a request to disclose documents. In practice, it is rare for the court to order that a party (either a party to the action or an adjoined party) is obliged to disclose a document. However, a request to oblige a governmental authority to disclose documents is more frequently accepted.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

As a matter of principle, a party can withhold all documents unless ordered otherwise by the court, as there is no positive disclosure obligation. A court cannot order a party to submit advice given by its lawyer, but can order a party to submit a document prepared in contemplation of litigation. In other words, there is no privilege for documents prepared in contemplation of litigation, but there is privilege for legal advice given by lawyers.

With regards to documents in the course of settlement/negotiation attempts, the other party will have them and nothing in the law prevents it from submitting the documents to the court. The UAE local courts do not recognise the without-prejudice basis in settlement discussions.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

Yes, the local courts have the power to request witnesses to give oral evidence at any hearing. However, in practice this rarely occurs, and the courts usually rely on documents and expert evidence.

4.4 Is evidence from witnesses allowed even if they are not present?

As a matter of procedure, it is permitted to submit written testimonies by witnesses. However, the evidential weight of such testimonies is within the court's discretion.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

The local court system is dominated by court-appointed experts in that they will be appointed by the court in any matter that involves any technical issue or to assess the quantum of claims. The first instance and appeal courts place heavy reliance on the report issued by the court-appointed expert. In addition, the parties are permitted to submit their own expert report, which is commonly known as a 'consultant expert report'. However, the courts do not give the consultant expert report the same evidential weight as the court-appointed expert's report.

4.6 What sort of interim remedies are available from the courts?

A variety of interim measures can be taken by the local courts. These include attachment of assets, ship arrests, appointment of experts to preserve evidence and other measures.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

If the claim amount is or exceeds AED 50,000, the judgment can be appealed from the first instance court to the court of appeal on grounds in respect of law and facts. If the claim amount is or exceeds AED 500,000, the judgment can be appealed from the court of appeal to the cassation/federal high court on grounds in respect of law only.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Interest is generally recoverable for most types of commercial claims before the UAE local courts. The maximum rate of recoverable interest is 12% annually; however, the courts commonly grant the rate of 9% annually. The date from which the interest starts to run depends on the nature of the claim. On some occasions, interest starts to run from commencement of the claim. On other occasions, interest starts to run from the date of judgment.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

The standard rules before the local courts are that legal costs are not recoverable except for a minimal value not exceeding AED

2,500 (USD 680) and that court fees are recoverable from the losing party.

There are no advantages in relation to costs for making an offer to settlement. The recovery of legal costs is fixed at a *de minimis* level, and so the UAE local court does not consider the merit of settlement offers previously made in determining costs recovery.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

The courts cannot compel the parties to mediate disputes if they have not agreed on mediation. However, the courts may invite the parties to reach settlement by amicable discussions. In terms of the other forms of Alternative Dispute Resolution, the UAE local courts cannot compel this either.

4.11 If a party refuses to a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

If the parties have not agreed to mediate or to follow an alternative dispute resolution mechanism, there are no consequences for a party that refuses to follow them.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

The courts generally respect the parties' autonomy and uphold the arbitration agreement provided that it complies with the UAE law requirements. The intervention of the court in the arbitral proceedings is limited to instances where the law permits that or the parties agree on it. The law permits the parties to refer to the court for appointing an arbitrator or to enforce an interim relief measure under certain circumstances.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

Under the Civil Code, in order for an arbitration clause to be enforceable in a contract of (re)insurance, it must be agreed separately from the standard conditions. The effect of this requirement is that the arbitration clause cannot be a standard condition in the policy. It must be agreed by reference or by means of endorsement. There are other requirements for validity of arbitration clauses under the UAE Arbitration Law which are applicable for all types of contracts and not limited in (re)insurance contracts, such as that the contract must be in writing and executed by an authorised person.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

Yes, if the express arbitration clause does not comply with the requirements of the Civil Code and/or the Arbitration Law, and if the party defending court proceedings commenced in contravention with the arbitration clause waives it and concedes to the jurisdiction of the courts.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

The law allows a party to seek a variety of interim relief measures from the court. These include preservation of evidence, attachment of assets, and an action to be taken in order to prevent current or imminent harm.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

The arbitral award must be reasoned unless the parties agree otherwise or the law applicable in the procedures of the arbitral proceedings does not require the award to be reasoned.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

Pursuant to the Arbitration Law, the arbitral award is final and non-appealable. However, at the stage of enforcing an arbitral award, there are certain grounds, not including the merits of the award, for seeking to annul/object to the arbitral award.

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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

The national commission that provides state regulation for the financial services market is a government body authorised to regulate insurance/reinsurance company activity.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

Any joint-stock company, limited partnership or partnership with additional liability registered under the Ukrainian Law "On commercial partnerships" may obtain a licence for the provision of financial services to act as an insurer/reinsurer in Ukraine.

The company registration procedure lasts from three to five working days. The procedure period is needed to draft necessary documents, apply for registration and receive an extract from the Register of Commercial Partnerships. The official Registrar or notary provides company registration.

The head of the executive body of the insurer or its first deputy must have a university degree in economics or law, and the chief accountant of the insurer must have a university degree in economics.

The Insurer is obliged to develop and approve insurance rules separately for each type of voluntary insurance for which it is licensed, and to register such rules in the national commission that provides state regulation for the financial services market.

To obtain a licence, an entity must comply with the demands stipulated in the Decree of the Cabinet of Ministers of Ukraine "On the licence terms for commercial activity of financial services provision (except activity on the securities market)".

Foreign insurers that have obtained the right to act as legal insurers/reinsurers according to the laws of the country of registration may provide insurance services through a subsidiary branch in Ukraine.

Foreign insurers may act in Ukraine under the following conditions:

- the insurer's country is a WTO member country;
- the memorandum on exchange of information is signed between the authorised body for supervision of insurance companies of the insurer's country and the authorised body of Ukraine;
- the insurance activity of the insurer is subject to state supervision in the country of registration;
- an international agreement on tax evasion and the avoidance of double taxation has been concluded between Ukraine and the insurer's country;
- the insurer's country is not included in the list of offshore zones determined in accordance with the legislation of Ukraine;
- the insurer has obtained the necessary permissions for insurance activity in the country of registration; and
- the rating of financial reliability (stability) of the insurer meets the requirements established by the authorised body.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Foreign insurers are able to write business directly.

Foreign insurers are permitted to act as insurers/reinsurers/agents/brokers exclusively in marine transportation, commercial aviation, space rocket launches, freight for the transportation of cargo and liability connected thereto, stated as an object of an insurance.

Accompanying services, such as consultation, risk calculation and claims handling, and reinsurance services may also be provided by foreign insurers.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

The parties must comply with the legal requirements for insurance agreements.

Article 4 of the Law "On insurance" defines the subject of an insurance agreement as property risks that are connected with:

- life, health, working ability and retirement security;
- possession, use and disposal of property; and
- damage incurred by a physical or legal person.

According to Article 16 of the Law "On insurance", insurance agreements must consist of:

- title of the document;
- name and address of the insurer;
- name, address and date of birth of the insured;
- name, address and date of birth of the beneficiary;
- subject of the agreement;
- sum of the insurance;
- list of insurance cases;
- amount of detriment and terms of payment;
- insurance tariff;
- term of the agreement;
- the conditions for change/termination of the agreement;
- the conditions for insurance payment;
- a list of grounds for refusal of the insurance payment;
- rights, obligations and liability of the parties; and
- other terms agreed.

1.5 Are companies permitted to indemnify directors and officers under local company law?

Companies are permitted to indemnify directors and officers under local company law.

1.6 Are there any forms of compulsory insurance?

Article 7 of the Law "On insurance" stipulates the 43 types of compulsory insurance.

In practice, significant "part out" of insurance types is nominally compulsory.

The following types of insurance are compulsory for commercial activities:

- medical insurance;
- personal insurance for medical and pharmaceutical workers of private organisations for cases of HIV infection;
- personal insurance for workers of fire-fighting stations;
- insurance for sportsmen of the highest categories;
- health and life insurance for veterinarians;
- personal insurance in case of a transport accident;
- civil aviation insurance;
- liability insurance for a marine transport carrier in respect of damage inflicted on passengers, luggage, post, cargo, other carriers and third persons;
- civil liability insurance for owners of ground vehicles;
- insurance of water transport;
- civil liability insurance for a nuclear power station in respect of damage inflicted by a nuclear accident;
- civil liability insurance for an investor for the damage incurred on the environment and the person's health;
- property risks insurance under provisions of the Law "On oil and gas";
- insurance for workers of state medical and scientific institutions for cases of infection;
- liability insurance for exporters and persons liable for disposal of hazardous waste in respect of the damage inflicted on the person's health, property or environment at the moment of the hazardous waste's export or utilisation; and
- property in concession insurance.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

The substantive law is more favourable to insureds.

2.2 Can a third party bring a direct action against an insurer?

Any party can bring a direct action in case of a violation of a party's rights.

2.3 Can an insured bring a direct action against a reinsurer?

An insured can bring a direct action against a reinsurer, unless another procedure is agreed between the parties of an insurance agreement.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

An insurer can refuse to provide insurance payments in case of either misrepresentation or non-disclosure by the insured. Other types of remedies may be stipulated by the insurance agreement.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

Under Article 21 of the Law "On insurance", an insured is obliged to present all information that may affect the insurer's insurance risk assessments.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

Article 27 of the Law "On insurance" stipulates the automatic right of subrogation for insurers.

Insurers are not obliged to represent interests or cooperate with insureds in bringing a claim against a third party.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

Commercial insurance disputes between legal persons are adjudicated by the commercial court.

Commercial insurance disputes between physical persons and another party are adjudicated by the civil court.

There is no right to hear a commercial insurance dispute before a jury.

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

The Ukrainian Law "On court fees" defines the amounts of court fees. Sums for court fees change once a year, because of the connection with a living wage.

The party that initiates the proceeding is obliged to pay the fee for the claim application when the claim is applied for.

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

The length of a commercial case adjudication depends on the type of case and the functioning capacity of the court.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

Parties may present original documents or accurate copies related to the case before the actual case is adjudicated.

Parties may present other documents later, explaining why these had not been presented earlier.

Parties can apply to the court for document disclosure before/after the case has commenced.

To obtain document disclosure, parties must declare the following information to the court:

- the name of the document;
- the connection between the document and the case;
- the fact that can be proven by the document;
- the reason for which the other party possesses the document;
- the reason for which the party cannot obtain the document; and
- the attempts of the party to obtain the document.

The court then makes a court ruling to provide the document disclosure.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

Parties may not withhold from document disclosure when provided by a court ruling.

Parties can state an inability to disclose documents to the court within five days of receipt of the court ruling, based on reasonable grounds.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

The parties exclusively have the right to call a witness under civil proceedings.

In commercial proceedings, the court has the power to require witnesses to give evidence when the court has reasonable doubts as to the witnesses' evidence presented in writing.

4.4 Is evidence from witnesses allowed even if they are not present?

In civil proceedings, there is no prescribed procedure for presenting evidence from witnesses in writing.

Witnesses can present evidence via video conference. Witnesses may take part in a video conference while present at another court building defined by the court, according to Article 212 of the Civil Proceeding Code.

In a commercial proceeding, witnesses are allowed to conclude a witness application to present the evidence in written form, according to Article 88 of the Commercial Proceeding Code.

Witness applications must be signed by the witness. When the witness is unable to present the evidence personally on the court's demand, a signature shall be certified by a notary.

Witness applications must be concluded in Ukrainian or translated to Ukrainian by a certified translator.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

Expert witnesses can be appointed by the court or by parties. The court has no powers to appoint an additional expert.

Parties may express reasonable doubts to the court when the expert appointed is biased.

When parties have reasonable doubts as to a conclusion made by an expert, another expert shall be appointed.

When the conclusion of an expert does not contain answers on the questions stated to the expert, an additional expert shall be appointed.

If a court appoints an expert, the parties cover the expert's fees *pro rata*.

4.6 What sort of interim remedies are available from the courts?

Civil or commercial courts can apply the following interim remedies:

- arrest of property or monetary assets;
- prohibition of the party to perform a specific action;
- obligation for the party to perform a specific action;
- prohibition for any person to perform a specific action related to the subject of the dispute;
- forced cessation of sale;
- cessation of an enforcement procedure;
- transfer of the disputed subject to storage;
- cessation of customs clearance;
- vessel arrest in respect of maritime claims; and
- other remedies.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

Decisions of civil or commercial courts of the first instance can be appealed by parties to the case or a third person whose rights and/or obligations were affected by the decision.

Decisions of the civil court can be appealed within 30 days from receipt of the decision, according to Article 354 of the Civil Proceeding Code.

Decisions of local civil courts can be appealed to the local appeal court. Decisions of the appeal court can be appealed to the High Court.

Decisions of commercial courts can be appealed within 20 days from the receipt of the decision, according to Article 256 of the Commercial Proceeding Code.

Decisions of the local commercial court can be appealed to the local appeal commercial court. Decisions of the local appeal commercial court can be appealed to the High Court.

Decisions of the civil or commercial courts can be appealed on the following grounds:

- the case circumstances were not investigated by the court;
- vital circumstances of the case were not defined by the court;
- the presented evidence related to the case was unreasonably rejected by the court;
- the presented evidence related to the case was not investigated by the court;
- the provisions of the law were used improperly;
- new circumstances of the case must be investigated; and
- new evidence, that could have not been presented to the court of first instance, must be investigated.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Article 625 of the Civil Code stipulates that debtors who fail to fulfil their obligation shall pay the inflation index +3% annually for the period of non-completion upon the creditor's demand.

Any additional penalties for non-compliance with the agreement shall be stipulated in the agreement.

Interest is obtained under a court judgment or according to the parties' agreement.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

The losing party is responsible for payment of court fees.

The parties cover the general sum of the court expenses *pro rata* to the satisfaction of the parties' demands.

Court fees consist of the following:

- court fees;
- attorney fees;
- expenses for witnesses, experts and translators;
- expenses for evidence ordering and investigation; and
- expenses for other procedural actions.

Parties must present documents and other evidence to the court to prove the sum of the court expenses incurred before the court debates stage starts.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

The court does not compel parties to mediate disputes or engage with other forms of alternative dispute resolution.

4.11 If a party refuses to a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

Disputes mediation is not yet an obligatory procedure in Ukraine. Parties may turn to court without prior alternative dispute resolution provisions.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

Usually, contracts have an arbitration clause for parties to solve disputes, and the government courts do not take any particular approach in relation to arbitration.

Commercial Proceeding Code and Civil Proceeding Code provide clauses about territorial jurisdiction, allowing the possibility for courts to transfer the case to the right court if the party (plaintiff) chose the wrong jurisdiction. If arbitration is provided for in the dispute, courts may not send the case by themselves to the right arbitration forum.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

The parties can put an arbitration clause into a contract of insurance/reinsurance or conclude an additional agreement on arbitration before/after the dispute arises.

According to Article 7 of the Law "On international commercial arbitration", the arbitration clause/agreement shall be concluded in writing and formed as a document signed by the parties or as a clause that is an integral part of the document signed by the parties.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

The court may refuse to enforce the clause if such clause enforcement violates the court regulations and applicable law provisions.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

The arbitration court may oblige any party of the case to provide any reasonable form of relief, according to Article 17 of the Law "On international commercial arbitration".

The arbitration court may not oblige other persons that are not parties to the case to provide necessary relief.

The arbitration court may oblige parties to pay the costs of the court expenses, to disclose documents, to cease a specific action, etc.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

Article 31 of the Law "On international commercial arbitration" stipulates the obligation of arbitration courts to make a reasonable decision grounded on the applicable law provisions.

According to Article 33 of the Law "On international commercial arbitration", the party can apply to the arbitration court for an explanation of the award, a correction to the award, or issuance of an additional award 30 days from receipt of an award.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

An arbitral decision can be appealed to the local appeal court under Article 34 of the Law "On international commercial arbitration".

The term of appeal is three months from receipt of the decision.

An arbitral decision can be appealed on the following grounds:

- the arbitration clause/arbitration agreement is invalid;
- the party was not reported properly on the arbitration initiation/arbitrator nomination; and
- the arbitration decision/arbitrations procedure exceeds the limits defined by the arbitration clause/arbitration agreement.

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BLACK SEA LAW COMPANY has a team of qualified lawyers with profound knowledge and unique regional experience in arbitration and commercial litigation, transport, insurance and maritime disputes.

The Company has two offices in Ukraine: the head office in Odessa; and the filial office in Kherson.

As BLACK SEA LAW COMPANY has been focused only on aspects of maritime and insurance law, its "boutique" service is the best way to deliver fast and effective cross-jurisdictional specialised legal solutions in the best interests of our clients.

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USA

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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

The regulation of insurance companies is split between the states and the federal government. Each of the 50 states regulates the operations of insurance businesses within its borders and has its own laws concerning the appropriate contractual terms that parties to an insurance contract are allowed to enter into. For example, states are responsible for regulating insurance rates, licensing insurance companies and brokers, employing financial examiners to investigate an insurer's accounting methods, and providing consumer service support to their residents. State insurance regulators are also members of the National Association of Insurance Commissioners ("NAIC"), an organisation that standardises the regulation of insurance among the states and facilitates the sharing of best practices among them.

In comparison, the federal government has a more modest footprint in insurance regulation because the McCarran-Ferguson Act, passed in 1945, assured that states would have the primary role in regulating insurance. Nevertheless, there are some significant federal regulations concerning interstate insurance commerce. The 2015 National Association of Registered Agents and Brokers Reform Act streamlined approval for non-resident insurance sellers to operate across state lines. The 1986 Liability Risk Retention Act allowed individuals and businesses with similar risk profiles to form groups in order to lower costs and increase market choice for insurance consumers by making it easier to compare policies that fit their profiles.

Furthermore, after the 2008 financial crisis, the federal government started to regulate the financial elements of insurance companies. The 2010 Wall Street Reform and Consumer Protection Act ("Dodd-Frank") created two review councils within the Department of Treasury – the Financial Stability Oversight Council ("FSOC") and the Federal Insurance Office – to monitor the stability of the insurance industry. FSOC has the ability to designate certain insurers as "Systemically Important Financial Institutions" ("SIFIs") so they may be regulated by the Federal Reserve Board. SIFIs are subject to heightened financial oversight – they must meet higher capital requirements, take stress tests, and submit "living will" bankruptcy plans for review. (While initially six insurers were identified as being "systemically important", all were eventually dedesignated, and currently there are none with this designation). In 2017, in a shift towards deregulation, the Treasury Department recommended changing the designation process for SIFIs, and in 2019 FSOC proposed moving from an entity-based approach to a holistic activities-based approach. Under the new approach a company would only be designated as an SIFI if FSOC believed that attempts by state and federal regulators to address the risks of their activities were not sufficient.

Dodd-Frank also included the Nonadmitted and Reinsurance Reform Act ("NRRA"), in order to make it easier for surplus-line insurers and brokers to conduct business across states.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

Each state has its own unique requirements for setting up a new insurance company, but all states accept the Uniform Certification of Authority Application ("UCAA"), a model application offered by the NAIC. The UCAA requires the applicant to provide information about its business plan, corporate bylaws, financial statements, and officers, as well as to identify the type of insurance it plans to offer (*e.g.*, life, disability, property). Each state imposes requirements in addition to the UCAA. For example, states generally require a certain level of financial health before licensing a corporation. Each state has different capital and surplus requirements, and some may require a corporation to have prior experience or pass accreditation standards before being allowed to sell certain forms of insurance. States will also usually require companies to pay fees to fund regulatory agencies depending on the type of insurance an applicant wishes to offer. For example, to conduct business with workers' compensation or automobile insurance, many states require companies to pay fees to an oversight board.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

The NRRA allows foreign insurers to conduct business within the states without being admitted if they are included in the "Quarterly Listing of Alien Insurers", which is maintained by the NAIC. Among other requirements, the NAIC requires applicants to file financial statements, copies of auditors' reports, names of their US attorney or other representative, and details of their US trust account to show that they have (1) a minimum shareholders' equity amount of $45,000,000, (2) a US-based trust fund, and (3) a management team with "a proven and demonstrable track record of relevant experience, competence, and integrity".

A company may also choose to become licensed by a state government. Alternatively, a non-admitted insurer can, subject to certain requirements, write a policy on a surplus line basis in cases where the insured's risk is too high for an admitted insurer

to underwrite. For example, catastrophe insurance for natural disasters is frequently bought on a surplus line basis due to its risk.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

Each state has its own rules limiting the parties' freedom of contract. Many states require insurance policies to contain mandatory clauses. For example, insurance policies are often required to contain: (1) cancellation and renewal terms; (2) notice of loss requirements; (3) incontestability clauses (in life insurance policies); and (4) appraisal clauses (for fire or property insurance). As with other insurance regulations, states may vary in how aggressively they will regulate the parties' freedom of contract. For instance, the majority of states mandate that insurers give the insured notification for a conditional renewal of the policy, but a minority – like Massachusetts, Michigan, and Hawaii – do not.

Courts also read in certain substantive limitations into contracts, such as restrictions to protect the insurer from unforeseen consequences not contemplated by the insurance contract. For example, California and Nebraska law read a "proximate cause" requirement into contracts to restrict claims that were not foreseeable. Similarly, many states impose "known loss" requirements where the insured is not protected against losses that were known to the insured before the policy started. States may also mandate that a reinsurer pay for obligations under the contract regardless of whether the insurer is solvent. These "insolvency" clauses lower the moral hazard in insurance transactions because they reduce the ability of a reinsurer to agree to policies without having to pay for the underlying risk.

Finally, the same restrictions that govern any contractual dealing are implicated. These include common law concerns like procedural and substantive unconscionability, proper assignment of rights, and the covenant of good faith and fair dealing. Some of these restrictions are broadly accepted – all jurisdictions impose some version of the requirement that an insurer settle a claim against an insured in good faith. Others are quite divisive. Mandatory arbitration clauses in insurance agreements, for example, are enforced by only about half of the states.

1.5 Are companies permitted to indemnify directors and officers under local company law?

Most state corporate laws, including Delaware's, allow for indemnification. For example, under Delaware law, a director has access to both discretionary and mandatory indemnification. The board of directors in a Delaware corporation must indemnify a director for fees spent in defending a derivative suit if the suit is successful on the merits. The board of directors has the option but not the obligation to indemnify a director for expenses, fines, and judgments provided that the director acted in good faith. Under Delaware law corporations are not permitted to indemnify directors and officers who have acted in bad faith. A Delaware corporation also has the option to purchase insurance for its directors and officers.

Although a state's local law may permit indemnification, regulatory agencies may limit a corporation's ability to indemnify an officer. This limitation is intended to create a deterrent effect. For example, in civil enforcement proceedings, the Securities and Exchange Commission and the Consumer Financial Protection Bureau sometimes bar an executive from seeking indemnification in the settlement order. Within the insurance context, the Federal Deposit Insurance Corporation also has the power to prevent deposit institutions from making indemnification payments to individuals who have been fined, removed from office, or required to take or refrain from taking certain actions by any federal banking agency.

1.6 Are there any forms of compulsory insurance?

States often require individuals and businesses engaged in certain activities to purchase insurance related to their actions. For example, motor vehicle owners are required to purchase automobile insurance in every state except for New Hampshire and Virginia. Subject to certain conditions, employers are required to carry workers' compensation insurance in every state. Some states, like California, Hawaii, New Jersey, New York, and Rhode Island, as well as the territory of Puerto Rico, require employers to purchase some form of disability insurance for their employees.

The federal government also requires some forms of compulsory insurance. The Terrorism Risk Insurance Act ("TRIA") and Terrorism Risk Insurance Program Reauthorization Act of 2015 require insurers of commercial property and casualty insurance to make terrorism coverage available under their policies. TRIA expires in 2020, and legislation to extend the programme has not yet been introduced in Congress, although the programme has wide support. Uniquely, the 2010 Patient Protection and Affordable Care Act mandates every individual to purchase health insurance if they are not covered by a sponsored health or government health plan. In December 2019, however, the Fifth Circuit Court of Appeals found the individual mandate for health insurance unconstitutional. An appeal to the United States Supreme Court is expected. While the federal tax penalty associated with the individual mandate was repealed, some states have individual coverage mandate penalties. Massachusetts, New Jersey and the District of Columbia have penalties in effect in 2019, and California and Rhode Island will impose penalties in 2020.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

Whether the law favours the insurer or the insured depends on the particular substantive issue.

When concerns about fairness and disparate bargaining power are implicated, insureds are generally granted more formal protections. For example, many states construe ambiguous contractual terms in favour of the insured. Similarly, insurers often have a duty to settle their claims against the insured in good faith and a duty to provide the insured with defences to claims made under a liability policy.

In contrast, state legislators have been wary of foisting moral hazards or unforeseen burdens onto insurers. Proximate cause and known loss rules protect insurers from unpredicted liabilities that were not contemplated during the contract's formation.

Furthermore, each field of insurance law creates separate substantive rules that benefit the insured and insurer differently. For example, for disability insurance, some jurisdictions may actively favour the insured. California, for instance, defines "total disability" as an insured's inability to perform the substantial and material duties of his or her own occupation, even if the disability policy expressly conditions coverage on being unable to

perform "any other" occupation as well as one's own. Similarly, for motor vehicle insurers, many states favour the insured by statutorily limiting an insurer's ability to cancel policies and by setting minimum coverage requirements. In contrast, workers' compensation insurance for workplace injuries arguably provides benefits to both the insured and insurer. Although an insurer may in some instances be bound by the decision of a workers' compensation board, it creates a streamlined, predictable process for the insurer over piecemeal tort litigation.

2.2 Can a third party bring a direct action against an insurer?

Generally, a third party does not have the right to bring a direct action against an insurer. However, there are two ways a third party may do so. First, an insured may assign a right to a third party that allows it to sue the insurer. All states allow for some right of assignment for an insurance claim, although a few states limit the assignability of certain rights. For example, in Georgia, a statutory claim for a bad-faith settlement can be pursued only by the insured and is not assignable. Second, most states also have direct action statutes, allowing for an injured party to sue the tortfeasor's liability insurer if the injured party has won the underlying substantive dispute against the insured. A minority of jurisdictions allow for suit without first winning the underlying substantive dispute.

2.3 Can an insured bring a direct action against a reinsurer?

The general common law rule is that an insured is not in privity of contract with a reinsurer and thus has no right of action against the reinsurer. However, certain contracts may provide for the reinsurer's liability through "cut-through" or "cutoff" clauses. These clauses are often negotiated when there are concerns about the direct insurer's solvency. Separately, in certain jurisdictions, such as New Jersey, a reinsurer may be liable to the insured if the reinsurer intervenes in the defence and management of suits brought against the direct insurer. Similarly, a reinsurer may be liable if it enters into a "fronting" agreement with an insurer. In these arrangements, a primary insurer cedes the risk of loss to a reinsurer and the reinsurer controls the underwriting and claims handling process of the policy.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

The harshest remedy available to an insurer in these circumstances is rescission, where the policy is declared void *ab initio* and the premium returned. To access the remedy of rescission, an insurer must usually show that the misrepresentation or omission was material and there was an intent to deceive. Other remedies available to an insurer for misrepresentation or non-disclosure include non-payment or the ability to cancel a policy.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

Material omissions that are the equivalent of a misrepresentation may expose an insured to rescission of the policy or other contractual remedies. Moreover, insureds are generally bound by a duty of good faith to disclose information. This duty is implicated in particular when an insured has exclusive or peculiar knowledge of a material fact that may influence the writing of a policy. However, insurers have a duty to investigate representations on applications before taking action. Courts have invalidated an insurer's decision to rescind a policy without investigation when further examination would have revealed no misrepresentation. With respect to reinsurance firms, ceding companies – companies that transfer the risk from an insurance portfolio to a reinsurance firm – have an affirmative duty of good faith to disclose all material information even if the reinsurer fails to ask.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

There is no generally applicable, automatic right of subrogation. Instead, the right arises in certain conditions. First, the contract with the insured may itself include a right of subrogation. Second, an insurer may move for a judicially crafted remedy known as equitable subrogation that allows an insurer to sue a third-party tortfeasor. Although available in all states except Louisiana, the grant of equitable subrogation is discretionary. Courts generally look to whether the party claiming subrogation: (1) paid its underlying debt; (2) paid its debt only because of some legal obligation; and (3) is secondarily liable for the debt. Moreover, as an equitable remedy, the court will also inquire as to whether injustice will be done by granting subrogation. Third, certain statutes, such as Medicare/Medicaid and the Employee Retirement Income Security Act of 1974 (commonly known as ERISA), may also provide a right of subrogation.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

Both state and federal courts are sites of insurance disputes. By itself, the value of a dispute does not determine what forum is appropriate – high-value disputes are litigated in both federal and state courts, though federal and state courts have various minimum dollar thresholds for jurisdiction. Instead, the choice between federal and state courts is often driven by strategic considerations as well as jurisdictional requirements. State courts are courts of general jurisdiction and are empowered to hear all manner of claims, including insurance disputes. In comparison, federal courts have a number of jurisdictional requirements the parties to a suit must meet. The most foundational of these requirements are proper subject matter and personal jurisdiction over the parties. A court has subject matter jurisdiction either if the parties are litigating a federal law with a right of action or if the parties are members of different states and the amount in controversy is over $75,000. A federal court has personal jurisdiction if the defendant is domiciled in the state of the federal court or has significant minimum contacts with that state, a test of a defendant's ties to the forum state in relation to the underlying dispute.

The right to a jury trial varies between federal and state courts. The Seventh Amendment of the United States Constitution provides a right to a jury trial in civil cases for some legal claims, including those for money damages. However, the Seventh Amendment right does not pertain to equitable relief, meaning

a party has no right to jury trial for remedies like an injunction, garnishment, or rescission. In comparison, while the Seventh Amendment right does not apply to the States, nearly every state guarantees some form of a civil jury trial for legal claims.

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

In federal district court there is a $400 filing fee to begin a civil action. If a party is unable to pay, they can petition the court for leave to proceed *in forma pauperis*. Section 1915(a)(2) requires all parties seeking to proceed without paying the fees to file an affidavit regarding their inability to pay.

The filing fees in state court range from $100 to several hundred dollars, with a number of states assessing higher fees if a jury trial is requested. Many states also employ a graduated filing fee based on the value of the claim.

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

The time a civil case may take depends on each case's unique factors as well as the court and the judge responsible for the dispute. The median length of an insurance case in federal court is 265 days, but an insurance case that implicates other statutes and complex commercial dealings may last significantly longer. For instance, the median length of multi-district insurance litigation is 386 days.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

As compared to foreign jurisdictions, courts in the United States have significant powers to order discovery of documents in commercial actions. The Federal Rules of Civil Procedure allow parties to obtain discovery regarding any non-privileged matter that is relevant to a claim or defence in the action and proportional to the needs of the case, taking into account the importance of the issues at stake, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of discovery to resolve issues, and whether the burden of discovery outweighs its benefit. State rules authorising discovery are generally similarly expansive. To begin discovery, the parties usually exchange and negotiate discovery requests. A court will rule on any disputes and may compel production of a valid request. At times, a court must limit discovery if it determines that a party seeks information that is duplicative or can be obtained from a less burdensome source, a party has had a significant prior opportunity to obtain the information, or when the burden of producing the information outweighs its benefits.

Discovery from non-parties requires a subpoena. Both federal and state procedural rules detail certain service and geographical requirements in obtaining and executing a subpoena. Moreover, courts are sensitive to the costs imposed on non-party discovery and require a party seeking third-party discovery to take reasonable steps to avoid imposing undue burden or expense on non-parties.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

Documents containing communications between lawyers and their clients are shielded from disclosure by the attorney-client privilege. However, a party cannot claim the privilege if the communication does not seek, provide, or otherwise reflect legal advice or if the communication involves a third party that breaks the privilege. Similarly, a party can assert the work-product protection to withhold from disclosure materials created in anticipation of litigation, regardless of whether they are created by attorneys. However, the work-product privilege is not absolute and a discovering party may seek disclosure of such documents if it demonstrates a substantial need and the inability to obtain the substantial equivalent of the materials by other means without undue hardship.

Documents produced in the course of settlement negotiations are not always protected from production. While they are generally protected at trial as an evidentiary rule, the assertion of the settlement rule as a "settlement privilege" varies from court to court. The majority of courts do not recognise the privilege, but some have endorsed a limited application of the privilege if the production of certain documents may chill settlement discussions.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

As a general matter, a court can require a witness to testify in a civil case through a subpoena. However, this power is limited by jurisdictional and evidentiary concerns. For instance, Federal Rule of Civil Procedure 45 limits a court's subpoena power geographically to within 100 miles of where a witness resides, is employed, or regularly transacts business unless certain other conditions are met. Moreover, a witness can assert various privileges – such as the Fifth Amendment right against self-incrimination or the spousal privilege – to abstain from testifying.

4.4 Is evidence from witnesses allowed even if they are not present?

In general, depositions of witnesses not present at trial may be used as evidence in federal court as long as their use satisfies several conditions enumerated under Federal Rules of Civil Procedure 32, the most significant of which is that the use is permissible under the Federal Rules of Evidence. In other words, the deposition must at least be relevant and fall within an exception to the hearsay rules or not be subject to hearsay rules in order for it to be offered for truth. For example, if a witness cannot be present at court due to death, illness, significant physical distance, or refuses to attend even if subpoenaed, his or her deposition can usually be introduced as evidence. In addition, statements made by an opposing party, or that party's agent or employee within the scope of that relationship, are often admissible as a party admission independent of hearsay concerns.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

A court must certify an expert before he or she is allowed to present expert testimony. State and federal law diverges over

the proper standard for certification. Federal courts and the majority of states follow the *Daubert* test, a four-part standard that inquires whether: (1) the expert's scientific, technical, or other specialised knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (2) the testimony is based upon sufficient facts or data; (3) the testimony is the product of reliable principles and methods; and (4) the expert has applied the principles and methods reliably to the facts of the case. In contrast, some states like New York and California use the common-law *Frye* test that only looks to whether the expert's testimony is based on scientific methods "sufficiently established to have gained general acceptance".

Although courts are allowed to appoint experts, they rarely exercise that power. Instead, it is more likely that the parties will submit their own experts for approval. Experts in an insurance dispute can provide helpful specialised knowledge, such as calculating the magnitude of damages or reconstructing accidents.

4.6 What sort of interim remedies are available from the courts?

Interim relief often takes the form of provisional relief to preserve the *status quo* before a final judgment. For example, in a breach of contract dispute, a party can petition the court for a temporary restraining order or preliminary injunction to prevent future occurrences of the alleged breach before the end of the litigation. A party may also move to freeze a portion of its adversary's assets to preserve them for an award. While the standards for these forms of equitable relief vary, a party must generally show that it is likely to succeed on the merits of the underlying case and would suffer irreparable harm without such relief.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

A party has the right of appeal for final decisions to an appellate court and for orders granting, modifying, or refusing a preliminary or permanent injunction. Most interlocutory decisions – those decided on issues that do not dispose of a case on its merits – are appealable only on a reviewing court's discretion and if they contain a controlling issue of law. A "controlling issue of law" is an issue that would lead to reversal on appeal if decided erroneously or is otherwise important to the conduct of the litigation. Some states allow a broader set of interlocutory orders to be appealed – New York, for instance, allows interlocutory orders that "affect[] a substantial right" or "involve[] some part of the merits" to be appealed.

A party's grounds for appeal are similarly constrained by the type of issue being challenged. With the exception of foundational procedural and jurisdictional issues, a party cannot raise issues for the first time on appeal. Moreover, an appellate court applies different standards of review to different types of decisions. Questions of law, such as contract interpretation or analysis of a legal standard, are reviewed "*de novo*" with no deference to the trial court. In contrast, questions of fact are reviewed for "clear error" and an appellate court gives a trial court substantial deference. Other discretionary standards like evidentiary or discovery rulings are reviewed only for "abuse of discretion", a more lenient standard of review that gives considerable deference to the decision in the court of first instance.

The stages of appeal are governed by a three-layer court structure. In federal court, the trial courts – also known as the District Courts – serve as the courts of first instance. A District Court may also review decisions by a specialised court, such as a magistrate or bankruptcy court. District Court decisions are reviewed by the Court of Appeals, a set of regional circuit courts that review cases in panels of judges. The United States Supreme Court serves as the final court of appeal, and appeal to the Supreme Court is largely discretionary. States courts have a similar three-tiered structure.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Pre- and post-judgment interest are generally both recoverable. Pre-judgment interest creates an award to compensate the use of monies between a date before a trial and the judgment date. Post-judgment interest creates an award for the use of monies from the judgment date until payment is received.

The interest rate differs from federal and state courts. There is no federal pre-judgment interest rate – it is instead determined on a case-by-case basis based on a court's determination of an amount that will compensate the plaintiff for the defendant's use of its funds. The federal post-judgment interest rate is based on calculating the average one-year constant maturity Treasury yield for the calendar week preceding the date of entry of the judgment along with the judgment value. In contrast, various states have created their own floors and ceilings for pre- and post-judgment interest rates. Currently, there is significant variation from state to state, but many states' post-judgment interest rates range from 6 to 12%.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

The default rule, often referred to as the "American rule" to contrast it with other systems, requires each side to pay for its own legal fees. In the insurance context, most states allow a policyholder to recover attorneys' fees in some circumstances. For example, an insured who prevails in a coverage action and shows that the insurer acted in bad faith or demonstrates a breach of contract by the insurer can sometimes recover fees. Moreover, some procedural rules incentivise pre-trial settlement. Under Federal Rule of Civil Procedure 68, if a defendant offers settlement more than 14 days before trial and the plaintiff rejects the offer and the final judgment is equal to or less than the settlement offer, the plaintiff must pay the defendant's costs incurred after making the offer. "Costs" under this arrangement are limited to miscellaneous printing and court expenses, and they do not include attorneys' fees unless the statute creating the cause of action defines costs to include attorneys' fees. State procedural rules have similar cost-shifting mechanisms.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

While courts often encourage mediation, the power of courts to compel mediation varies. Federal courts have power under the Alternative Dispute Resolution Act of 1989 ("ADRA") not only to compel mediation but also require good faith participation in the process, pursuant to Federal Rule of Civil Procedure 16(f), 28 U.S.C. § 1927, and the local rules of various districts. Each federal district court must devise and implement an alternative dispute resolution ("ADR") programme, and provide at

least one type of ADR, including arbitration and mediation, to parties. Under the ADRA, district courts require civil litigants to consider ADR, and the court can compel parties to engage in non-binding types of ADR such as arbitration. Many district courts use settlement conferences pre-trial. Many state courts also have the authority to compel mediation. In some states like Minnesota and North Carolina, some type of ADR is mandated in most civil cases, and in New Jersey parties must participate in mediation before they can pursue a case in court. Although courts may have the ability to compel participation in mediation, they cannot force the parties to come to a settlement in mediation.

4.11 If a party refuses to a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

In federal court a party that refuses to follow court-ordered meditation or one who participates in mediation in bad faith may face sanctions for failing to comply with a pretrial order under Federal Rule of Civil Procedure 16(f). In many states, like Minnesota, the courts also have the power to sanction a party who does not participate in a mandatory component of ADR. If a party refuses mediation, a court will often determine the reasonableness of the party's choice. Among other reasons, if the nature of the dispute, the success of past settlement attempts, and sums at stake in the litigation point in favour of mediation, courts may impose monetary sanctions against a party who refuses mediation. Similarly, a court may monitor the mediation process to determine if the parties are attempting to reach a resolution of their dispute in good faith. Of course, when a court does not impose mediation and one party merely requests it, the other is not obligated to accept the offer.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

Court intervention in arbitration is generally rare because arbitration itself is an alternative to the judicial system. The Federal Arbitration Act ("FAA") establishes a policy that favours enforcement of arbitration agreements and expressly limits a court's ability to intervene in a proceeding. There is, however, legislation pending in Congress which would amend the FAA and restrict mandatory arbitration agreements. Courts do sometimes intervene in arbitration for procedural reasons; for example, in selecting an arbitrator when an unplanned third party enters or when a multi-party arbitration is consolidated. Similarly, a court may force arbitration if there is a prior, mutual arbitration agreement one party refuses to follow.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

The only requirement is that a contract's arbitration clause should be clear in expressing the parties' intent to arbitrate their disputes. Many arbitration agreements include provisions addressing procedures to notify the other party of arbitration, a time limit for when arbitration may start, and procedures for selecting arbitrators.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

With some exceptions, many jurisdictions will enforce express arbitration clauses. The Supreme Court in *AT&T Mobility LLC v. Concepcion* held that state regulations that disrupt the "fundamental attributes of arbitration" are unenforceable because they interfere with the FAA. 563 U.S. 333, 344 (2011). Supreme Court decisions since Conception have shown strong support for arbitration. States courts in Ohio, Florida, Illinois, Texas, and Wisconsin have read *Concepcion* to require judges to enforce nearly all arbitration agreements. Nevertheless, courts have still declined to uphold arbitration clauses in some instances.

Some courts have applied general contractual concepts like fraud, duress, or unconscionability to strike down certain arbitration agreements. The *Concepcion* Court left open this possibility by suggesting that these concerns do not implicate arbitration itself. The Ninth Circuit found that the FAA did not pre-empt a California law that prohibited a party from seeking public injunctive relief in any forum, because the state law did not specifically obstruct arbitration. In Kentucky, the state Supreme Court held that a state law barring employers from making arbitration a condition of employment was not pre-empted by the FAA because the statute was not an arbitration statute, but rather an anti-employment discrimination one. The U.S. Supreme Court declined to take the case. The Kentucky legislature subsequently passed a law overruling *Snyder* and reaffirming the enforceability of arbitration clauses.

Certain states, like California, Washington and Missouri, have subsequently invalidated arbitration clauses on the grounds of unconscionability or duress, albeit with narrow readings of *Concepcion*. Moreover, even states like Ohio or Alabama that generally enforce arbitration agreements have declined to do so when a litigated issue was outside the arbitration clause or when the original contract was void.

In addition, some federal courts have concluded that state regulations limiting insurance arbitration agreements are still valid. At least 13 states have banned mandatory arbitration clauses within insurance contracts and at least three have restricted mandatory arbitration through regulation. Although the FAA broadly applies to arbitration agreements, the McCarran-Ferguson Act specifically leaves states as the primary regulator of insurance law over the federal government. Therefore, some courts have concluded that a state's regulation over insurance arbitration agreements is still applicable even if its regulations over other forms of arbitration clauses are not. Several Federal Courts of Appeal have applied this theory to invalidate various insurance arbitration agreements.

Outside of its domestic law, the United States also has a similarly mixed approach in enforcing foreign arbitral awards. Although it is a signatory of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, US federal courts will refuse to enforce a foreign arbitral award if it believes there to be a procedural concern with the award. For example, some federal courts have declined to enforce an award based on concerns that the United States is not a proper venue for the matter. Moreover, the Convention itself allows a party to resist enforcement of an award if the arbitral agreement is invalid or if the tribunal exceeded its authority.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

For most jurisdictions, interim relief in arbitration functions like it does for court proceedings: it primarily serves to help preserve the *status quo* before the arbitration judgment is rendered. Thus, a party may request a court to issue an injunction to prevent an activity it claims is in breach of contract or an order of attachment to prevent its adversaries from using funds that it may need to pay a judgment in support of arbitration. Moreover, if the arbitrability of a dispute is at issue, a party might often move to stay other court proceedings pending a court's determination.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

Under the FAA, arbitrators do not have a general, affirmative obligation to provide a reason for their awards. If the parties request a finding of fact or conclusion of law, there is no obligation for the arbitrator to provide a conclusion. However, in an arbitration agreement itself, both parties can require an arbitrator to provide a reasoned decision.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

The FAA creates a narrow right of appeal to courts. A party must show: (1) the award was procured by corruption, fraud or undue means; (2) there was evident partiality or corruption by the arbitrators; (3) there was arbitral misconduct, such as refusal to hear material evidence; or (4) the arbitrators exceeded their powers, or so imperfectly executed their powers that they failed to render a mutual, final and definite award. Moreover, the Supreme Court has recognised another ground for appeal, allowing the parties to claim the arbitral award "manifestly disregarded the law". The "manifest disregard" standard applies if a party can show an arbitrator was aware of and disregarded clearly established law. Federal circuit courts are split over whether manifest disregard serves as an independent ground of appeal, but a party has no other right to appeal beyond these grounds. The Supreme Court in *Hall Street Associates, LLC v. Mattel, Inc.* confirmed that even if two parties grant themselves other avenues for appeal – such as the option to have a District Court overturn an arbiter's award based on the substance of his or her reasoning – that right is invalid. 552 U.S. 576, 584, 592 (2008).

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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

The insurance industry in Uzbekistan is supervised by the State Insurance Supervisory Inspection Department (*Gosstrakhnadzor*), which was established on 8 July 1998, by the Cabinet of Ministers, under Resolution No. 286 On Measures for the State Supervision of Insurance Activity. Gosstrakhnadzor began working as the insurance supervisory authority in February 1999.

The Ministry of Finance:

- establishes binding standards for solvency and the procedure for determining them, a methodology for calculating the maximum permissible amount of insurers' liabilities for individual risks and the total amount of liabilities, and the procedure and terms for providing information on the solvency of insurers;
- controls the compliance of professional participants in the insurance market with legislation on insurance activities, ensuring established solvency ratios and other requirements for their financial stability;
- licenses the insurance activity of insurers and insurance brokers;
- establishes the procedure and conditions for the formation and placement of insurance reserves of insurers, as well as the procedure for recording and reporting on such, with the exception of the procedure for agreeing the placement of insurance reserves in government securities of foreign countries;
- establishes the qualification requirements for the director and chief accountant of the insurer, insurance broker and their separate subdivisions;
- establishes the form of the financial statements provided by the insurers and the annual financial statements they publish, as well as the procedure and terms for its provision and publication;
- establishes the form of the financial statements provided by the insurers and the annual financial statements they publish, as well as the procedure and terms for its provision and publication;
- in accordance with the established procedure, imposes a penalty in the amount of up to 0.1% of the minimum amount of the statutory fund of the insurer for violation by the insurer of legislation on insurance activities, including established economic standards;
- suspends the validity of licences of insurers and insurance brokers in full or in respect of certain types (classes) of insurance in accordance with the procedure established by law, and also appeals to the court to terminate their actions;
- applies measures and sanctions in respect of insurers and insurance intermediaries in accordance with the legislation, in case of violation of legislation on combatting the laundering of proceeds from crime and financing of terrorism;
- publishes, within six months after the end of each fiscal year, annual reports on activities for the regulation and supervision of insurance activities, as well as statistical data on the activities of the insurance market during the fiscal year;
- establishes the procedure and conditions for the implementation of investment activities by insurers, as well as their financing of measures to prevent the occurrence of insured events, except for the order of agreeing a list of preventive measures financed from the reserve for precautionary measures of the insurer;
- establishes the procedure for providing actuarial services;
- develops and approves training programmes and the procedure for obtaining qualification certificates for actuaries;
- in accordance with the established procedure, issues, terminates and revokes actuaries' qualification certificates, and maintains a register of actuaries with a qualification certificate;
- requests information from professional participants of the insurance market; and
- exercises other powers in accordance with the law.

The Ministry of Finance and its employees have no right to participate in the statutory fund and in the management bodies of professional participants in the insurance market, and also to act as an insurance intermediary, with the exception of participation in the statutory fund and management bodies of the JSCs 'UzAgroSugurta', 'Kafolat' and the national export-import insurance company 'Uzbekinvest'.

The Uzbek government is improving the economic and political environment as compared to previous years. The President and government are bringing the country back to the level it was some time ago. This can be seen in each and every aspect of society. There have been substantial improvements to the banking, insurance, education, medicine and pharmaceutical sectors.

A special expert council is being created under the Foreign Trade Ministry of Uzbekistan, tasked with boosting the development and implementation of programmes for comprehensive support of domestic exporters. Independent experts as well as the direct representatives of export businesses, together with the specialists of the Ministry, will be a part of the council, according to the concept.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

The state registration of insurers and insurance brokers is carried out by the Ministry of Justice of the Republic of Uzbekistan in the order established by the Cabinet of Ministers of the Republic of Uzbekistan.

The minimum authorised capital for insurance companies operating:

- in the general insurance sector – UZS 7.5 billion;
- in the life insurance sector – UZS 10 billion;
- in compulsory insurance – UZS 15 billion; and
- exclusively for reinsurance – UZS 30 billion.

The initial statutory fund of the insurer must be formed by the founders by the time the licence is received, and it cannot be less than the minimum statutory fund amount established by law.

To obtain a licence, the applicant must submit the following documents to the licensing authority:

- an application for issuing a licence, indicating the name and organisational and legal form of the legal entity, the location (postal address), the name and account number of the bank, and the type of licensed activity that the legal entity intends to implement;
- notarised copies of the certificate of state registration of the legal entity and its registered constituent documents;
- documents confirming the compliance of the head and chief accountant with the qualification requirements established by the specially authorised state body for regulation and supervision of insurance activities (application form, notarised copies of higher education diplomas or certificates from the authorised state body recognising the equivalence of higher education documents received from a foreign educational institution, and a work record book);
- a document confirming the submission by the licence applicant of a fee for consideration by the licensing authority for the application;
- documents confirming payment of the authorised capital (certificate of the bank, acts of acceptance and transfer of property, or other documents) in an amount not less than the minimum authorised capital;
- economic justification of insurance activities, including a business plan for a licensed insurance class, containing a forecast for the development of insurance operations, a plan for prospective reinsurance transactions, and a plan for calculating insurance reserves; and
- rules (conditions) for the types of insurance for which a licence is requested, containing a definition of the scope of insurable subjects and restrictions on the conclusion of insurance contracts, a definition of insurable objects, a list of insurable events, in the event of which the insurer's liability for insurance payments arises (basic and additional conditions), exemptions (risks or property) for which the insurer is discharged from performance of obligations, tariffs (rates) of insurance premiums, the mutual obligations of the parties under insurance contracts and possible cases of failure to pay under insurance contracts, and the order of consideration of claims under the insurance contract.

Examples of insurance contracts must be attached to the rules.

Rules (conditions) of insurance, approved by the head of the licence applicant, are presented in two copies, which must be bound and numbered.

Applicants of a licence, the subject of which is exclusively reinsurance, must submit the documents specified above, except for the final point relating to insurance rules (conditions).

Licence applicants whose subject is also compulsory insurance for civil liability of vehicle owners, together with the documents specified in this subparagraph, must additionally submit:

- a notarised copy of the agreement on the membership of the insurer with the Guarantee Fund for Compulsory Motor Third Party Liability Insurance; and
- documents confirming the presence of branches and other separate divisions of the insurer in the Republic of Karakalpakstan, in all oblasts and the city of Tashkent that are authorised to conclude compulsory insurance contracts, consideration of claims of victims to insurance payments and insurance payments themselves.

Licence applicants whose activity includes obligatory insurance of employers' civil liability, together with the documents specified in the list above, must additionally submit documents confirming the presence of branches and other separate divisions of the insurer in the Republic of Karakalpakstan, in all oblasts and the city of Tashkent that are authorised to conclude contracts for compulsory insurance of employers' civil liability or annuity contracts.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

The market is admitted. Execution of insurance by foreign insurance companies in the territory of the Republic of Uzbekistan is not allowed. Foreign insurers can only reinsure the risk of a domestic insurer.

Local insurers cannot assume obligations that exceed the maximum allowable size for individual risks, and the maximum permissible aggregate amount of liabilities, except for cases when their ability to fulfil these obligations is reinsured in accordance with the established solvency ratios and other requirements for financial stability. Insurers have the right to reinsure their obligations outside the Republic of Uzbekistan.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

There are internal rules of insurance developed by each insurance company independently in line with the authorised state bodies' guidelines.

1.5 Are companies permitted to indemnify directors and officers under local company law?

Yes. There are no restrictions relating to a company indemnifying directors and officers.

1.6 Are there any forms of compulsory insurance?

In accordance with the meaning of Article 914 of the Civil Code of the Republic of Uzbekistan, there is a system of voluntary and obligatory insurance.

For obligatory insurance, an insured is obliged to enter into a contract with an insurer under the terms of the legislation in force.

Hereunder is a list of the types of obligatory insurance in the Republic of Uzbekistan:

- Motor third-party liability.
- Employers' liability.
- Carriers' third-party liability (death, bodily injury and property damage of passengers).

- Third-party and environmental liability for accidents at hazardous production facilities.
- Professional liability for the following: valuers; customs clearing agents; financial services consultants; auditors; real estate agents; and notaries.
- State insurance of the life and health of workers in the energy and mining industries, court officials, the military, emergency rescue services and tax services personnel.
- Third-party liability for hazardous cargo transportation.
- Ecological insurance.
- Contractors' all risks for objects built with state funds or under state guarantee.
- Insurance of items taken as loan pledges.
- Insurance of leased equipment.
- Insurance of property offered as security.
- Insurance of mortgaged property.
- Insurance of risks under concessionaires' contracts.
- Insurance of valuables in the post.
- Tourist insurance.
- Export contract insurance.
- Life and health insurance for participants in clinical trials (required by trial sponsors in order to obtain a licence – not a legal requirement).

Supplementary Information on Compulsory Insurances

There is no official comprehensive list of all compulsory types of insurance in Uzbekistan; they are all referenced in separate places in legislation.

The four main types of compulsory cover are:

- motor third-party liability;
- employers' liability;
- carriers' third-party liability; and
- third-party and environmental liability for accidents at hazardous production facilities.

Statutory limits and tariffs in respect of these classes are set by the Cabinet of Ministers in resolutions separate from the individual laws implementing the class. Further information is provided in the Motor, Workers' Compensation and Employers' Liability, and Liability sections of this report.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

In general, (re)insurance agreements protect the interest of insurance companies. The authorised body is in the process of creating ombudsmen (authorised representative of the Oliy Majlis of the Republic of Uzbekistan), which will enable insureds to make complaints with respect to their policies and related claims.

2.2 Can a third party bring a direct action against an insurer?

A party which does not have any title in an insurance agreement cannot bring a direct action against an insurance company.

2.3 Can an insured bring a direct action against a reinsurer?

As per the insurance legislation, the fronting insurance company which issues the insurance contract is fully responsible in front of the insured, and the insured has no right to go directly to the reinsurance company.

Cut-through clauses are not popular with local insurance companies. However, if such a clause is attached to a reinsurance contract, this will enable the insured to take action against the reinsurer, if required.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

As per the law, the insurance company can reject the claim, not return the premium and, if required, take legal action against the insured.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

Yes. As per the principles of insurance, the client has to disclose all material information, which he is aware of, regarding the risks that are going to be transferred to the insurance company and, furthermore, he should update the insurance company during the policy period in case the circumstances change from those stated at the inception of the cover. Otherwise, the insurance company can reject the claim, if any, and not return the premium as well.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

A subrogation clause is a standard clause within an insurance agreement unless otherwise agreed.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

If the parties, in their agreement, have agreed upon a pre-trial procedure for dispute resolution (e.g. through negotiations), they should follow that procedure before going to court. If negotiations have failed, only then may the parties go to court. Otherwise, the court will dismiss the case.

Foreign entities have the same procedural rights and duties as their Uzbek counterparts.

Generally, the parties are free to determine the court competent to hear their dispute(s). If such jurisdiction is not determined, a claim should be filed with the court where the defendant is located. If there are several defendants, the claim may be filed where one of the defendants is located.

Any court decision may be appealed to the appellate court (before the decision becomes effective) and to the cassation court (after the decision becomes effective).

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

State dues are subject to be paid when applying to the court. Any additional payments are not allowed.

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

Depending on the value of dispute, it may take between three and six months. Usually the parties appoint a law firm or lawyers specialised in insurance affairs.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

The courts have full power in this regard.

Each party shall prove the circumstances it refers to as the grounds for their claims and objections. Legal representation in court involves a deep analysis of all the circumstances of the case. For this, it is necessary to examine all the documents, all the evidence, to question the concerned parties, etc.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

No. A party cannot withhold documents from disclosure.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

Yes, they do. In cases where one party is reluctant to give evidence, the court is able to ask the embassy in his territory to send an application via local court inviting him to the court in order for him to provide his evidence. In cases where the parties are residents of the country, the court can request parties to attend court on a specific date to provide their evidence, and local law enforcement bodies are used by the court to enforce this.

4.4 Is evidence from witnesses allowed even if they are not present?

No. In cases where the party is not present, he is able to provide his evidence via his lawyer or by referring to a notary public and then sending the legalised version to the country where the case is in process.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

Depending on the case, an expert witness can be called in. It is not common to have a court-appointed expert.

4.6 What sort of interim remedies are available from the courts?

Depending on the case, remedies can vary, and may include a fine, imprisonment with the right to pay a fine to avoid the period of confinement, or imprisonment subject to not being prosecuted by the prosecutor's office.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

Yes, appeal is possible; usually the court of appeal accepts a maximum of between three and five appeals.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Yes, it is recoverable. The current rate is between 0.1% and 0.5%.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

Civil lawyers and solicitors charge their clients as per the regulated tariffs. Cases can be settled prior to trial in case there will be benefits for the parties due to the status of the claim. However, usually the general trend is to refer cases to the court.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

This is not a usual practice. However, if the court decides to use a mediator either for one party or all parties involved, they have to invite them to the court, advise them on the purpose of the invitation and ask them to introduce their mediators. The court can use legal enforcement authorities to make a party/parties obey.

4.11 If a party refuses to a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

A party will receive a court application with the deadline to mediate.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

Along with the State judicial bodies, there are also alternative dispute resolution mechanisms available, such as arbitration courts (also referred to as "third-party courts"), the Arbitration Commission of the Republican Universal Agro-Industrial House, etc.

Arbitration courts hear disputes where the parties are individuals as well as where they are business entities. The courts cannot consider cases involving administrative, family, and labour/employment disputes.

The distinctive features of arbitration courts in Uzbekistan are as follows:

- the dispute may be considered by the arbitration court only if there is an arbitration agreement, which can be in the form of a dispute resolution clause in a contract or in the form of a separate agreement;

- an arbitrator must be a citizen of the Republic of Uzbekistan who has a law degree;
- upon rendering its decision, such a decision is not subject to appeal; upon request of any of the parties, the decision can only be cancelled by a competent State court in case of violation of the procedural rules of the arbitration; and
- for enforcement purposes, the party shall apply to a competent State court for obtaining a writ of execution.

Such arbitration may be less time-consuming and less expensive than taking the case to the economic courts of Uzbekistan. However, arbitration courts are still in low demand, mostly because it is a relatively new mechanism for dispute resolution and people are uncertain about its efficiency.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

In case a reinsurer includes such clause in the contract, the local insurance company, i.e. the fronting company, adds such clause in the insurance agreement. Such an agreement must be in writing and specify the consent of the parties to refer the dispute to arbitration. The International Arbitration Law specifically states that such agreement may be in the form of an arbitration clause in a contract or in the form of a standalone agreement, and that such a standalone agreement may be formed by way of an exchange of correspondence by any means; although the Domestic Arbitration Law does not contain these details, the same principle should apply based on the general rules of contract formation.

However, concerning insurance, an arbitration clause should be inserted within the insurance agreement.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

A recent review of the judicial practice regarding recognition and enforcement of decisions rendered by foreign (arbitration) courts shows that the Uzbek economic courts do not have a unified methodology for considering such cases.

Thus, for example, certain economic courts send foreign court decisions, without their recognition, directly to court executors for enforcement of the decisions. Such practice contradicts the international conventions, agreements, and treaties in which it is specifically provided that, before its enforcement, a foreign arbitral award must first be recognised.

Another example of irregularities in cases involving enforcement of foreign court decisions is that the economic courts often do not follow the pre-enforcement requirements. Thus, under Article 4 of the NY Convention, for a foreign arbitral award to be recognised and subsequently enforced, an applicant must submit the following document along with the application:

- the duly authenticated original award or a duly certified copy thereof; and
- the original agreement between the parties to the dispute which contains an arbitration clause.

If the said award or agreement is not made in Uzbek (an official language of Uzbekistan), the party applying for recognition and enforcement of the award must produce an Uzbek translation of the documents. Such a translation must also be notarised by a notary public.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

The parties to arbitration proceedings may apply to the court for interim security measures. The petitioner must provide the court with a confirmation that the arbitration proceedings have been properly commenced in order for the court to review the request.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

Yes. The tribunal must provide details. However, this can be foreseen within the documents before submitting the application for arbitration to the tribunal.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

Courts cannot appeal the decision. However, the arbitral conclusion can be challenged by an arbitral head appointed by both parties.

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