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The International Comparative Legal Guide to:

Insurance & Reinsurance 2014

3rd Edition

A practical cross-border insight into insurance and reinsurance law

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General Chapters:

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Chapter 17

India

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1 Regulatory

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

Insurance and reinsurance companies in India are governed by the Insurance Regulatory and Development Authority (IRDA).

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

Only an Indian insurance company that is registered with the IRDA can undertake insurance business in India. Registered Indian insurers can undertake life insurance business, general insurance business, and/or health insurance business in accordance with the terms of their registration.

In order to secure registration, an applicant must, among other formalities, have a minimum paid up equity capital of Rs.1 billion and restrict any direct or indirect foreign investment in an insurer (or reinsurer) to 26 per cent.

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.

Indian residents are also prohibited from purchasing insurance from overseas insurers, unless the purchase falls within a general or specific approval of the Reserve Bank of India (RBI).

Non-admitted insurers can write reinsurance of Indian risks in accordance with the IRDA'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 allowed 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 IRDA under its file and use procedure.

There are extraneous rules that will impact policy terms. For example, the Insurance Act 1938 gives the policyholder a right to override contrary policy terms in favour of Indian law and jurisdiction, and Indian policyholders cannot be stopped from approaching the 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 part of the remuneration payable to the officer. However, if such person is proved to be guilty of any negligence, default, misfeasance, breach of duty or breach in relation to the company, the premium paid on the 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:

- Public Liability Insurance Act 1991: accidental cover for persons handling hazardous substances and environmental issues.
- Motor Vehicles Act 1988: compulsory third party liability insurance.
- Deposit Insurance and Credit Guarantee Corporation Act 1961: insurance to be taken by the banks functioning in India (DICGC is an RBI subsidiary).
- IRDA Brokers Regulation 2002: professional indemnity insurance covering errors and omission, dishonesty and fraudulent acts by employees and liability arising from loss of documents or property.
- Carriage by Air 1972: requires parties to maintain adequate insurance covering any liabilities that may arise.
- Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995: insurance scheme for employees with disabilities.
- Personal Injuries (Compensation Insurance) Act 1963: employer's liability for workers sustaining injuries.
- Employees State Insurance Act 1948: for insurance to employees in case of sickness, maternity and employment injury.
- Payment of Gratuity Act 1972: insurance for gratuity payments to employees.
- War Injuries (Compensation Insurance) Act 1943: for workmen sustaining injury in war.
- Marine Insurance Act 1963: on the lives of crew members.
- Merchant Shipping Act 1958: on the lives of crew members.

- Inland Vessels Act 1917: insurance of mechanically propelled vessels.
- The Companies Act, 2013: insurance of deposits accepted by companies (not enforced yet).

2 (Re)insurance Claims

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

In general terms, the statutory framework may be said to favour insurers more than insured; the regulatory framework and the interpretation of applicable law is perhaps more favourable to the insured. For example:

- The Insurance Act 1938 restricts the ability of insurers to call a life insurance policy into question after two years from inception on the grounds of innocent or negligent nondisclosure.
- The IRDA (Protection of Policyholders' Interests) Regulations 2002 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.); and they follow certain claims procedures to expeditiously process claims; pay interest at the rate of two per cent above the prevalent bank rate in cases of delayed payment, etc.
- On 20 September 2011, the IRDA 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.
- Following the IRDA's directions in its Circular of 31 March 2009, general insurers and health insurers can decline the renewal of a health insurance policy only on grounds of fraud, moral hazard or misrepresentation. Renewal cannot be denied on grounds such as an adverse claims history.
- The IRDA has also directed that all health insurance policies offer portability benefits whereby policyholders are given credit for the waiting periods already served under previous health insurance policies with that insurer or any other Indian insurer.
- The IRDA has recently introduced standard form definitions for health insurance and critical illness policies, a standard claim form for health insurance policies and a standard proposal form for life insurance policies.

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.

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

There is no equivalent in India of the Third Parties (Rights against Insurers) Act 2010. As a general rule, Indian law recognises the principle of privity of contract and thus a third party would be unable to bring direct action against an insurer. Motor cases are the exception:

- It is common practice for third parties to name the defendant's insurer in motor accident-related proceedings.
- The Motor Vehicles Act 1988 (MVA) provides that the rights of an insured under a policy are transferred to a third party claiming against the insured in the event of the insured's insolvency.
- The MVA empowers the Motor Claims Tribunal to seek the insurers' involvement in a third party action against the insured if the Tribunal believes the claim is collusive or if the insured fails to contest the claim.

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

There is no specific provision permitting this, but there is nothing to prevent an insured from attempting to sue a reinsurer, for example in tort, if the circumstances are such that the reinsurer has assumed liability. 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 in the Indian Courts so far.

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

Under Indian law, an insurance contract is one of the utmost good faith, and insurers are entitled to a fair presentation of the risk prior to inception. If there has been a misrepresentation or non-disclosure of a material fact then an insurer may avoid the policy *ab initio*. Unless the misrepresentation or non-disclosure was fraudulent, the premium must be tendered back to the policyholder.

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 Indian Marine Insurance Act 1963 obliges an insured to make a full and frank disclosure prior to inception and the Supreme Court has said that this includes by way of the proposal. There is an argument that an insurer may limit the insured's duty by limiting the questions asked in the proposal form unless the proposal form contains a statement that has the effect of negating any restriction of the disclosure obligation by reference to the questions asked. The IRDA (Protection of Policyholders' Interests) Regulations 2002 also impose 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?

Yes. There is statutory and judicial recognition of the right of subrogation. No separate contractual clause is required to trigger it. However, as a matter of practice, policies do contain subrogation clauses and insurers will frequently obtain "subrogation letters" and the right to an "assignment" of a third party claim from the insured. The IRDA (Protection of Policyholders' Interests) Regulations 2002 obligates an insured to assist its insurer in recovery proceedings.

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?

An insured can approach a Civil Court or (if the dispute qualifies) a Consumer Court. An insurer can only approach a Civil Court. Both

Civil and Consumer Courts have territorial and pecuniary jurisdiction, so actions before them need to be brought keeping in mind the geographical location pertaining to the cause of action/defendant and the value of the claim. The Consumer Courts follow a three-tier hierarchy, which in ascending order are the 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 *circa* US$3,600. There are 35 State Consumer Dispute Redressal Commissions that can accept claims over *circa* US$3,600 and up to a value of US$186,000 and appeals against the decisions of the District Commissions. At the apex lies the National Consumer Dispute Redressal Commission (NCDRC), which accepts matters with a value of over *circa* US$186,000 and appeals against the decisions of the State Commissions.

Similarly, the broad ascending hierarchy of the Civil Courts comprise circa 600 District Courts, 21 High Courts and the Supreme Court of India (India's highest). Four of the 21 High Courts (i.e., the Delhi, Bombay, Madras, and Calcutta High Courts) have original jurisdiction to hear matters over a certain pecuniary value so the District Courts under them do not hear matters involving values higher than that limit. The remaining District Courts have an unlimited pecuniary jurisdiction; so do the competent Courts of first instance to hear any insurance dispute falling within their territorial jurisdiction. There is no right to a hearing before a Jury and cases are decided by Judges.

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

Litigation in India is slow. There are reportedly over 32 million cases presently pending before Indian Courts, of which the bulk, *circa* 28 million, are before the lower Courts, *circa* 4.3 million before the High Courts and *circa* 67,000 before the Supreme Court. However, in this context, the Ministry of Law and Justice has formulated a National Litigation Policy to reduce the cases pending in various Courts in India under the National Legal Mission to reduce average pendency from 15 to 3 years.

Adjournments are frequently sought and granted, although the Supreme Court of India has sought to curb this practice (see *Shiv Cortex v Tirgun Auto Glass Limited* 2011 (9) SCALE 500).

If both sides to a dispute cooperate, it may still take four plus years for a first instance decision and perhaps a further six years for the exhaustion of the appeals process. If a litigant is uncooperative and aims to delay, then the process will take much longer.

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 to the Action

- The Code of Civil Procedure 1908 (CPC) allows either party to the action to apply to the court for an order directing the other to make discovery. The court will consider the relevance of the documents requested to the dispute to be determined and direct the discovery of a particular/class of document accordingly.
- The CPC allows a party to give notice to the other in whose pleadings or affidavits a reference is made to any document to produce it for inspection.
- Non-compliance with a discovery order can lead to the dismissal of the action or defence as the case may be.

Non-parties to the Action

The CPC allows a court to direct any person, even if a non-party, to produce any document that is material to the dispute and to do so in person at 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?

The Indian Evidence Act 1872 protects communications between a legal advisor and his client. A client's consent is required before a lawyer may disclose such communications, unless the communication was made in furtherance of an illegal purpose. The Evidence Act also provides that a person cannot be compelled to disclose any confidential communication between him and his legal professional adviser unless he offers himself as a witness and such communication is required to explain his testimony.

Beyond this, Indian courts have held that the position under Indian law relating to privilege is similar to that under English law. In this regard, the Bombay High Court has effectively recognised privilege over documents created in contemplation of litigation.

As regards documents prepared in the course of settlement negotiations/attempts, it is common for parties to mark them "without prejudice", but these are not expressly protected as privileged documents under the 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. A court has the power to require witnesses who are within its jurisdiction to give evidence and to issue an arrest warrant if a witness refuses to comply. A court cannot compel the attendance of a witness outside its jurisdiction and thus cannot impose any penal consequences for non-attendance.

The CPC allows a court to issue a commission for the examination of a witness outside its jurisdiction and allows it to issue a commission for the examination of a person resident outside India. If the person, whose attendance as a witness is deemed necessary by the court, is a party to the action, and such person fails to attend or give evidence, the court may dismiss the plaint or the defence as the case may be.

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 to be on affidavit. Every witness must be offered for cross-examination. If he cannot be physically present, the court may issue a commission for the purpose of such cross-examination. The Supreme Court has permitted video conferencing for the examination of witnesses.

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 Evidence Act allows the court to hear expert evidence on a matter of foreign law, science or art. Appointment of an expert may be on an application made by a party asking the court to permit that

party to call an expert to give evidence, or the court may decide to appoint its own expert. A report submitted by an expert does not automatically become evidence and an expert must be examined as a witness.

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

There are a very wide variety of discretionary interim remedies available from the Courts. In the main, temporary injunctions and interlocutory orders are provided for under the CPC, in addition to interim mandatory injunctions available under the Specific Relief Act 1963. A court may issue a temporary injunction restraining any act or omission to act, or make an order for the purpose of staying and preventing the alienation, sale, removal or disposition of a property in appropriate cases.

It is for the court to decide whether any interim relief should be granted, the terms on which it should be granted, and the duration of the 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?

Appeal to Decisions of the Court of First Instance

The CPC provides that, unless otherwise expressly provided in law, an appeal lies from every decree passed by a court exercising original jurisdiction to the court authorised to hear appeals from the decisions of such court, unless the decree has been passed with the consent of the parties.

Subsequent Stages of Appeal

As a general rule, an appeal will lie if there is a substantial question of law involved. Facts established at the lower courts are not normally disturbed.

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. The final stage of appeal is before the Supreme Court of India.

The limitation period for filing an appeal ranges from 30-90 days depending on the stage of appeal and delays can be condoned at the Court's discretion for good reasons.

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 judgment. A rate of 9-12 per cent is currently applied. An arbitration award will carry interest at the rate of 18 per cent from the date of the award to the date of payment, unless the Tribunal says otherwise.

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, but the award is in the Court's discretion. It is common for costs awards to be made in favour of a successful party, but the level of costs awarded is rarely sufficient to cover the actual costs incurred. The Supreme Court has recently commented that costs awards are too low and therefore do not serve to discourage vexatious litigation. Referring to a statutory upper limit of *circa* US$60 for costs awards in the case of vexatious litigation, the Supreme Court suggested that parliament should consider raising the limit to US$2,000.

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 so Calderbank letters are hardly, if ever, used.

4.10 Can the courts compel the parties to mediate disputes? If so, do they exercise such powers?

Section 89, of the CPC embraces the provision for settlement of disputes outside the court. All the cases which are filed in court need not necessarily be decided by the court itself. Keeping in mind the delay in legal procedures and the limited number of judges available, it has now become imperative to resort to an Alternative Dispute Resolution mechanism with a view to end litigation between the parties at an early date. The Alternative Dispute Resolution (ADR) mechanism as contemplated by Section 89 is arbitration or conciliation, or judicial settlement including settlement through *Lok Adalat* or mediation.

There are a number of mediation cells associated with various high courts but the consent of the parties is a condition precedent to mediation.

4.11 If a party refuses to a request to mediate, what consequences may follow?

Consent of the parties is a condition precedent before parties can be referred to mediation. As mediation is a consensual proceeding, there are no formal sanctions if proceedings are not followed through to their logical end.

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. 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 Tribunal. The principle of party autonomy has been recently confirmed by the Constitutional Bench of the Supreme Court of India in *Bharat Aluminium Co v Kaiser* (2012).

The decision restricts the scope of the Indian Courts to intervene in respect of those arbitrations where the seat is non-Indian. Further, the ACA expressly bars the Courts from intervening in an arbitral proceeding except to the extent this is provided for in the Act 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 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, needs to be in writing and 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 come into existence if it is contained in a subsequent exchange of letters, telex, telegrams or other means of telecommunication which provide a record of 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?

In relation to domestic arbitration, the ACA bars the intervention from Courts except for some specific instances wherein the Courts are allowed to intervene. For example, for interim reliefs, 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 time frame.

In relation to international commercial arbitration, the tendency of the Indian judiciary to intervene in international arbitration proceedings is now declining. The recent decision of India's Supreme Court in *Bharat Aluminium Co. v Kaiser* has reversed earlier authority which endorsed an interventionist approach under certain circumstances.

However, there are exceptions to the non-interventionist approach. For example, the Supreme Court has held that cases involving allegations of fraud and misrepresentation which go to the root of the agreement, or substantial questions of law and complicated facts that require detailed evidence, should be tried in a Court rather than by an Arbitral Tribunal. The Courts have also recognised additional categories of matters such as cases involving disputes relating to: criminal offences; matrimonial disputes; guardianship disputes; insolvency and winding up; and testamentary disputes, etc., that ought not to be arbitrated. However, courts have now started adopting the tendency to refer such matters to arbitration and allow the arbitrators to decide upon their own jurisdiction to hear and decide such matters.

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 may, before the start of the proceeding or during them, or even after the arbitral award has been pronounced (but before it is enforced), 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;
- securing the amount in dispute;
- the detention, preservation, or inspection of any property or thing that is the subject of the dispute;
- interim injunction or the appointment of a receiver; and
- such other interim measure of protection as a Court may find just and convenient.

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. The grounds on which the award can be challenged before a court 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:

- A party was under some incapacity.
- The arbitration agreement is not valid under the applicable law.
- 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.
- The arbitral award deals with a dispute that does not fall within the arbitration agreement, or it contains decisions on matters beyond the scope of the submission to arbitration.
- The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law.
- The dispute is not capable of settlement by arbitration under Indian law.
- The arbitral award is in conflict with the public policy of India.

Additionally, the ACA allows an arbitral tribunal to decide upon its own jurisdiction. If the tribunal decides that it has jurisdiction, an aggrieved party cannot approach the courts until after an award has been given. Further, any challenge to the impartiality, independence or qualification of an arbitrator is to be heard by the tribunal and, again, an aggrieved party cannot approach the courts until after an award has been given.

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Mr. Tuli also acts as an arbitrator and is currently appointed on behalf of one of India's largest public sector manufacturing and engineering companies in relation to two energy disputes with a Russian enterprise, where his co-arbitrators are both English QCs.

Mr. Tuli is recognised as a leading lawyer for Product Liability, and a leading lawyer for Insurance & Reinsurance, in India as per the Expert Guides. He has been invited to be the first President of the Insurance Law Association of India being formed in association with British Insurance Law Association, and he is a member of the Confederation of Indian Industry's National Committee on Dispute Resolution.

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Ms. Celia Jenkins handles the firm's non-contentious practice, and specialises in product development, regulatory issues and corporate and commercial work.

Ms. Jenkins has been involved in drafting and vetting and advising on insurance contract working and ancillary documentation across a range of business and product lines and has reviewed almost 1,100 policies, including ULIPs, term life, whole life, rural-oriented, health-oriented (for stand-alone health insurers and life insurers), personal accident, pension, gratuity, superannuation, leave encashment, travel, home contents, D&O, various E&O, marine/aviation liability policies, medical complications liability, POSI, and trade credit.

Ms. Jenkins also advices insurers, intermediaries and third party service providers on structuring and drafting commercial arrangements, database/service provider payments, credit management, distribution channels management, rebating, and also on larger commercial issues such as re-structuring of existing joint ventures, entry strategies, investments in exchange traded funds, and pension funds.

Ms. Jenkins also assists Insurers and Insurance Intermediaries in dealing with disciplinary actions by the Insurance Regulator.

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Tuli & Co was established in 2000 to service the Indian and international insurance and reinsurance industry. Tuli & Co is an insurance driven commercial litigation and regulatory practice and has working associations with firms in other Indian cities as well as globally via our association with Kennedys. Tuli & Co's approach is straightforward and informal. We provide our clients with direct, uncomplicated, clear advice and recommendations, delivered in plain English. In short, we believe in finding the best and most cost effective solution for our clients and provide value by focusing on what is needed and delivering it in a friendly but business-like manner.

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