Insurance Litigation

In 20 jurisdictions worldwide

Contributing editor
Barry R Ostrager

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GETTING THE DEAL THROUGH

Insurance Litigation 2015

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Preliminary and jurisdictional considerations in insurance litigation

1 In what fora are insurance disputes litigated?

In the absence of any reference to arbitration under the terms of the policy, insurance disputes can be litigated both before a civil court or consumer forums. If the insurer initiates the litigation, it has to be before the civil courts and the consumer forums cannot entertain such disputes.

Both the civil and consumer courts have territorial and pecuniary jurisdiction, and the civil court or consumer forum before which the matter is decided is dependent on the value of the dispute and the geographical limits within which the cause of action for the dispute arose.

The broad ascending hierarchy of the civil courts comprises roughly 600 district courts, 24 High Courts and the Supreme Court of India, which is the highest court of law in India. Four of the 24 high courts (ie, Delhi, Mumbai, Chennai and Kolkata) have original jurisdiction to hear matters over a certain pecuniary value so the civil judges under them do not hear matters involving values higher than that limit. In all other cases district courts and the competent courts of first instance have an unlimited pecuniary jurisdiction to hear any insurance dispute. There is no right to a hearing before a jury and cases are decided by judges.

The consumer courts follow a three-tier hierarchy, which in ascending order is 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 approximately US$3,600. There are 35 state consumer dispute redressal commissions, which can accept claims of up to approximately 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 US$186,000 and appeals against the decisions of the state commissions.

2 When do insurance-related causes of action accrue?

Disputes between the insured and the insurer usually arise when the insured's claim is rejected (in part or in full) by the insurer and which the insured believes is covered under the policy. There can be disagreement between the insurer and the insured in relation to the scope of the insuring clauses, the applicability of exclusions or the compliance with policy terms and conditions. Under the Indian Limitation Act of 1963, the cause of action for the purposes of calculating the limitation for filing a suit against the insurer will commence from the time that the claim is denied or the date of the occurrence causing the loss.

3 What preliminary procedural and strategic considerations should be evaluated in insurance litigation?

The procedural considerations include identification of the appropriate limitation period and jurisdiction for institution of the litigation. In relation to strategy, it is important that the preliminary objections to any suit (such as expiry of limitation) are brought to the court's attention at the early stages to attain a dismissal on the basis of the preliminary objections. However, in India, it is very often the case that the preliminary objections are decided after the substantive pleadings are complete, as the courts are unwilling to decide without having had access to all the paperwork on the matter.

4 What remedies or damages may apply?

The relief that is available in an Indian litigation in case of insurance disputes is specific performance and claims for damages. The insured can in a proceeding either require the insurer to specifically perform its obligations under the policy or pay the claim amount.

An Indian court or tribunal has the discretion to award interest from the date when the cause of action arose until the enforcement of the judgment. Interest is usually awarded at the rate of 9 to 12 per cent while in certain cases based on the conduct of the parties interest of 18 per cent is also awarded.

The courts may also award the successful party its costs, but the award is at the court's discretion. It is common for cost awards to be made in favour of a successful party, but the level of costs awarded is rarely sufficient to cover the actual costs of litigation. Referring to a statutory upper limit of 4,000 rupees for costs awards in the case of vexatious litigation, the Supreme Court suggested that Parliament should consider raising the limit to 124,000 rupees. In view of the low level of costs awarded, there are, as yet, no material advantages in making a pretrial offer in civil litigation so *Calderbank* letters are hardly, if ever, used.

In relation to interim reliefs that are available in general, they include temporary injunctions and interlocutory orders that are provided for under the Civil Procedure Code of 1908 in India. Parties also seek interim mandatory injunctions that are available under the Specific Relief Act of 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. The other option that is more applicable to insurance disputes is calling for deposits.

Interpretation of insurance contracts

5 What rules govern interpretation of insurance policies?

It is a settled legal proposition that while construing the terms of a contract of insurance, the words used therein must be given paramount importance, and it is not permitted for the court to add, delete or substitute any words. It is equally settled that since upon issuance of an insurance policy, the insurer undertakes to indemnify the loss suffered by the insured on account of risks covered by the policy, its terms have to be strictly construed in order to determine the extent of the liability of the insurer.

The general rule is that where the contract is expressed in writing, oral evidence is inadmissible to explain or vary the terms of a written contract. Although a contract must always be construed according to the intention of the parties, that intention can only be ascertained from the instrument itself and all other evidence of intention is excluded because when an agreement is reduced to writing the parties thereto are bound by the terms and conditions of it.

However, in the event that there is an ambiguity or doubt as to the provisions in the contract, the same is to be construed contra proferentem, that is, against the insurance company.

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6 When is an insurance policy provision ambiguous and how are such ambiguities resolved?

An insurance policy provision is ambiguous when there is uncertainty as to the meaning or intention of that provision. It can also be a situation where the same words are capable of two different meanings. When such an ambiguity appears in an insurance policy then it is to be construed contra proferentem as the terms of an insurance policy are drafted by the insurer in most cases.

Notice to insurance companies

7 What are the mechanics of providing notice?

The mechanism for the provision of notice to insurers is generally provided in the policy and differs from one policy to the other. The notice can be required to be given by way of post, e-mail or facsimile and the name and address of the person to whom the notice should be given is also mentioned in the policy. We have seen policies where claims or circumstances are required to be reported on a periodic basis by way of a bordereau.

In relation to the contents of the notice, this should contain a summary of the matter including the details of its inception, estimated quantum along with the supporting relevant information and documentation that would be required by the insurer to assess coverage under the policy. Irrespective of the time period within which notice is required to be given under the policy, insurers always prefer early notification (as soon as the claim or circumstance of the same arises) as they then have the opportunity to effectively participate in the handling of the claim or assume a defence depending on the policy wording.

8 What are a policyholder's notice obligations for a claims-made policy?

In a claims-made policy, the insured is required to give notice to the insurer as and when the claim is made against the insured. The trigger point for this sort of policy is a claim or the circumstances of a claim made against the insured. It is advisable that the notice is given immediately when the insured becomes aware of the claim or circumstance but the outer limit is usually mentioned in the policy. This can be within a specified number of days or 'as soon as reasonably practicable'. The notice is required to carry all the information in respect of the claim or circumstance that will be required by the insurer to assess coverage under the policy and understand the developments in the matter.

9 When is notice untimely?

Notice is usually considered to be untimely when it can be established by the insurer that the notice was not provided to the insurer as soon as practicable and the delay in notification prejudiced the insurers' assessment of the claim.

The National Consumer Disputes Redressal Commission in *Satpal v United India Insurance Co* RP No. 2068 of 2013 held that 'As far as merits of the case are concerned, learned state commission rightly allowed appeal as there was delay of more than 30 days in intimation to the insurance company and thus petitioner violated terms and conditions of the policy.' In *Hukam Singh and Giriraj v United India Insurance Co Ltd* RP No. 4028 of 2012 the Commission held that:

> *The intimation given to the financing bank cannot be a substitute for the intimation required to be given immediately to the insurance company. Purpose of such intimation of theft to the insurance company is to enable the insurance company to take steps to protect their interest by appointing investigators to trace the vehicle. The petitioners obviously have failed to protect the interest of the insured by failing to immediately inform the report of theft in terms of the general condition 5(i)(b) of the insurance policy referred to in the impugned order.*

In *Bajaj Alliaz General Insurance Co Ltd through Shri Ashutosh Singh, Dty Manager v Mr K Eswara Prasad* RP No. 2555 of 2012 it was held by the National Commission that 'delay in intimation to the insurance company is fatal. In the case in hand, apparently there is long delay in lodging FIR and intimation to the insurance company about the theft of the insured car and in such circumstances, complaint is liable to be dismissed.'

The National Commission has recently, in the case of *HDFC ERGO General Insurance Co v Bhagchand Saini* RP No. 3049 OF 2014, held that any delay in the notification of theft to the Police or the insurer in motor vehicle policies is fatal to the claim. Over the last few months, the position in *Bhagchand Saini* has been relied on by the National Consumer Disputes Redressal Commission in *National Insurance Company Ltd v Babu A Sirsat*, MANU/CF/0772/2014, *Bihar State Hydroelectric Power Corporation Ltd v National Insurance Co Ltd*, *Saurashtra Chemicals Ltd v National Insurance Co Ltd*, and *Jatinder Singh v Oriental Insurance Co*.

10 What are the consequences of late notice?

Insurance contracts require that the claims or circumstances of the claims are intimated to the insurer within the time period specified in the policy. This requirement may be expressed as a condition or a condition precedent to the insurer's liability under the policy and the consequences of non-compliance will to some extent depend upon whether the notification clause is expressed as a condition or condition precedent. If the notice clause is a condition then the insurer will have to show that it suffered prejudice on account of the delayed notice but if the clause is a condition precedent then, in theory, no prejudice is required to be shown for placing reliance on the clause.

In practice, however, irrespective of whether the notice clause is expressed as a condition or condition precedent, courts previously have said that the condition relating to notice should not prevent settlement of genuine claims where there is a delay in intimation or in submission of documents due to unavoidable circumstances. This is the position that the Indian Insurance Regulator (IRDA) has also recommended in its circulars when the insurers were directed not to reject claim unless and until the reasons of delay are specifically ascertained, recorded and the insurers are satisfied that the delayed claims would have been rejected even if they had been reported in time. Courts and consumer forums have also followed the view that clauses limiting the period for notification of claims are not to be construed strictly, and have often overturned the rejection of the claim where the delay was reasonably justifiable.

The IRDA also recommends that insurers should incorporate additional wording in the policy documents that suitably highlights that a delay in intimating a claim or submitting the relevant documents to the insurer will be condoned if the delay is proved to be for reasons beyond the control of the insured.

In recent times, however, the Supreme Court of India has passed judgments enforcing the agreed terms and conditions between parties. In *Export Credit Guarantee Corp of India Ltd v Garg Sons International*, 2013 (1) SCALE 410, the Court allowed a claim to be rejected on grounds that timely intimation of claims was under a credit insurance policy. The Court further ruled that the terms and conditions of a contract should be strictly followed:

> *... it is not permissible for the court to substitute the terms of the contract itself, under the garb of construing terms incorporated in the agreement of insurance. No exceptions can be made on the ground of equity. The liberal attitude adopted by the court, by way of which it interferes in the terms of an insurance agreement, is not permitted.*

Despite the ruling of the Supreme Court, the approach is not always followed and further clarification on the issue is necessary to settle the legal position.

Insurer's duty to defend

11 What is the scope of an insurer's duty to defend?

Insurance carriers who use a duty to defend clauses in their policies have the obligation to manage the litigation process from the initiation of the claim. At the same time, insurers have the right to select defence counsel who would be appointed. The insured usually has no control over the defence counsel assigned.

The duty-to-defend clause in an insurance policy essentially states that in the event a claim is made against the named insured for an alleged wrongful act, the insurance company providing coverage at the time has the duty to defend the claim, even if it is subsequently found to be groundless, false or fraudulent. Therefore, although the claim lacks merit, the insurer still has an obligation to defend the claim.

12 What are the consequences of an insurer's failure to defend?

There does not appear to be any Indian case law relating specifically to the insurer's breach of its duty to defend. We understand, however, that this issue is a subject of dispute in the United States and the position there appears to be that an insurer that erroneously refuses to defend an insured

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Update and trends

The much-anticipated increase in foreign holdings in an Indian insurance company has at long last been codified as law. However, rather than being enacted through the usual legislative process, the increase in the limit of holding from 26 per cent to 49 per cent has become law through an unusual and temporary device known as an ordinance.

As a result there still exists a question mark over the resilience of this otherwise welcome reform. The Indian Constitution permits the President of India to pass emergency temporary laws when Parliament is not in session. The day after Parliament rose at the end of the winter session, the cabinet recommended that the president pass the Insurance Bill through the ordinance route.

On 26 December 2014, the president formally assented to the cabinet's recommendation and the Insurance Laws (Amendment) Ordinance 2014 came into effect increasing the cap on foreign investment from 26 per cent to 49 per cent. However, an Indian insurer must still retain the right to appoint a majority of the directors, to control management and to control policy decisions.

The ordinance also allows foreign companies to open branches to undertake reinsurance business in India and the Lloyd's market will now be permitted to access the Indian market as the branch of a foreign reinsurer.

The ordinance has also significantly increased the fines that may be imposed on insurers for regulatory breaches, such as carrying on business without being registered, and provides for the Securities Appellate Tribunal to hear appeals against the orders or decisions of the Insurance Regulatory Development Authority.

These reforms, while welcome, would not have a significant impact unless the validity of the ordinance is confirmed by Parliament within six weeks of its next sitting in February 2015. It is worthwhile to note however that acts under the ordinance while it is effective will remain valid even if subsequently the ordinance ceases to become effective.

will have no right to subsequently rely on policy defences and appeal against the order of the court. However, one of the biggest risks associated with an insurance company's incorrect choice not to defend an insured is that it may be held liable for breach of contract, specifically if the insured can establish that their claim is in fact covered by the policy.

As set forth more fully below, once a company has unjustifiably failed to defend, the insurer is not only prevented from raising policy defences, but also has liability for:

- the amount of the judgment rendered against the insured or for the amount of the settlement;
- expenses incurred by the insured in defending the suit; and
- any additional expenses caused by the breach of the insurance contract.

However, this does not necessarily mean that the company is liable for more than its policy limits. Unless the insurer has acted in bad faith by refusing to defend its insured (or by failing to act reasonably to settle a claim within its policy limits), it is not liable for that portion of the judgment or settlement in excess of its policy limits.

An unjustified refusal to defend does not arise where the refusal to defend is based upon a conflict of interest. Further, an insurer has not unjustifiably refused to defend where it has offered a defence under a reservation of rights, but the insured rejects the reservation of rights. Where coverage is in question, the insurer is not required to provide an unconditional defence.

Standard commercial general liability policies

13 What constitutes bodily injury under a standard CGL policy?

The scope of bodily injury under a CGL policy may vary from one policy to another but bodily injury is generally understood to mean any bodily injury, sickness, disease or death that is sustained by a person. The *Black's Law Dictionary* defines bodily injury as 'physical damage to a person's body'.

14 What constitutes property damage under a standard CGL policy?

What constitutes property damage under a standard CGL policy may differ in scope from one policy to another but it is usually understood to mean physical injury to tangible property resulting in the loss of use of that property.

15 What constitutes an occurrence under a standard CGL policy?

What constitutes an occurrence under a standard CGL policy may differ in scope from one policy to another but it is usually defined as an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

16 How is the number of covered occurrences determined?

In the event that multiple covered claims are made by the insured in the course of the policy year, the insurer is liable to indemnify the insured until such time as the limit of liability set out under the policy is exhausted.

It appears therefore that there can be no predetermined number of covered occurrences to which a policy may respond and the number of occurrences that trigger coverage under the policy is determined solely by the limit of liability set out under the policy and the time at which such sum is exhausted.

17 What event or events trigger insurance coverage?

This will be dependent on the wording of the insuring clause in a policy. By way of illustration, cover under a D&O policy will be triggered if there is a claim (written demand, suit, complaint) made against a director or officer of a company who has taken the policy.

18 How is insurance coverage allocated across multiple insurance policies?

Usually policies contain another insurance clause to cater to situations where the claim notified may be covered by two or more policies covering the same risk. This clause will determine how the loss will be allocated or distributed between the policies and the level of risk to be borne by each insurer. This other insurance clause would normally say either that the policy operates in excess of any valid or collectible insurance or that the policy will contribute rateably in proportion to the amount covered under the contract and that covered under the other policy. If both policies operate in excess over one another, or when there are no such terms in the policy, there will be rateable allocation between different policies.

First-party property insurance

19 What is the general scope of first-party property coverage?

The scope of first party-property coverage policies is determined by the terms of the policy. The property policies could be exclusion-based policies where all risks other than those specifically excluded are covered or named-perils policies where only the specific perils named within the terms of the policy would be covered.

The terms and conditions of property and engineering insurance cover are currently governed by the policy wordings specified by the former Tariff Advisory Committee. Very few modifications to these policy wordings have been permitted.

20 How is property valued under first-party insurance policies?

There are various methods of valuation. Choice of appropriate valuation method depends on the purpose of valuation and on the nature of the assets involved. The various methods used for valuation are as follows.

Detailed estimate basis

The detailed estimate method involves working out the bill of materials for various materials such as cement, sand, brick, reinforcement steel, joinery and masonry, along with the cost of labour. Unit rates for various types of work such as brickwork, plastering, reinforced concrete cement and woodwork can also be used for calculating the value of the building.

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Plinth area rate method
The all India standard schedule published by the National Buildings Organisation annually publishes the normal market rate prevailing for construction in a particular area. In the plinth area rate method, such published rates can be used to estimate the value either by perusing the sanctioned plan or by actual measurement. The reinstatement value is obtained by multiplying the plinth area by the rate or unit area.

Fair value method
This represents the value in exchange. This method of valuation is applicable to assets that can be currently exchanged in the market for value (eg, whatever may be the cost of production of LPG, its value in the market for sale in exchange for cash is the fair value).

Depreciation method
This method involves valuing property by deducting appropriate amounts on a yearly basis as depreciation from the book value of the asset.

Book value
This represents the written down value of the assets in the book of accounts. In this first year, this represents the actual cost of the asset and with each passing year appropriate depreciation is charged and the value of the asset is accordingly reduced. Over a period of time, the asset value becomes so low that it will not reflect the true worth of the asset.

Market value
In this method depreciation is allowed on current replacement value of the asset for the number of years it has been in use to arrive at market value.

Directors' and officers' insurance

21 What is the scope of D&O coverage?

D&O policies typically taken out by companies provide cover for the following:

- the personal liability of directors and officers of the company (policyholder or its subsidiaries arising due to wrongful acts in their managerial capacity);
- the personal liability of a director outside the entity (company's director or officer who has been asked to serve as a director or officer of another company) arising due to wrongful acts in their managerial capacity; and
- the amounts paid by the company for the loss of directors and officers of the company arising due to wrongful acts in their managerial capacity.

The scope of the cover may be extended by way of endorsement to cover the company for:

- securities actions made against the company; and
- employment practice violations.

22 What issues are commonly litigated in the context of D&O policies?

We have not seen much litigation in the context of D&O policies in India. Also, D&O policies typically have an arbitration clause, so most disputes would be first referred to an arbitral tribunal. In other jurisdictions, such as the United States, we have seen disputes being raised in respect of:

- allocation;
- scope of cover; and
- coverage for the claimants' attorney fees.

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