



The Legal 500 Country Comparative Guides

China

INSURANCE DISPUTES

Contributor

Guantao Law Firm



Frank Huang

Executive Partner | huangfl@guantao.com

Hongfu Wu

Executive Partner | wufh@guantao.com

Sherry Huang

Partner | huangxl@guantao.com

Kelly Wu

Partner | wux@guantao.com

This country-specific Q&A provides an overview of insurance disputes laws and regulations applicable in China.

For a full list of jurisdictional Q&As visit legal500.com/guides

CHINA

INSURANCE DISPUTES



1. What mechanism do insurance policies usually provide for resolution of coverage disputes?

The dispute resolution mechanism for insurance policies may vary from company to company. But normally, there are generally only two options, that is, litigation and arbitration. For litigation, the policy will usually provide for the jurisdiction of the local court of the insurance company or the competent court in accordance with the law. For arbitration, the arbitration institution at the location of the insurance company's head office or branch office is usually chosen.

2. Is there a protocol governing pre-action conduct for insurance disputes?

In China, there is so far no mandatory pre-action conduct for insurance disputes. However, there are initiatives by regulators and courts to conduct mediation. For example, if one goes to the regulator to file a complaint against an insurance company, the regulator will have an officer or assign a third party to mediate the dispute. If one goes to the court to file a lawsuit, the court will have a judge or refer a third party to conduct mediation. However, mediation by the regulator, the court or a third party is not a mandatory requirement in law. The party can bring the lawsuit against the insurance company directly in court.

3. Are the Courts in your region adept at handling complex insurance disputes?

Because of the large number of insurance dispute cases each year, judges in Chinese courts are, on the whole, very experienced in common insurance disputes. In the courts of some major cities, there are specialised judges to handle insurance disputes, and their professionalism is even more assured. However, it has to be admitted that some complex insurance disputes, especially cross-border insurance contract disputes, are challenging for Chinese judges as the terms of the policy may not be

written in Chinese or may require the application of foreign laws (e.g. English law).

4. Is alternative dispute resolution mandatory in your jurisdiction?

There is no mandatory ADR, only mediation mechanisms of an encouraging nature.

5. Are successful policyholders entitled to recover costs of insurance disputes from insurers?

In the case of litigation, the attorney's fees are generally borne by each party, and the costs of the litigation are borne by the losing party. In the case of arbitration, in principle, both attorney's fees and arbitration costs are borne by the losing party.

6. Is there an appeal process for Court decisions and arbitral Awards?

With regard to court proceedings, Chinese law implements a two-tier trial system for general cases. In other words, if a person is not satisfied with the judgement of the first instance, he or she may file an appeal. The judgement rendered by the court of second instance will be an effective judgement. However, for small-amount lawsuits (those where the amount involved is less than 50 percent of the average annual salary in the previous year at the provincial level), the judgement of first instance will be final.

In addition, for court proceedings, China also has a system of retrial and protests by the procuratorate, but this is not a regular system for hearing cases, but rather a system for supervising judgements that have already entered into force. In other words, if a judgement that has already entered into force is found to be wrong, the judgement can be corrected through the court's retrial system or the Procuratorate's protest system.

In the case of arbitral awards, the parties will not be able to seek an appeal in court, but may request the court to set aside the arbitral award. For such applications, the court would not review substantive issues, but only procedural issues and whether public policy had been violated. Some Chinese arbitration institutions have set up procedures for reviewing arbitral awards, but they require the prior consent of the parties, and this system has not been chosen in any insurance company's policy so far.

7. How much information are policyholders required to disclose to insurers prior to inception of the policy?

Prior to inception of the policy, the policyholder shall truthfully disclose to the insurer of any enquiry made by the insurer concerning the subject matter of the insurance or the insured. The content of "shall truthfully disclose" refers to what the policyholder knows or should know about the subject matter of the insurance or the insured. The policyholder's obligation to disclose is limited to the scope and content of the insurer's enquiry. If the parties dispute the scope and content of the enquiry, the insurer shall bear the burden of proof. If the insurer uses "others" or "in addition to the aforesaid" enquiries in the enquiry form or disclosure letter, it is likely to be regarded as not having made such enquiry. The policyholder may not disclose what is already known to the insurer, or what is known to the insurer according to common sense, or what the insurer declares not to be necessary to disclose.

The policyholder is the party of the fulfilment of the obligation to disclose truthfully. The insurer's enquiry to the insured cannot be regarded as an enquiry to the policyholder. However, if the insurer inquires both the policyholder and the insured about the relevant matters, the policyholder shall be deemed to have fulfilled the obligation of disclosure as long as one of them make the disclosure truthfully.

8. What remedies are available for breach of the duty of disclosure, and is the policyholder's state of mind at the time of providing the information relevant?

Where the policyholder failed to perform the obligation of disclosing 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 terminate the contract.

The right to terminate the contract shall commence on

the date on which the insurer becomes aware of the trigger event for termination and shall extinguish if the right is not exercised more than 30 days. An insurer shall not terminate a contract if a two-year period has lapsed since conclusion of the contract; upon occurrence of an insured event, the insurer shall be liable to make indemnification.

Where a policyholder failed to perform the obligation of disclosing truthful information intentionally, the insurer shall not be liable to make indemnification for an insured event which has occurred before termination of the contract, and the premium shall not be refunded.

Where a policyholder failed to perform the obligation to disclose truthful 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 indemnification for the insured event which has occurred before termination 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 disclosed truthful information, the insurer shall not terminate the contract; upon occurrence of an insured event, the insurer shall be liable to make indemnification.

9. Does the duty of disclosure end at inception of the policy?

The duty of disclosure is generally deemed to be terminated after the conclusion of the policy. However, it does not mean that the policyholder and the insured can completely refrain from providing any information to the insurer during the term of the contract. Under certain circumstances, such as the occurrence of an insured event, the transfer of title of the subject matter, an increase in the risk of the subject matter, etc., the policyholder or the insured will need to disclose to the insurer in a timely manner.

10. Are certain types of provisions prohibited in insurance contracts?

Provisions that are prohibited in general contracts are also prohibited in insurance contracts, such as those that are contrary to public orders and morals and detrimental to the interests of the country and the public interest of society.

Meanwhile, it is worth noting that Article 19 of the Insurance Law of the People's Republic of China ("the Insurance Law") provides that:

The following stipulations in an insurance contract concluded using the form provided by the insurer are invalid: (i) Exempting the insurer from its obligations under the law or aggravating the responsibilities of the policyholder or the insured; (ii) Excluding the rights enjoyed by the policyholder, the insured or the beneficiary in accordance with the law.

11. To what extent is a duty of utmost good faith implied in insurance contracts?

Firstly, regarding the concept of utmost good faith, there is no clear provision on utmost good faith under China's current legal system. Article 5 of the Insurance Law provides that "parties to insurance activities shall follow the principle of honesty and good faith in exercising their rights and fulfilling their obligations". The provision here is not different from the principle of good faith applicable to other contracts. However, the insurance law, in various aspects, actually has contents that reflect the principle of utmost good faith, such as the disclosure obligation of the policyholder and the insured's obligation to explain the terms of the contract at the time of the conclusion of the insurance contract, which is obviously different from the conclusion of other contracts.

Secondly, regarding implied obligations, Chinese law and practice generally do not use "implied obligations" to define the obligations of the parties to a contract. Nevertheless, Chinese law applies the principle of good faith, contractual interpretation, and trading practices to achieve a similar function to that of an implied obligation. In other words, although the principle of utmost good faith is not expressly provided for in insurance contracts, there are still similar mechanisms to adjust the rights and obligations of the parties in insurance disputes.

12. Do other implied terms arise in consumer insurance contracts?

China does not have special legislation on insurance contracts for individual consumers. However, in practice, given that individual consumers may be less familiar with insurance contracts than commercial units, Chinese courts may be more inclined to protect individual consumers in specific disputes. For example, there will be higher requirements on the insurer's duty to explain the terms of insurance policy.

13. Are there limitations on insurers' right

to rely on defences in certain types of compulsory insurance, where the policy is designed to respond to claims by third parties?

Yes, for certain compulsory insurance, there will be these limitations. For example, in the case of compulsory vehicle insurance, for a driver who deliberately causes a traffic accident, the insurer is also required to compensate the third party for the loss first within the limit of liability of the compulsory vehicle insurance without being able to invoke a defence against the driver. However, the insurer can recover the damages from the driver after compensating the third party.

14. What is the usual trigger for cover under insurance policies covering first party losses, or liability claims?

In the case of liability claims, the insured is required to indemnify the third party before the insurer is triggered to indemnify the insured. However, if the liability of the insured to the third party is determined, at the request of the insured, the insurer may also be triggered to compensate the third party directly. If the insured fails to do so, the third party may directly demand compensation from the insurer.

15. Which types of loss are typically excluded in insurance contracts?

The following types of losses are typically excluded from insurance contracts: (1) intentional or grossly negligent acts; (2) unlawful acts; (3) administrative or judicial acts; (4) war and terrorism, etc.; (5) natural disasters; (6) nuclear events; (7) inherent or latent defects, natural wear and tear; and (8) environmental pollution.

16. Does a 'but for' or 'proximate' test of causation apply, and how is this interpreted in wide area damage scenarios?

Where there are multiple causes of loss, the principle of causation will need to be considered in determining coverage. In wide area damage scenarios, since the loss may be multi-caused, the court will consider the effect of the multiple factors on the occurrence of the loss before determining coverage and how much to pay. Please see further to the response to question 17.

17. What is the legal position if loss results from multiple causes?

If the loss is due to more than one cause, the first question is whether the proximate cause, i.e., the one that is continuously decisive or effective, can be identified. If the proximate cause is a covered risk, the insurer is liable to pay; if the proximate cause is an excluded or uninsured risk, the insurer is not liable to pay. If the proximate cause is difficult to determine, the insurer is liable in the proportion or degree of the insured risk to the cause of the event.

18. What remedies are available to insurers for breach of policy conditions?

Remedies for breach of the conditions of the policy depend largely on how the policy was agreed. As far as legal remedies are concerned, the insurer's remedies are mainly provided for in Article 16 (obligation of the policyholder to disclose truthfully), Article 21 (obligation to notify of the insured event), Article 27 (insurance fraud), Article 49 (transfer of the subject matter), Article 51 (obligation of safety), Article 52 (obligation to notify of an increase in risk), and in Article 61 (legal consequences of not being able to exercise the right of subrogation), of the Insurance Law. .

19. Are insurers prevented from avoiding liability for minor or unintentional breach of policy terms?

The consequences of a policyholder's breach of the terms of the policy will, in many cases, depend on whether the breach is intentional and whether it is material.

For example, if the policyholder intentionally fails to comply with the terms of the truthful disclosure, and if this is sufficient to influence the insurer's decision on whether to underwrite the policy or to increase the premium, then the insurer will have the right to terminate the contract, and will not be liable to pay compensation for insured event occurring prior to the termination of the contract. If it is not intentional, but there is gross negligence to fail to fulfil the obligation of truthful disclosure, then it has a serious impact on the occurrence of insured event, the insurer will not be liable for compensation for insured event occurring before the termination of the contract, but should return the premium.

Another example is that the policyholder, the insured or the beneficiary should notify the insurer in time after

knowing the occurrence of the insured event. If the insurer intentionally or through gross negligence fails to notify the insurer in a timely manner, making it difficult to determine the nature, cause and extent of loss of the insured event, the insurer shall not be liable to pay compensation or insurance indemnifications for the undetermined portion of the accident.

20. Where a policy provides cover for more than one insured party, does a breach of policy terms by one party invalidate cover for all the policyholders?

Yes, it is possible. But it largely depends on the specifics of the dispute. For example, if one of the insureds breaches the terms of the policy but has no effect on the insured event suffered by the other insured, then the first insured's breach of the policy should not result in the other insured not being able to obtain compensation. However, if the first insured's breach of the terms of the policy also affects the occurrence of the insured event of the other insured, then the first insured's breach of the policy may result in the other insured being unable to obtain compensation as well.

21. Where insurers decline cover for claims, are policyholders still required to comply with policy conditions?

If an insurer declines a claim, but the policy is still in force, the insured may still need to comply with the terms of the policy, in order to sustain a claim under the policy in the event of a new accident.

22. How is quantum usually assessed, once entitlement to recover under the policy is established?

Generally, in China, after an insured event occurred, the insurer will appoint surveyors to assist in assessing the amount of loss. If the insured is not satisfied with the outcome of the survey report and is unable to negotiate with the insurer to determine the amount of loss, the parties may determine the amount of loss through litigation or arbitration.

23. Where a policy provides for reinstatement of damaged property, are pre-existing plans for a change of use relevant to calculation of the recoverable

loss?

Where there is a reinstatement clause, the loss is generally calculated on the basis of the subject matter of the insurance being in a state when it was new, without regard to depreciation. If there are pre-existing plans for a change of use, and such plans have been disclosed to the insurer and taken into account by the insurer in calculating premiums, then the cost of the change of use should also be taken into account in calculating the loss.

24. After paying claims, to what extent are insurers able to pursue subrogated recoveries against third parties responsible for the loss?

Pursuant to article 60 of the Insurance Law, if an insured event occurs as a result of damage caused by a third party to the subject matter of the insurance, the insurer is subrogated to the insured's right to claim compensation against the third party to the extent of the amount of the insurance indemnification from the date of making the indemnification.

It is worth noting that the right of recovery against the third party is transferred to the insurer in statutory form at the time the insurer makes indemnification. After the transfer, claims for recovery from the third party can only be made in the name of the insurer.

25. Can claims be made against insurance policies taken out by companies which have since become insolvent?

Yes. The insolvency of the policyholder does not prevent the insured or other persons entitled to claim from claiming against the insurer under the policy.

26. What are the significant trends/developments in insurance disputes within your jurisdiction in recent years?

China's newly revised Company Law ("the new Company Law") will come into effect on 1 July 2024. On the one hand, the new Company Law further refines the standards of directors' and supervisors' duties of fidelity and diligence, and the obligations and liabilities of corporate executives become clearer, as well as more legally actionable. On the other hand, Article 193 of the new Company Law stipulates that a company may take out liability insurance for the liability of a director arising from the performance of his/her duties for the company during the director's term of office. This is the first time in China that companies are encouraged by law to take out directors' liability insurance. It is expected that with the implementation of the new Company Law, more and more listed and non-listed companies will take out Directors and Officers Liability Insurance (D&O Insurance) for their executives, and there will be more and more insurance disputes in this regard.

Another noteworthy trend is that in recent years, as the development of arbitration has been encouraged in China, where several leading arbitration institutions in China have been recognised by the business and legal communities, more and more insurance cases are being resolved through arbitration, especially high value, specialised, or cross-border insurance disputes. In addition, the revision of China's arbitration law, which is expected to be completed soon, will bring it closer to internationally recognised arbitration laws and rules, and it is believed that this change will further encourage more insurance disputes to be resolved through arbitration.

27. Where in your opinion are the biggest growth areas within the insurance disputes sector?

With the amendments to the Securities Law and Company Law in the past few years, it is expected that insurance companies will update the terms and conditions of D&O Insurance, and the related disputes will grow significantly.

Contributors

Frank Huang
Executive Partner

huangfl@guantao.com



Hongfu Wu
Executive Partner

wufh@guantao.com



Sherry Huang
Partner

huangxl@guantao.com



Kelly Wu
Partner

wux@guantao.com

