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India

INSURANCE DISPUTES

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

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INDIA
INSURANCE DISPUTES

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

Insurance policies are structured to incorporate comprehensive mechanisms for dispute resolution in respect of coverage and quantum disputes. Insurance policies typically include details of the insurance ombudsman, who is appointed to address complaints by the insured, inter alia in relation to the settlement of claims.

The Insurance Regulatory and Development Authority of India ("**IRDAI**") requires insurers to formulate a grievance redressal policy and file it with the IRDAI. An insurer is also required to provide the details of the grievance redressal mechanism within the policy. Policyholders who have complaints against insurers are first required to approach the grievance or customer complaints department of the insurer. Insurers are required to form a part of the Integrated Grievance Management System (IGMS) put in place by the IRDAI to facilitate the registering/tracking of complaints online by the policyholders. In cases of delay or no response relating to policies and claims, the IRDAI can take up matters with the insurers to ensure speedy resolution. While policyholders, claimants or the insured can approach the IRDAI for assistance but advocates, agents and other third parties are not allowed to approach the IRDAI.

Additionally, insureds can approach commercial courts or civil courts, depending upon the value of the claim, or invoke arbitration for recovering monies under an insurance policy, provided that the insurance policy contains an arbitration clause. Insureds are also treated in law as consumers of insurance services and can therefore approach the consumer courts for relief under the Consumer Protection Act 2019 ("**CPA**"). The right to approach a consumer forum exists even where there is an arbitration clause.

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

The IRDAI (Protection of Policyholders' Interest) Regulations 2017 ("**PPHI Regulations**") requires every insurer to have a proper grievance redressal mechanism to resolve complaints and grievances of the policyholders and claimants and specify the procedure to be followed by all the insurers. In addition, the PPHI Regulations require every insurance policy to 'clearly' state the details of insurer's internal grievance redressal mechanism as well as the contact details of the insurance ombudsman within whose jurisdiction the branch/office of the insurer or residential address/place of residence of the policyholder is located.

In addition, the Commercial Courts Act 2015 ("**CCA**") provides for compulsory mediation for parties before filing of a commercial suit, except where a party seeks urgent interim relief.

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

Indian courts are equipped to handle commercial claims. In 2015, the CCA was introduced which carves out special benches in all existing civil courts to adjudicate commercial matters exclusively. An insurance dispute comes under the purview of the CCA as it falls under the definition of a "commercial dispute". By providing for an exclusive forum, the CCA has expedited the litigation process for commercial disputes. Commercial disputes are referred to the commercial courts having the requisite territorial and pecuniary jurisdiction. The pecuniary jurisdiction of a commercial court is INR 300,000 and above. The legislation is meant to speed up the adjudication process. Insurance and reinsurance disputes are categorised as commercial disputes and can be heard by the commercial courts.

Insureds can also approach the consumer commissions under the CPA for adjudicating insurance disputes. The consumer commissions have a three-tier hierarchy with

District Commissions at the lowest rung followed by a State Commission (for every State) and a National Commission at the apex level. District Commissions have the jurisdiction to deal with complaints arising out of a contract, for services or goods, where the consideration does not exceed INR 1,00,00,000. For the State Commission the threshold is above INR 1,00,00,000 and up to INR 10,00,00,000, whereas the National Commission can take up original complaints where the consideration is above INR 10,00,00,000.

4. Is alternative dispute resolution mandatory in your jurisdiction?

The Arbitration and Conciliation Act 1996 ("**Arbitration Act**") provides that a judicial authority shall refer parties to arbitration where there is an arbitration agreement in a contract. However, the Supreme Court of India has held that an existing arbitration agreement does not deprive consumers of remedies under the CPA if they choose to pursue them.

Recently, the IRDAI has issued a circular dated 27 October 2023 ("**Circular**") directing all insurers that an insurance policy issued under the commercial lines of business shall have a mandatory arbitration clause, which stipulates that "*the parties to the contract may mutually agree and enter into a separate Arbitration Agreement to settle any and all disputes in relation to this policy*". In case parties mutually agree on an arbitration agreement, then the arbitration proceedings will be conducted as per the provisions of the Arbitration Act. The Circular has further deleted arbitration clauses from all polices under the retail lines of business prospectively. For the existing retail policies, the existing arbitration clause shall remain valid till the term of the policy expires unless a policyholder specifically requests the insurer to replace it with the clause as mandated by the IRDAI. This also applies to all existing policies issued under the commercial lines of business.

In case of commercial suits filed under the CCA, it is mandatory for the parties to undergo mediation proceedings prior to admission of the suit before the commercial court.

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

The courts or tribunals may award the successful party its costs, but the award of costs is at the adjudicating authority's discretion and is typically far from the actual costs incurred.

The Code of Civil Procedure 1908 ("**CPC**") prescribes the upper limit at INR 3,000 for costs in cases of vexatious litigation. The Supreme Court has suggested that the Parliament should consider raising this limit to INR 100,000.

The CCA has expanded the definition of costs which includes the fees and expenses of the witnesses, the legal fees and any other expenses incurred in connection with the proceedings. Still, it is at the discretion of the courts. In cases of vexatious litigation under the CCA, the statutory upper limit as per CPC has been excluded. Nonetheless, even in relation to litigation under the CCA, costs, if awarded, typically would be reasonable costs as opposed to the actual costs incurred.

The Arbitration Act prescribes for reasonable costs to the successful party to cover expenses incurred towards legal costs, administrative costs, and any other ancillary expense. The basis for determination of costs depends on a variety of factors like the conduct of the parties, vexatious claims, success in the case etc.

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

Appeal under the CCA

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). The CCA 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.

A party has an option of filing a Special Leave Petition before the Supreme Court of India seeking recourse against any order of the lower courts. However, the leave is subject to the discretion of the Supreme Court.

Appeals under the CPA

In case of consumer fora, appeals against the decision of the District Commission are heard by the State Commissions. An appeal against the decision of the State Commission lies before the National Commission. An appeal against the decision of the National Commission lies before the Supreme Court of India.

Appeals under the Arbitration Act

The Arbitration Act allows for challenge of the arbitral awards, however, there is a narrow scope for interference in as much as an arbitral award cannot be set aside on grounds of erroneous appreciation of law,

reappreciation of evidence and/or by entailing a review on merits of the dispute. Even where the arbitrator has taken a possible/plausible view, although a different view may be possible on the same evidence, the court does not have the jurisdiction to interfere. A challenge against an arbitral award lies before a court which has jurisdiction of the arbitration proceedings. 'Court' in case of a domestic arbitration means the principle Civil Court of original jurisdiction in any district and includes the High Court in exercise of its original civil jurisdiction.

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

The statutory framework in this jurisdiction requires the policyholders to act with utmost good faith, and courts have held that this includes the duty to disclose material information. Any information which would be relevant to the risk being underwritten by an insurer is deemed to be material information. Whether a fact is material will depend on the circumstances, as proved by evidence, of the particular case. Therefore, any fact which would influence the judgement of a prudent insurer is a material fact which must be disclosed prior to the policy inception.

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?

Policyholders are required to disclose every material fact known to them. Further, there is a presumption of knowledge to the effect that policyholders are deemed to know every fact which, in the ordinary course of business, is ought to be known to them.

A policyholder's innocent failure to disclose material facts would entitle the insurer to avoid the contract ab initio but the premium paid would have to be returned if the risk has not attached. This is subject to the insurer being able to establish that the non-disclosure induced the insurer to undertake a risk which the insurer would not have taken, or would not have taken on the same terms, had the material facts been disclosed. Where the non-disclosure is fraudulent, insurers have the right to avoid the policy ab initio and retain the premium.

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

As per the Marine Insurance Act, 1963 policyholders must disclose every material circumstance before the contract is concluded. Failure to disclose will entitle the insurer to avoid the contract. However, this statutory remedy is limited to non-disclosure occurring prior to the policy inception. In case of non-disclosure after the policy has incepted, an insurer can repudiate the claim and argue that there has been a breach of the principles of utmost good faith. This is because courts in this jurisdiction have held that the duty to act with utmost good faith is a continuing one, and it includes the obligation to disclose all material information.

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

At present, Indian insurers are required by the PPHI Regulations to insert certain terms and conditions in their insurance contracts. In addition, there are also restrictions in terms of some provisions in insurance contracts. For instance:

- The terms and conditions of insurance contracts are standardised for certain categories of insurance contracts, such as motor third party, contractor all risks and fire) and insurers are permitted to issue these contracts only in this form.
- Insurance contracts cannot cover alternate risk transfers or financial guarantees.
- Per Section 46 of the Insurance Act 1938 insurance contracts cannot contain any provisions which excludes the jurisdiction of the Indian courts.
- Retail general insurance policies cannot include any grounds for policy cancellation other than misrepresentation, non-disclosure of material facts, fraud, and insured's non-cooperation.
- Insurers are not permitted to use ambiguous or technical terms and/or conditions in their insurance contracts.

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

It is a fundamental principle of insurance law that utmost good faith (uberrimae fides) must be observed by the contracting parties. The duty of utmost good faith places an obligation on the insured to voluntarily disclose all material facts which are relevant to the risk being insured. If there has been a misrepresentation or non-disclosure of a material fact, an insurer can avoid the policy from the beginning.

Further, the Indian Marine Insurance Act, 1963 and the

PPHI Regulations mandate that an insured is under an obligation to disclose all material information sought by the insurer in the proposal before the inception of the policy. Insurer is therefore entitled to receive full and fair disclosure of the material information that would influence the judgement of the insurer in determining whether to accept or reject the risk.

The PPHI Regulations also impose an obligation on the insured to disclose all material information. This forbids the insured from concealing what they privately know, with a view to drawing the insurer into a bargain. The insured's duty to disclose is not confined to the facts which are within his knowledge but extends to all material information which the insured ought to have known. The duty of good faith is of a continuing nature and applies to both, the insured and the insurer. Accordingly, the duty of utmost good faith is implied in all insurance contracts.

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

When interpreting insurance contracts, Indian courts have held 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 has also been observed that, because 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. 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 that agreement.

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

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

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?

When there is compulsory insurance, for instance in motor accident-related proceedings, there are limited grounds on which an insurer can deny payment for a third-party claim in this jurisdiction. Even if the insurer succeeds in establishing a defence, it is usually nevertheless obliged to pay the third-party claimant, but courts can direct the insured to reimburse the insurer.

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

The trigger for cover would depend on the specific policy wordings, including the insuring clause.

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

The nature of losses excluded would generally differ from each policy type and will largely depend on the specific policy wording. In our experience, property policies generally exclude losses caused by wear and tear or design defects. We have also seen liability policies generally exclude losses or claims arising from criminal acts where such liability has been adjudicated by a court of law, and any contractually arising liability.

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

Courts in this jurisdiction have applied the test of proximate cause and have generally implied the requirement for the loss to be caused by a covered peril which was also the proximate cause. However, the

impact of the insured peril on the wider area cannot be taken into account in assessing business interruption.

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

We have not seen the rule of concurrent causation be put to test before courts in this jurisdiction. However, we believe that the courts are likely to adopt the position under English law. The position is that there is cover for a loss which arises from two equally effective causes, and one is expressly covered but the second is not. However, the loss is excluded where it arises from two equally effective causes, and one is covered, and the other is expressly excluded.

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

The effect of breach of conditions in an insurance policy depends on whether the 'condition' is a condition precedent to insurer's liability or not. Usually, an insurance policy will expressly state the provisions which are conditions precedent to liability. If any condition precedent has been breached, the insurer has the right to repudiate the claim. However, where it is not expressly stated, the Indian courts will make efforts to decide whether a particular clause is merely a condition or a condition precedent to the insurer's liability. To action the breach of a condition, an insurer will have to show that the breach has caused it to suffer prejudice.

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

The courts in this jurisdiction are likely to consider a minor or unintentional breach of policy conditions are inconsequential to the insured's right to cover. This position is slightly different for those terms which are specified as being conditions precedent to the insurer's liability, as an insurer can generally repudiate claims for a breach of condition precedent. However, this is an evolving sphere and we have seen courts take a lenient view on such breaches in recent times.

The position is much clearer when it comes to breach of warranties. Warranties are the clauses which form the basis of the contract of insurance. Usually, clauses which are meant to operate as warranties are expressly stated to be as such in the insurance policies. All warranties under an insurance policy must be strictly complied with, whether material to the risk or not. If a warranty is breached, an insurer is discharged from all liability under the policy. The Supreme Court of India has recently held that mere knowledge on the part of the insurer that there was breach of warranty by an insured would not amount to a waiver in the absence of an express representation by the insurer.

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?

Cover to multiple insureds is generally provided under composite policies, and in our experience, these may at times include terms which specifically state that the policy applies separately to each insured. Although this is subject to the specific wording of the policy, where cover is extended to multiple insureds, the policy is considered as a separate contract between each insured and the insurer. The cover provided to each assured mostly remains unaffected by the default of other co-assureds.

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

Policy conditions are generally drafted as requirements that must be fulfilled for an insured to become entitled to cover. We have not seen any precedents in this jurisdiction which specifically comment on the effect of a breach of policy conditions once a claim has been repudiated. However, based on our experience, the insured is unlikely to continue to abide by the policy terms and conditions after repudiation, and a court/tribunal may not take an adverse view of non-compliance occurring after repudiation. The position will however be different for breaches of warranties, as an insurer's right to action a breach of warranty cannot be implied to have been waived unless expressly stated otherwise.

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

For most classes of first party losses, the statutory and regulatory framework requires an insurer to appoint a surveyor and seek a final survey report which includes an assessment on the quantum. The surveyor's report is not binding or sacrosanct, but an insurer will need substantive grounds to disagree with a surveyor's assessment. However, certain classes of claims are

exempt from the statutory requirement of seeking a survey report. In such cases, the quantum would be assessed by the insurer who may also include terms in the policy which require the insured to provide evidence of the quantum of loss.

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?

In our experience, courts in this jurisdiction are likely to not consider pre-existing plans for a change of use while calculating the recoverable loss. This is because an insurer is obliged to reinstate the damaged property only to the condition in which it was before the loss, and to the extent reasonable and possible. Further, property insurance in this jurisdiction is also based on the principle of indemnity, and subject to specific policy wording, there is usually no cover for any betterment.

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

There is statutory and judicial recognition to the right of subrogation. For statutes, the Marine Insurance Act, 1963, specifically Section 79, provides for the insurer's right to subrogation.

Equally, Indian courts have recognised subrogation as an equitable corollary of the principle of indemnity, under which the rights and remedies of the insured against the wrongdoer are transferred to and vested in the insurer.

No separate contractual clause is required to trigger this; however, in practice, policies do also contain subrogation clauses and insurers will frequently obtain "subrogation letters" and an "assignment" of the third-party claim from the insured. The PPHI Regulations also obligate an insured to assist its insurer in recovery proceedings if the insurer so requires.

In practice, insurers did not initiate subrogated proceedings very often in view of the costs and time it would take to pursue the action. The quantum of the claim should be such as to justify the expense of recovery proceedings. However, we now see a change in the trend as more subrogated recoveries are being pursued.

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

The obligation to make payment, if any, to the insolvent insured will be under the general insolvency or bankruptcy laws. In the authors' view, the insolvency of the insured will not affect the liability of the insurer to pay the insured.

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

The Supreme Court has recently settled the long-contested position of whether an insured comes within the scope of a "consumer" under the consumer laws. In the case of *National Insurance Co Ltd v Harsolia Motors and Ors* (2023) 8 SCC 362, the Supreme Court has held that the relevant consideration to determine whether an insured is a "consumer" is to see whether the items sold, or the services offered are directly related to the activity that generates profit. It was observed that availing an insurance policy is an act of indemnifying a risk of loss/damages and there is, therefore, no element of profit generation.

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

Over the last few years, we have seen a steady increase in disputes arising out of agricultural insurance policies, which provide coverage to farmers in case of crop destruction due to natural calamities. There has also been an upward trend in disputes arising out trade credit insurance policies. We have also witnessed a growing number of cyber-insurance covers being issued and claims being made under them, including a rise in disputes arising out of cyber policies.

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