The Insurance and Reinsurance Law Review

Second Edition

Editor
Peter Rogan

Law Business Research

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Chapter 16

INDIA

Neeraj Tuli and Celia Jenkins[1]

I INTRODUCTION

The Indian insurance market was nationalised shortly after India's independence in 1947 and remained so until the Indian government's industrial policy of 1991 announced the advent of a liberalised Indian economy, which included private participation in the insurance sector. In 1993 the government set up the Malhotra Committee to review the then existing structure of the regulation and supervision of the insurance industry and to suggest reforms. The Committee recommended, *inter alia* that the private sector be permitted to enter the insurance industry and that foreign insurers be allowed to enter the Indian market by forming joint venture companies with Indian partners.

There was considerable delay in implementing these recommendations, and in particular a rather lengthy debate over the right level of the cap on foreign ownership, but in 1999 the Insurance Regulatory and Development Authority (IRDA) was set up as an autonomous body to regulate the insurance industry and develop the insurance market, and in August 2000 private competition was permitted with a foreign ownership cap of 26 per cent.

Despite the growing complaints about the relatively low 26 per cent cap on foreign investment, the insurance sector has grown by approximately 15 to 20 per cent a year since the advent of liberalisation. India now has 24 life insurers, 28 general insurers and five stand-alone health insurers, 31 third-party administrators, 380 insurance brokers, nine web aggregators, five insurance repositories and innumerable corporate agents and insurance agents. At present, the government-owned General Insurance Corporation is the only reinsurance company registered in India.

1 Neeraj Tuli is a senior partner and Celia Jenkins is a partner at Tuli & Co.

II REGULATION

i The insurance regulator

Insurance and reinsurance companies and intermediaries in India are governed by the IRDA.

ii Position of non-admitted insurers

Overseas non-admitted insurers cannot write direct insurance business in India. Non-admitted insurers reinsure risks written by Indian insurers in accordance with the IRDA's regulations on the reinsurance of life and general insurance business.

Indian residents are also prohibited from purchasing insurance from overseas non-admitted insurers unless the purchase falls within a general or specific approval of the Reserve Bank of India.

iii Position of brokers

Only insurance brokers that are registered with the IRDA as direct brokers, reinsurance brokers or composite brokers in accordance with the IRDA (Insurance Brokers) Regulations 2002 can operate as insurance brokers in India.

iv Requirements for authorisation

The general rule is that only licensed insurance agents, corporate agents and other insurance intermediaries can distribute insurance products for Indian insurers. Unlicensed persons are prohibited from soliciting and procuring insurance business or providing introductions or leads.

v Regulation of individuals employed by insurers

Individuals employed by Indian insurers must be internally trained by the insurer to carry out distribution of insurance products. Indian insurers are also permitted to use individual insurance agents that are licensed under the IRDA (Licensing of Insurance Agents) Regulations 2000 as well as corporate agents that are licensed under the IRDA (Licensing of Corporate Agents) Regulations 2002 for the distribution of insurance products.

vi The distribution of products

Only licensed insurance agents, corporate agents and other insurance intermediaries can solicit and procure insurance business for insurers. Insurers are also permitted to engage licensed telemarketers and licensed web aggregators for the solicitation and procurement of insurance business and to purchase access to the database of licensed referral companies.

vii Compulsory insurance (e.g., employers' liability)

The following insurance covers are examples of those that are compulsory by central law:

a Public Liability Insurance Act 1991: accidental cover for persons handling hazardous substances and environmental issues;

b Motor Vehicles Act 1988: compulsory third-party liability insurance;

c Deposit Insurance and Credit Guarantee Corporation Act 1961: insurance to be taken by the banks functioning in India;
d IRDA (Insurance Brokers) Regulations 2002: professional indemnity insurance covering errors and omission, dishonesty and fraudulent acts by employees and liability arising from loss of documents or property;
e Carriage by Air Act 1972: requires parties to maintain adequate insurance covering any liabilities that may arise;
f Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995: insurance scheme for employees with disabilities;
g Personal Injuries (Compensation Insurance) Act 1963: employers' liability for workers sustaining injuries;
h Employees State Insurance Act 1948: for insurance to employees in case of sickness, maternity and employment injury;
i Payment of Gratuity Act 1972: insurance for gratuity payments to employees;
j War Injuries (Compensation Insurance) Act 1943: for workmen sustaining injury in war;
k Marine Insurance Act 1963: on the lives of crew members;
l Merchant Shipping Act 1958: on the lives of crew members;
m Inland Vessels Act 1917: insurance of mechanically propelled vessels; and
n the Companies Act 2013: insurance of deposits accepted by companies (not enforced yet).

viii Taxation of premiums

Premiums received on account of insurance and reinsurance business attract service tax (which currently stands at 3.06 per cent for traditional products and 12.36 per cent for unit-linked products). Income tax laws provide deductions to the policyholder on life and health insurance premiums paid.

ix Proposed changes to the regulatory system

Stakeholders within the Indian insurance industry as well as several overseas insurers and reinsurers have now been waiting several years for the Insurance Laws (Amendment) Bill 2008 to be passed but developments over the few years indicate that the wait is not over yet. Of significance, the Bill proposes to (1) raise the present foreign direct investment (FDI) cap from 26 to 49 per cent (while maintaining the FDI cap at 26 per cent for insurance cooperative societies); (2) permit overseas reinsurers (who are not admitted in India) to open branch offices to carry out reinsurance business in India; (3) facilitate the entry of Lloyd's of London through a joint venture with Indian partners and also as a branch of a foreign reinsurer; and (4) lower the capital requirements for stand-alone health insurers to 50 million rupees.

x Other notable regulated aspects of the industry (e.g., ownership, mergers, capital requirements)

The minimum paid-up equity capital for an insurer is 1 billion rupees and any direct or indirect foreign investment in an insurer is restricted to 26 per cent. Currently, there have been no mergers in the Indian market, although some investors in insurance joint ventures have exited the joint venture through transfer of shares and some investors are currently said to be contemplating their exits.

III INSURANCE AND REINSURANCE LAW

i Sources of law

The Insurance Act 1938, the Insurance Regulatory and Development Authority Act 1999, the Marine Insurance Act 1963 and the regulations, guidelines, circulars and notifications issued by the IRDA govern insurance and reinsurance business in India.

Indian courts may refer to common law if there are no judicial precedents available under Indian law. Common law is, however, not binding on Indian courts.

ii Making the contract

The terms and conditions of property and engineering insurance covers are currently governed by the policy wordings specified by the former Tariff Advisory Committee. Very few modifications to these policy wordings have been permitted. On all other lines of insurance business (except mega risks, which are written on a special contingency basis), insurers are permitted to issue only those policy terms and conditions, endorsements and other ancillary documentation that have been approved by the IRDA in advance. No changes are permitted to be made unless the prior consent of the IRDA is obtained. In addition, for health insurance policies, the IRDA has specified a standard set of definitions, standard nomenclature for critical illness, standard pre-authorisation and claim form, standard list of excluded expenses and standard agreements between insurers, TPAs and hospitals. The IRDA has also specified a number of other conditions for health insurance policies making these policies highly regulated.

The IRDA (Protection of Policyholders' Interests) Regulations 2002 require general insurance contracts to state several matters, including:

a full description of the property or interest insured with locations and insured values;

b period of insurance;

c sums insured;

d perils covered and excluded;

e premium payable;

f policy terms, conditions and warranties;

g action to be taken by an insured for claims and circumstances that may give rise to a claim;

h the insured's obligations in relation to the subject matter of insurance upon occurrence of an event giving rise to a claim and the insurer's rights in the circumstances;

i any special conditions;

j provisions for cancellation;

k insurer's address;

l details of endorsements; and

m grievance redressal mechanism.

All condition precedents and warranties are required to be stated in express terms in the policy documentation.

In addition, all product literature is required to be in 'simple language' and 'easily understandable to the public at large' and all technical terms used in the policy wording are to be clarified to the insured. To the extent possible, insurers are also required to use similar wording for describing the same insurance cover or the same requirements across all their products, particularly in relation to clauses on renewal, basis of insurance, due diligence, cancellation and arbitration.

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. 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.

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 returned to the policyholder.

iii Interpreting the contract

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

a The Indian courts and consumer forums have held that if there is any ambiguity in the terms and conditions, then it shall be construed in favour of the insured.

b 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 non-disclosure.

c The IRDA (Protection of Policyholders' Interests) Regulations 2002 provide, among other obligations, that insurers follow certain practices at the point of sale of the policy as well as at the processing or claims stage so that the insured can understand its terms properly; have proper procedures and mechanisms to hear any grievances of the insured; clearly state the policy terms (such as warranties, conditions, insured's obligations, cancellation provisions, etc.); and follow certain claims procedures to expeditiously process claims; pay interest at the rate of 2 per cent above the prevalent bank rate in cases of delayed payment, etc.

d On 20 September 2011, the IRDA issued a direction 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.

e Following the IRDA (Health Insurance) Regulations 2013 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.

f 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.

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 and reasonably.

iv Intermediaries and the role of the broker

Insurance brokers, corporate agents, web aggregators, referral companies and insurance agents are granted a licence for a fixed period of three years following which the licence may be renewed for a further three years at the discretion of:

a the IRDA for insurance brokers, web aggregators and referral companies; and

b the insurer in accordance with the IRDA's specified norms, for corporate agents and insurance agents.

Insurance brokers are required to exclusively carry on the distribution of insurance products, while corporate agents may have a main business other than the distribution of insurance products. However, if a corporate agent has a main business other than insurance distribution, then the corporate agent is not permitted to make the sale of its products contingent on the sale of an insurance product or vice versa.

The IRDA's regulations specify separate codes of conduct for insurance brokers, web aggregators, corporate agents and insurance agents that govern the conduct expected of brokers, web aggregators, corporate agents and insurance agents while performing their functions. Breach of the respective code of conduct could lead to suspension or cancellation of their licence.

There are statutory limits on the commission or remuneration payable to insurance brokers, web aggregators, corporate agents and insurance agents for the solicitation and procurement of insurance business. Insurers are not permitted to make any other payments to brokers, corporate agents or insurance agents.

Insurance brokers, web aggregators, corporate agents and insurance agents are also prohibited from offering rebates to customers on the premium or commission receivable.

All insurance brokers are required to be part of the Insurance Brokers Association of India.

v Claims

Insurance policy terms and conditions are meant to specify the requirements for notification of claims or circumstances that may give rise to a claim. Although it is common for these clauses to be expressed as condition precedent to the insurer's liability to make payment of the claim, the IRDA's Circular of 20 September 2011 makes it clear that insurers cannot 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.

Insurance policy terms and conditions are also meant to expressly state the insurer's grievance redressal procedure and the applicable dispute resolution provisions for differences or disputes arising under the policy. While there are no specific regulatory requirements in this regard, it is common for retail policies to give exclusive jurisdiction to the Indian courts and commercial lines policies to contain express arbitration provisions.

At present, general insurance policies are usually annually renewable policies with the entire premium being paid in advance and it is not common to offer these policies on a long-term basis or to provide for premium payments in instalments. Life insurance policies usually have policy terms of at least 10 years and unless a single premium is payable in advance, it would usually be payable at regular intervals during the policy terms. All life insurance policies are required to contain express provisions and conditions for reinstatement of the policy in the event of discontinuance of premium payments.

V DISPUTE RESOLUTION

i Jurisdiction, choice of law and arbitration clauses

Policyholders have a statutory right to sue for relief under an insurance policy in Indian courts and Indian law shall be applicable. This right cannot be abridged by the terms of the insurance policy or otherwise.

It is common for retail policies to be subject to the exclusive jurisdiction of Indian courts and for commercial lines policies to contain arbitration clauses.

ii Litigation

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 or defendant and the value of the claim.

The consumer courts follow a three-tier hierarchy, which in ascending order is the district consumer dispute redressal commissions, followed by state consumer dispute redressal commissions, then the National Consumer Dispute Redressal Commission (NCDRC). There are 629 district consumer dispute redressal commissions, which can accept claims up to a value of approximately US$33,300. There are 35 state consumer dispute redressal commissions, which can accept claims of between US$33,300 and US$166,000 and appeals against the decisions of the district commissions. At the apex lies the NCDRC, which accepts matters with a value of over US$166,000 and appeals against the decisions of the state commissions.

Similarly, the broad ascending hierarchy of the civil courts comprise around 600 district courts, 21 High Courts and the Supreme Court of India (India's highest court). 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, as 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.

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.

As a general rule, an appeal will lie if there is a substantial question of law involved. Facts established at the lower court 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.

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

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 document or type 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. The CPC also allows a court to direct any person, even if a non-party, to produce any document material to the dispute and to do so in person at the court.

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 or 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.

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.

Courts may award the successful party its costs, but the award is at 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

US$60 for costs awards in the case of vexatious litigation, the Supreme Court suggested that the Indian 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 pretrial offer in civil litigation.

In addition, 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 time involved in legal proceedings and the limited number of judges which are available, it has now become imperative to resort to the alternative dispute resolution mechanism with a view to end litigation between the parties at an early date. The alternative dispute resolution mechanism as contemplated by Section 89 is arbitration or conciliation or judicial settlement including settlement through a *lok adalat* or mediation. There are a number of mediation cells associated with various High Courts.

iii Arbitration

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, and 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 recently been confirmed by the Supreme Court of India in cases such as *Bharat Aluminium Co v. Kaiser* (2012) and *World Sport Group (Mauritius) v. MSM Satellite* (2014). The decisions restrict 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:

a 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;

b a party can apply to a court for interim remedies; and

c a party can seek the court's assistance for the appointment of an arbitrator if the other party refuses to cooperate in the process.

iv Alternative dispute resolution

The ACA recognises arbitration and conciliation as valid forms of alternative dispute resolution.

v Mediation

The courts may direct the parties to refer their disputes to alternative dispute resolution, with the parties' consent. There are a number of mediation cells associated with various high courts but the consent of the parties is a condition precedent to mediation. The mediator selected by the parties acts as a facilitator to encourage parties to settle their disputes. However, unlike arbitration, the mediation process is not binding on either party.

V YEAR IN REVIEW

The year 2013 witnessed a continued momentum of the IRDA from 2012 towards regulatory investigations and orders against insurers and intermediaries. Further, the IRDA consolidated and revised the regulatory framework concerning the regulation of, *inter alia*, life insurance business, health insurance business, web aggregators, insurance brokers, third party administrators, surveyors and loss assessors. The IRDA also constituted a committee to look into removing or increasing the limits on foreign investment in insurance intermediaries.

VI OUTLOOK AND CONCLUSIONS

The frequent changes in the regulatory environment and general discontent with the pace of liberalisation have had an adverse impact on economic growth in the insurance sector in India generally, and in the perception of India. Some foreign investors are reportedly looking for an exit route or are withholding or refusing investment in existing ventures, or delaying their plans to enter India.

The Insurance Bill continues to face setbacks in terms of delays and it is anticipated to be taken up for consideration by Parliament in the later half of this year. If the Bill is passed, however, there are expectations of an inflow of fresh capital, an increase in the number of insurance joint ventures and faster development of the market. For now, however, uncertainty remains.

Appendix 1

ABOUT THE AUTHORS

NEERAJ TULI

Tuli & Co

Mr Neeraj Tuli is the firm's senior partner. Before setting up Tuli & Co in 2000, Mr Tuli was a partner at Kennedys in London. Mr Tuli's contentious work and coverage advice ranges across a wide variety of policies including trade and credit, MD, BI, CPM, E&O, D&O, DSU, ALOP, EAR, and CAR. He has handled litigation and arbitration in India, London, Paris, New York, San Francisco, Hong Kong, Singapore and Papua New Guinea, and is currently managing claims on behalf of insurers and reinsurers in India, the US, Chile, the UK, Germany, Ireland, Finland, Italy, Japan, Kuwait, Dubai, Australia and New Zealand.

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 and reinsurance in India. He has been invited to be the first president of the Insurance Law Association of India being formed in association with the British Insurance Law Association, and he is a member of the Confederation of Indian Industry's National Committee on Dispute Resolution.

CELIA JENKINS

Tuli & Co

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, vetting and advising on insurance contract wording and ancillary documentation across a range of business and product lines and has reviewed more than 1,000 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 restructuring 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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