ICLG

The International Comparative Legal Guide to:

Insurance & Reinsurance 2018

7th Edition

A practical cross-border insight into insurance and reinsurance law

Published by Global Legal Group, with contributions from:

Advokatfirman Vinge KB
AKP Best Advice
Arthur Cox
Bae, Kim & Lee LLC
BECH-BRUUN
BLACK SEA LAW COMPANY
Blaney McMurtry LLP
BSA Ahmad Bin Hezeem & Associates LLP
Camilleri Preziosi Advocates
Cavus & Coskunsu Law Firm
Christos Chrissanthis & Partners
Chuo Sogo Law Office, P.C.
CIS Risk Consultant Company (insurance brokers) LLP (CIS)
Clyde & Co LLP
Clyde & Co (Deutschland) LLP
Cordero & Cordero Abogados
Creel, García-Cuéllar, Aiza y Enriquez, S.C.
DAC Beachcroft SLPU
DAC Beachcroft Colombia Abogados SAS
Dirkzwager advocaten & notarissen N.V.
DLA Piper Norway DA
Eversheds Sutherland Ltd.
Gouveia Pereira, Costa Freitas & Associados
Gross Orad Schlimoff & Co.
Kennedys Chudleigh Ltd
LCS & Partners
Legance – Avvocati Associati
Lloyd's Market Association
Maples and Calder
Matheson
McMillan LLP
MinterEllison
Paul, Weiss, Rifkind, Wharton & Garrison LLP
R & T Asia (Thailand) Limited
Railas Attorneys Ltd.
Rajah & Tann Singapore LLP
Steptoe & Johnson LLP
Tavares Advogados
Tuli & Co
Vavrovsky Heine Marth

INSIGHT CONSENSUS INFLUENCE
glg global legal group

global legal group

Contributing Editors
Jon Turnbull & Michelle Radom, Clyde & Co LLP

Sales Director
Florjan Osmani

Account Director
Oliver Smith

Sales Support Manager
Toni Hayward

Editor
Sam Friend

Senior Editors
Suzie Levy
Caroline Collingwood

Chief Operating Officer
Dror Levy

Group Consulting Editor
Alan Falach

Publisher
Rory Smith

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Stephens & George Print Group
March 2018

ISBN 978-1-911367-98-7
ISSN 2048-6871

Strategic Partners

General Chapters:

1	**Aspects of the Impact of Brexit on UK/EEA Insurance and Reinsurance** – Jon Turnbull & Ivor Edwards, Clyde & Co LLP	1
2	**Cyber Insurance at Lloyd's: Coverage and Regulation of Global Digital Risks** – Patrick Davison & David Powell, Lloyd's Market Association	7
3	**Fire and Wire: Canadian Business Interruption Insurance in the Age of Cyber-Risk and Climate Change** – David R. Mackenzie & Dominic T. Clarke, Blaney McMurtry LLP	14
4	**Brexit Relocations: The Story So Far** – Darren Maher, Matheson	21
5	**Trending Tremors: Cat Bond Developments in Mexico and Latin America** – Leonel Pereznieto del Prado & María José Pinillos Montaño, Creel, García-Cuéllar, Aiza y Enríquez, S.C.	23
6	**Reinsurance in an Era of Sanctions** – Lilia Klochenko & Stanislava Adamaytis, AKP Best Advice	27

Country Question and Answer Chapters:

7	**Australia**	MinterEllison: Kemsley Brennan & James Stanton	31
8	**Austria**	Vavrovsky Heine Marth: Philipp Strasser & Jan Philipp Meyer	38
9	**Azerbaijan**	CIS Risk Consultant Company (insurance brokers) LLP (CIS): Homi Motamedi & Valentina Pan	44
10	**Belgium**	Steptoe & Johnson LLP: Philip Woolfson & Alexander Hamels	49
11	**Bermuda**	Kennedys Chudleigh Ltd.: Mark Chudleigh & Nick Miles	57
12	**Brazil**	Tavares Advogados: André Tavares & Daniel Chacur de Miranda	63
13	**Canada**	McMillan LLP: Carol Lyons & Lindsay Lorimer	69
14	**Cayman Islands**	Maples and Calder: Abraham Thoppil & Luke Stockdale	78
15	**Colombia**	DAC Beachcroft Colombia Abogados SAS: Juan Diego Arango Giraldo & Angela María Hernández Gómez	84
16	**Costa Rica**	Cordero & Cordero Abogados: Ricardo Cordero B.	91
17	**Denmark**	BECH-BRUUN: Anne Buhl Bjelke & Henrik Valdorf-Hansen	96
18	**England & Wales**	Clyde & Co LLP: Jon Turnbull & Michelle Radom	102
19	**Finland**	Railas Attorneys Ltd.: Lauri Railas	111
20	**Georgia**	CIS Risk Consultant Company (insurance brokers) LLP (CIS): Homi Motamedi & Valentina Pan	117
21	**Germany**	Clyde & Co (Deutschland) LLP: Dr Henning Schaloske & Dr Tanja Schramm	121
22	**Greece**	Christos Chrissanthis & Partners: Dr. Christos Chrissanthis & Xenia Chardalia	128
23	**India**	Tuli & Co: Neeraj Tuli & Celia Jenkins	136
24	**Ireland**	Arthur Cox: Elizabeth Bothwell & David O'Donohoe	143
25	**Israel**	Gross Orad Schlimoff & Co.: Harry Orad	150
26	**Italy**	Legance – Avvocati Associati: Gian Paolo Tagariello & Daniele Geronzi	156
27	**Japan**	Chuo Sogo Law Office, P.C.: Hironori Nishikino & Koji Kanazawa	163
28	**Kazakhstan**	CIS Risk Consultant Company (insurance brokers) LLP (CIS): Homi Motamedi & Valentina Pan	168
29	**Korea**	Bae, Kim & Lee LLC: Jong Ku Kang & Jong Min An	173
30	**Malta**	Camilleri Preziosi Advocates: Diane Bugeja & Francesca Galea Cavallazzi	179
31	**Mexico**	Creel, García-Cuéllar, Aiza y Enríquez, S.C.: María José Pinillos Montaño & Allan Galileo Olmedo Villegas	186
32	**Netherlands**	Dirkzwager advocaten & notarissen N.V.: Daan Baas & Niels Dekker	191

Continued Overleaf →

Country Question and Answer Chapters:

33	**Norway**	DLA Piper Norway DA: Alexander Plows & Michal Jorek	198
34	**Portugal**	Gouveia Pereira, Costa Freitas & Associados: José Limón Cavaco & Ana Isabel Serra Calmeiro	204
35	**Russia**	AKP Best Advice: Lilia Klochenko & Ekaterina Mikhaylova	210
36	**Saudi Arabia**	Clyde & Co: Mark Beswetherick & Saud Alsaab	217
37	**Singapore**	Rajah & Tann Singapore LLP: Elaine Tay Ling Yan	222
38	**Spain**	DAC Beachcroft SLPU: José María Pimentel & José María Álvarez-Cienfuegos	227
39	**Sweden**	Advokatfirman Vinge KB: Fabian Ekeblad & Paulina Malmberg	233
40	**Switzerland**	Eversheds Sutherland Ltd.: Peter Haas & Barbara Klett	240
41	**Taiwan**	LCS & Partners: Mark J. Harty & Alex Yeh	245
42	**Thailand**	R & T Asia (Thailand) Co., Ltd.: Sui Lin Teoh & Saroj Jongsaritwang	250
43	**Turkey**	Cavus & Coskunsu Law Firm: Caglar Coskunsu & Burak Cavus	255
44	**Ukraine**	BLACK SEA LAW COMPANY: Evgeniy Sukachev & Anastasiia Sukacheva	261
45	**United Arab Emirates**	BSA Ahmad Bin Hezeem & Associates LLP: Michael Kortbawi & Michel Abi Saab	266
46	**USA**	Paul, Weiss, Rifkind, Wharton & Garrison LLP: H. Christopher Boehning	272
47	**Uzbekistan**	CIS Risk Consultant Company (insurance brokers) LLP (CIS): Homi Motamedi & Valentina Pan	279

EDITORIAL

Welcome to the seventh edition of *The International Comparative Legal Guide to: Insurance & Reinsurance*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of insurance and reinsurance.

It is divided into two main sections:

Six general chapters. These are designed to provide readers with an overview of key issues affecting insurance and reinsurance work, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in insurance and reinsurance laws and regulations in 41 jurisdictions.

All chapters are written by leading insurance and reinsurance lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Jon Turnbull and Michelle Radom of Clyde & Co LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

Alan Falach LL.M.
Group Consulting Editor
Global Legal Group
Alan.Falach@glgroup.co.uk

Chapter 23

India


Neeraj Tuli


Celia Jenkins

Tuli & Co

1 Regulatory

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

The Insurance Regulatory and Development Authority of India (IRDAI) governs all insurance and reinsurance companies in India.

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

Insurance business in India can only be undertaken by an Indian insurance company or a reinsurance company/reinsurance branch office that is registered with the IRDAI. Insurers registered in India can undertake life insurance business, general insurance business, and/or health insurance business in accordance with the terms of their registration. Reinsurance companies/reinsurance branches can undertake reinsurance business in accordance with the terms of their registration.

In order to secure registration, an applicant must, along with other formalities, have a minimum paid-up equity capital of Rs.1 billion (*circa* US$15.3 million) in the case of life, general and health insurers, Rs.2 billion (*circa* US$30.6 million) in the case of a reinsurer and a minimum assigned capital of Rs.1 billion (*circa* US$15.3 million) in the case of a reinsurance branch. Moreover, foreign investment in the Indian insurance sector is permitted up to 49%.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Overseas, non-admitted insurers cannot write direct insurance business in India. As a general rule, the purchasing of insurance from overseas insurers by Indian residents is prohibited in India, unless the purchase falls within the general or specific approval of the Reserve Bank of India (RBI).

However, Indian residents are permitted to purchase health insurance policies from overseas insurers provided the aggregate remittance (including premium) does not exceed the prescribed limit. Indian residents are also permitted to purchase insurance policies in respect of any property in India or any ship, vessel or aircraft registered in India with an insurer whose principal place of business is outside India only with IRDAI's permission.

Non-admitted insurers who have registered with IRDAI as Cross Border Reinsurers can write reinsurance of Indian risks from overseas in accordance with the IRDAI's regulations on the reinsurance of life and general insurance business.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

Indian insurers are given the liberty to decide their own policy terms and conditions, but insurance products can only be offered if the terms and conditions have been approved by the IRDAI and/or filed under the applicable product filing procedures.

Further, the extraneous rules that will impact policy terms are: (a) the Insurance Act 1938 which gives policyholders a right to override contrary policy terms in favour of Indian law and jurisdiction; and (b) Indian policyholders cannot be stopped from approaching Consumer Courts.

1.5 Are companies permitted to indemnify directors and officers under local company law?

Under the Companies Act 2013, there is no ban on companies indemnifying directors and officers. The premium paid on such insurance is not to be treated as the remuneration payable to the officer. However, if such a person is proved to be guilty of negligence, default, misfeasance, breach of duty or breach in relation to the company, the premium paid on insurance will be treated as part of the remuneration.

1.6 Are there any forms of compulsory insurance?

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

- Carriage by Air Act 1972: requires parties to maintain adequate insurance covering any liabilities that may arise.
- Companies Act 2013: insurance of deposits accepted by companies.
- Deposit Insurance and Credit Guarantee Corporation Act 1961: insurance taken by the banks functioning in India (DICGC is an RBI subsidiary).
- Employees State Insurance Act 1948: for insurance to employees in case of sickness, maternity and employment injury.
- Inland Vessels Act 1917: insurance of mechanically propelled vessels.
- IRDA (Insurance Brokers) Regulations 2013, IRDA (Registration of Corporate Agents) Regulations 2015, IRDA (Revised Guidelines on Insurance Repositories and Electronic Issuance of Insurance Policies) 2015, IRDA (Registration of Insurance Marketing Firm) Regulations 2015 and IRDA

(Insurance Web Aggregators) Regulations 2017: professional indemnity insurance covering errors and omission, dishonesty and fraudulent acts by employees and liability arising from loss of documents or property.

- Marine Insurance Act 1963: for marine adventures.
- Merchant Shipping Act 1958: on the lives of crew members.
- Motor Vehicles Act 1988: compulsory third-party liability insurance.
- Payment of Gratuity Act 1972: insurance for gratuity payments to employees.
- Personal Injuries (Compensation Insurance) Act 1963: employer's liability for workers sustaining injuries.
- Persons with Disabilities (Equal Opportunities, Protection of Rights and full participation) Act 1995: insurance scheme for employees with disabilities.
- Public Liability Insurance Act 1991: accidental cover for those handling hazardous substances and environmental issues.
- War Injuries (Compensation Insurance) Act 1943: for workmen sustaining injury in war.

2 (Re)insurance Claims

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

The statutory framework in India favours insurers more than insureds, but the regulatory framework and the interpretation of applicable law is possibly more favourable to the insureds. For example:

- The Insurance Act 1938 restricts the ability of insurers to call a life insurance policy into question after three years on any grounds (including fraud).
- The IRDAI (Protection of Policyholders' Interests) Regulations 2017 provide, amongst other obligations, that insurers follow certain practices at the point of sale of the policy so that: the insured can understand its terms properly; they have proper procedures and mechanisms to hear any grievances of the insured; they clearly state the policy terms (such as warranties, conditions, insured's obligations, cancellation provisions, etc.); they follow certain claims procedures to expeditiously process claims; and pay interest at the rate of 2% above the bank rate fixed by the RBI at the beginning of the financial year in which claim has fallen due, in cases of delayed payment, etc.
- This payment of penal interest has been recently extended from delay in settlement of claims to delay in settlement of other payments made to the policyholders, including payments with respect to maturity, survival benefit and annuities, free look cancellation, surrender, withdrawal, request for refund of proposal deposit, and refund of outstanding proposal deposit.
- The IRDAI (Health Insurance) Regulations 2016 permit general insurers and health insurers to decline the renewal of a health insurance policy only on grounds of fraud, moral hazard, misrepresentation or non-cooperation by the insured. Renewal cannot be denied on other grounds; namely, an adverse claims history.
- On 20 September 2011, the IRDAI issued certain guidelines for condoning delay in claim intimation and submission of documents in relation to certain types of policies and policyholders to the effect that insurers should not reject claims on the basis of delayed notification if the delay was unavoidable, unless the insurer is satisfied that the claim would have been rejected in any event.
- The IRDAI (Health Insurance) Regulations 2016 have also stipulated that all health insurance policies offer portability benefits whereby policyholders are given credit for the waiting period already served under previous health insurance policies with that insurer or any other Indian insurer.
- The IRDAI has introduced standard form definitions for health insurance and critical illness policies.

There is one other feature of the Indian insurance sector that is worth mentioning. This concerns the government-owned insurers, who are considered an instrument of the State and are thus expected to act justly, fairly, and reasonably.

So far as the Court's interpretation of the policy terms and conditions is concerned, we have seen a trend towards strict interpretation. The Supreme Court has held that "the terms of the contract have to be construed strictly, without altering the nature of the contract as the same may affect the interests of the parties adversely. The clauses of an insurance policy have to be read as they are consequently, the terms of the insurance policy, that fix the responsibility of the Insurance Company must also be read strictly".

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

As a general rule, Indian law recognises the principle of privity of contract and thus a third party would not be able to bring a direct action against an insurer. Motor cases, however, are the exception to the norm:

- It is common practice for third parties to name the defendant's insurer in motor accident-related proceedings.
- The Motor Vehicles Act 1988 makes it mandatory for all vehicles to have third-party insurance or third-party liability cover and provides that the rights of an insured under a policy are transferred to a third party claiming against the insured in the event of the insured's insolvency.

The Motor Vehicles Act empowers the Motor Accident Claims Tribunal to seek the insurers' involvement in a third-party action against the insured if the tribunal believes the claim is collusive or if the insured fails to contest the claim.

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

We do not believe that a direct action can be brought against a reinsurer because, amongst other things, there is no privity of contract. However, attempts to sue a reinsurer may be made. The other exception where an insured may bring a direct action against a reinsurer would be if the contractual arrangements permitted it, for example, through a "cut through" clause, although no such clause has been tested before the Indian Courts so far.

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

Indian law mandates that a contract of insurance be one of utmost good faith. Insurers are therefore entitled to a fair presentation of the risk prior to inception and if there has been a misrepresentation or non-disclosure of a material fact, the insurer can avoid the policy *ab initio*. Unless the misrepresentation or non-disclosure was fraudulent, the premium must be returned to the policyholder. For life insurance policies, however, the policy cannot be called into question on any grounds (including fraud) after the completion of three years from the date of the issuance or the revival of the policy.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

The insured is required to disclose all material facts whether or not a specific question is asked, but often what is material is guided by the information and documents sought in the proposal form. The Marine Insurance Act 1963 requires that the insured make a full and frank disclosure prior to inception. The Supreme Court has said that this is to be done through the proposal form. The IRDAI (Protection of Policyholders' Interests) Regulations 2017 also imposes an obligation on the insured to disclose all material information.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

The right to subrogation is recognised under law. No separate contractual clause is required to trigger the right to subrogation, but as a matter of practice, policies do contain subrogation clauses and insurers will frequently obtain "subrogation letters" and the right to an "assignment" of a third-party claim from the insured. The IRDAI (Protection of Policyholders' Interests) Regulations 2017 also obligate an insured to assist its insurer in recovery proceedings, if the insurer so requires.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

The insured has an option to approach a Court of Civil Jurisdiction or (if the dispute qualifies) a Consumer Court, whereas the insurer can only approach a Civil Court for recourse. Both the Civil and Consumer Courts have pecuniary and territorial jurisdiction, so actions brought before them need to be initiated keeping in mind the geographical location of the defendant/cause of action and also the value of the claim. In 2015, the legislature passed the Commercial Courts, Commercial Divisions and Commercial Appellate Division of High Courts Act 2015 (Commercial Courts Act 2015) under which the governments of various states were required to set up special Commercial Courts to adjudicate commercial disputes, which would also include insurance and reinsurance disputes.

The Civil Court and Consumer Courts have a three-tiered hierarchy. The Consumer Courts usually follow (in ascending order) 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 Rs.2 million (*circa* US$30,000) and 35 State Consumer Dispute Redressal Commission that can accept claims over Rs.2 million (*circa* US$30,000) and up to a value of Rs.10 million (*circa* US$153,490) and also appeals against the order of the District Commissions. At the apex lies the National Consumer Dispute Redressal Commission which accepts matters with a value of over Rs.10 million (*circa* US$53,490) and appeals against the decisions of the State Commissions. An appeal from the decision of the National Commission lies before the Supreme Court of India.

The broad ascending hierarchy of the Civil Courts too is similar. This comprises *circa* 600 District Courts, 24 High Courts and the Supreme Court (highest court in India). Amongst 24 High Courts, four are termed Charter High Courts (i.e. Delhi, Bombay, Madras and Calcutta High Courts) which have original jurisdiction to accept and hear matters which fall above certain pecuniary thresholds, exempting the District Courts from hearing these matters due to a higher pecuniary limit. The rest of the District Courts have unlimited pecuniary jurisdiction, as do the competent Courts of first instance to hear any insurance dispute falling under the territorial jurisdiction. There is no right to a hearing before a jury in India, as the jury system has been abolished and the cases are heard and decided by the judges.

Pursuant to the passing of the Commercial Courts Act 2015, the governments and/or the Chief Justice of the High Court will have to designate judges at the District Court and High Court respectively to adjudicate commercial disputes. This process has now been completed in most states in India.

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

Indian litigation is slow and time-consuming. This is attributed to the reported pendency of close to 30 million cases presently in Courts across India. Usually it would take the Court of first instance a minimum of four to six years to reach a decision if both the parties are cooperative. In the case of a strongly contested litigation, the period may exceed eight to 10 years. An appeal from such order would take another five years or so to resolve.

The Commercial Courts Act 2015 requires the Commercial Courts to hold a Case Management Hearing where it may pass orders to, *inter alia*, fix the schedule for filing of evidence, filing written arguments and oral arguments. The Commercial Courts are required to ensure that the arguments are closed not later than six months from the date of the Case Management Hearing. The Commercial Court has to pronounce judgment within 90 days from the conclusion of arguments.

The Commercial Courts Act 2015 also says that the appellate Courts must endeavour to dispose of appeals filed before it within a period of six months. It should be noted that the Commercial Courts Act 2015 has been recently passed and it needs to be examined how the Courts implement the timelines set out by in the statute in practice. Our experience regarding the time taken by a Commercial Court to adjudicate upon a dispute has not been uniform. In some instances, disputes have been adjudicated quickly whereas in other instances matters have progressed at the usual pace seen in the jurisdiction.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

The power of discovery or summoning of documents is governed by the Code of Civil Procedure 1908 (CPC), as amended by the Commercial Courts Act 2015. The Courts, on a motion by either of the parties to a litigation or of its own accord, direct the parties to summon documents which relate to any matter in the dispute at hand. The relevance of the documents sought under the discovery would depend on the issue at hand. On a motion made for discovery of documents, the Court would direct the party who has made reference to produce the document, to give the same for inspection to the requested party or to answer its inability to produce such

document. The Court can also impose costs against a party refusing to produce such document or for not giving sufficient reasons for non-production of the document.

Non-compliance with an order for discovery of documents can lead to an adverse inference or even dismissal of the action or defence as may be.

Non-parties to the action

The CPC allows any party who would be in possession of documents to produce documents that are material to the dispute even if the person is not arrayed as a party to the ongoing litigation.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

The provisions under the Indian Evidence Act 1872 protect communications between a lawyer and his client. Unless an express permission is given by the client, the lawyer is estopped from disclosing such communications unless the same is in furtherance of an illegal purpose. The Indian Evidence Act also specifies that a person cannot be compelled to reveal information between that person and his/her lawyer unless the same is produced with his/her consent and is required to establish his/her testimony.

The Supreme Court and various High Courts in India have issued guidelines recognising the privilege of communications between a lawyer and his clients over documents made in furtherance of litigation. The privilege attributed to these documents is similar to the position in English law.

In terms of documents prepared in the course of settlement negotiations/attempts, it is common for the parties to mark them "without prejudice", but these are not expressly protected as privileged documents under the Indian Evidence Act and as a matter of practice, are commonly produced before Courts.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

Yes, the Courts have the power to call for witnesses within their jurisdiction to give evidence during the litigation before the final orders are reserved. Any non-compliance with the Court summons can even lead to arrest of the person evading such direction from the Court. The Court may not compel a person who is not a resident within its jurisdiction to be present for giving evidence. In such cases, the CPC recognises the Court's power to issue commissions or interrogatories to the parties whose evidence cannot be obtained easily to determine the issue at hand.

4.4 Is evidence from witnesses allowed even if they are not present?

As per the CPC, the examination-in-chief of a witness is required to be on an affidavit, but his attendance is necessary for the purposes of cross-examination. In the case that the witness is unable to appear before the Court, the Court may, in compliance with the provisions of the CPC, issue commissions or interrogatories to address this. The Supreme Court has even permitted cross-examinations to be conducted through video conferencing in cases where witnesses, for reasons beyond their control, are unable to appear before the Court; for example, an infirm person residing outside India.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

The Indian Evidence Act allows the Court to hear expert evidence on matters of foreign law, science or art. Appointment of an expert is usually on an application filed by a party asking the Court to permit that party to call an expert to give evidence, or the Court may also decide to appoint its own expert. The report/statement filed by the expert will not automatically become evidence and an expert must be examined as a witness. The contesting party will then have the opportunity to controvert his findings during cross-examination, or even file the evidence of its own expert witness.

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

The CPC provides for a wide variety of discretionary interim remedies which may be substantive or procedural. In terms of substantive remedies, temporary injunctions and interlocutory orders allow the Court to stop the commission of an act. Further, mandatory injunctions, available under the Specific Relief Act 1963, allow the Court to ask a party to carry out a positive and overt act. In other words, a Court may use an injunction to direct a party to act or restrain it from acting or omitting to act to the detriment of the contesting party.

In addition, a Court may also pass directions for a party to direct a deposit of an amount of money or provide surety in the Court in order to secure the interests of the contesting party, especially where that defaulting party is attempting to defeat a possible award or decree against it. This can be done by way of, *inter alia*, fixed deposits, bank guarantees, demand drafts or a simple direction that a party shall not dispose of its assets during the pendency of the litigation.

These remedies are obviously discretionary and a grant of such a remedy is based on various factors which need to be satisfied and proved before the Court.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

Appeal against decisions of the Court of first instance

The Commercial Courts Act 2015 allows an appeal only in specified circumstances. This right will not be available when the decision of the Court is with the consent of the parties. The first appeal can be made on any ground of error either legally, factually or procedurally, by the Court of first instance. However, no appeal is allowed from any interlocutory order of the Commercial Court and this may be taken as grounds while appealing against the final decree of the Court.

Subsequent stages of appeal

A subsequent appeal from a first appeal is only available in specific cases where there is a substantial question of law involved. Further, if the monetary value of the decision of the Court is less than Rs.25,000 (*circa* US$385), no subsequent appeal is available. There are some High Courts in the country which are the Courts of first instance where the subject matter of the proceedings is more than a fixed amount. These are the Delhi High Court, Bombay High Court, Madras High Court and Calcutta High Court. No second appeal is available from a decision of these Courts. The first appeal from a

decision of a single judge of these Courts lies to a division bench of the same Court. In cases where an Appeal is not provided for and is not specifically barred by any statute, a Letters Patent Appeal is available.

Appeal to the Supreme Court

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. In both these cases, a final stage of appeal is provided under the constitution to the Supreme Court for which prior leave of the Supreme Court is required.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

A Court has the discretion to award interest from the date when the cause of action arose to the date of actual payment. A rate of 9% to 12% is currently applied by the Courts. However, an arbitration award will carry interest at the rate of 18% unless the Tribunal says otherwise.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

The Court may award the successful party its costs of pursuing litigation, but such an award is entirely at the Court's discretion. It is common for costs awards to be made in favour of a successful party, but the principles of awarding costs are archaic and the level of costs awarded is rarely sufficient to cover the actual cost incurred. In a recent decision, while referring to a statutory upper limit of Rs.3,000 (*circa* US$46) for costs awards in cases of vexatious litigation, the Supreme Court suggested that Parliament should consider raising the limit to Rs.100,000 (*circa* US$1,535). In view of the low level of costs awarded, there are, as yet, no material advantages in making a pre-trial offer in civil litigation and Calderbank letters are hardly, if ever, used.

The Commercial Courts Act 2015 has expanded the definition of costs and the factors to be taken into account by the Court while awarding costs. Costs would now include the fees and expenses of the witnesses, the legal fees and any other expenses incurred in connection with the proceedings.

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

Section 89 of the CPC sets out the provision for settlement of disputes outside the Court, keeping in mind the delay in legal procedures and the limited number of judges available. It has now become imperative for the Courts to encourage, though not compel, parties to explore the possibilities of an out-of-court settlement with a view to end litigation between the parties at an early date. The Courts usually have an in-house mediation centre where experienced senior lawyers are appointed on a confidential basis and parties involved in contentious complex cases, which have the potential for an extremely delayed decision, are compelled to explore settlement at the mediation centre with the neutral experienced lawyers acting as mediators. All proceedings at the mediation centre and settlement discussions are kept confidential from the Court and do not prejudice either party in case mediation fails. In certain circumstances, however, the mediator may file a report before the Court if directed to do so. Parties are of course free to return to the Court process.

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

Consent of the parties is a condition precedent to be referred to the mediation. There are no formal sanctions if proceedings are not followed through to their logical end.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

The Indian Arbitration and Conciliation Act 1996 (ACA) is based on the UNCITRAL Model Law and was recently amended in 2015. The amended ACA applies to arbitrations which have been instituted after 23 October 2015, while the arbitrations instituted prior to this date continue to be governed by the unamended ACA.

The ACA preserves party autonomy in relation to most aspects of arbitration, such as the freedom to agree upon the qualification, nationality, number of arbitrators (provided it is not an even number), the place of arbitration and the procedure to be followed by the arbitration tribunal. The principle of party autonomy was confirmed by the Constitutional Bench of the Supreme Court of India in *Bharat Aluminium Co v Kaiser* and the same was followed in its subsequent decisions.

The *Bharat Aluminium* decision restricts the scope of the Indian Courts to intervene in respect of those arbitrations where the seat is non-Indian. Further, as far as Indian seated arbitrations are concerned, the ACA expressly bars the Courts from intervening in an arbitral proceeding, except to the extent this is provided for in the ACA itself. For example:

- Where a party files an action before a Court in spite of an arbitration agreement, the other party can apply to that Court to refer the dispute to arbitration instead.
- A party can apply to a Court for interim remedies (please see the response to question 5.4 below for further details).
- A party may also seek Court's assistance in taking evidence and summoning a witness.
- A party can seek the Court's assistance for the appointment of an arbitrator if the other party refuses to cooperate in the process.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

An arbitration agreement, as per the ACA, must be in writing and signed by the parties. The agreement should reflect the intention of the parties to submit their dispute(s) to arbitration. There is no prescribed form required for the purpose of an arbitration agreement. In fact, it is not necessary for an arbitration agreement to be incorporated into an insurance/reinsurance contract at all. An arbitration agreement can also come into existence if it is contained in a subsequent exchange of letters, telex, telegrams or other means of telecommunications (including by electronic means) which provide a record of the agreement.

The reference in a contract to another document which contains an arbitration clause also constitutes an arbitration agreement if the contract is in writing and the reference is such that it makes the arbitration clause part of the contract.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

In relation to domestic arbitration, the ACA bars the intervention from the Courts except for some specific instances wherein the Courts are allowed to intervene – for example, for interim relief, reference to arbitration when an action has been instituted before the Court and for the appointment of arbitrators, where parties have failed to nominate arbitrators within the stipulated timeframe.

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

However, there are exceptions to the non-interventionist approach. For example, in *N Radhakrishnan v Maestro Engineering*, the Supreme Court has held that cases involving allegations of fraud and misrepresentation which go to the root of the agreement, involve adjudication upon substantial questions of law and complicated facts, or that require detailed evidence ought to be decided by the Courts. Nonetheless judgments of the Supreme Court in *World Sports Group* (*Mauritius*) *Ltd v MSM Satellite*, *Swiss Timing Ltd v Organising Committee*, and *Commonwealth and A Ayyasamy v A Paramasivam* have diluted the effect of the judgment in *Radhakrishnan* and demonstrate a growing inclination towards a pro-arbitration and non-interventionist approach in the context of Indian as well as foreign-seated arbitrations.

In addition to the above, the Courts have recognised a few additional categories of matters, such as cases involving disputes relating to: criminal offences; matrimonial disputes; guardianship disputes; insolvency; disputes under the Indian Trusts Act 1882; and winding up and testamentary disputes, which ought not to be arbitrated. Further, the National Consumer Dispute Redressal Commission in its recent judgment in *Aftab Singh v Emaar MGF Land Limited & Anr*, held that disputes under the Consumer Protection Act 1986 cannot be referred to arbitration and an arbitration clause cannot oust the jurisdiction of the consumer courts.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

A party to an arbitral proceeding, before or during the proceeding, or even after the arbitral award has been pronounced (but before it is enforced), may apply to a Court for interim relief, seeking:

- the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings;
- the preservation, interim custody, or sale of any goods which are the subject matter of the arbitration agreement;
- the securing of the amount in dispute;
- the detention, preservation, or inspection of any property or thing that is the subject of the dispute; and
- an interim injunction or the appointment of a receiver; and such other interim measure of protection as a Court may find just and convenient.

However, pursuant to the amendment to the ACA in 2015, in the event that the Court grants interim relief prior to commencement of the arbitration, the arbitral proceedings have to commence within 90 days of such order by the Court, unless extended by the Court.

Further, once the arbitral proceedings commence, the Court shall not entertain any application for interim relief unless it is satisfied that the arbitration tribunal will not be able to provide an efficacious remedy.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

As per the ACA, an arbitral award must state the reasons upon which it is based unless: (a) the parties have expressly agreed that no reasons are to be given; or (b) the award is made upon terms agreed between the parties.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

The ACA lays down the grounds on which an award can be challenged before a Court. These grounds are narrow and limited and a Court is not allowed to reassess or re-appreciate the quality of evidence produced before the arbitrator. The Court cannot substitute the tribunal's findings with its own findings or conclusions and will set aside an arbitral award only if:

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

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

After the amendment to the ACA in 2015, the scope of "public policy" as grounds for a challenge has been reduced only to situations where an award:

1. was induced or affected by fraud or corruption; or
2. is in contravention of the fundamental policy of Indian law; or
3. is in conflict with the basic notions of morality or justice.

Neeraj Tuli
Tuli & Co
7A Lotus Towers, Community Centre
New Friends Colony, New Delhi
110025
India

Tel: *+91 11 4593 4000*
Email: *neeraj.tuli@tuli.co.in*
URL: *www.tuli.co.in*

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 variety of policies including trade credit, MD, BI, CPM, E&O, D&O, DSU, ALOP, EAR, CGL, Freight Forward Liability and CAR. He has handled litigation and arbitration in India, London, Paris, New York, San Francisco, Hong Kong, Singapore and Papua New Guinea, and currently manages claims on behalf of insurers and reinsurers in Australia, Chile, Dubai, Finland, Germany, India, Ireland, Italy, Japan, Kuwait, New Zealand, the UK and the US.

Mr Tuli also acts as an arbitrator and 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. He is also a member of the Confederation of Indian Industry's National Committee on Dispute Resolution.

Celia Jenkins
Tuli & Co
7A Lotus Towers, Community Centre
New Friends Colony, New Delhi
110025
India

Tel: *+91 11 4593 4000*
Email: *celia.jenkins@tuli.co.in*
URL: *www.tuli.biz*

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

Celia 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 1,300 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.

Celia also assists insurers and insurance intermediaries in dealing with disciplinary actions by the insurance regulator.

In addition, Celia advises overseas reinsurers and Indian financial companies on a range of corporate issues in relation to investments in the insurance space and also advises clients on restructuring options, foreign direct investment issues and joint ventures in the insurance and financial space. Celia also advises foreign investors in relation to investment in Indian insurance companies and intermediaries and in establishing a presence in the Indian insurance sector. Recently, Celia has also been involved in assisting reinsurers in setting up branch offices in India.

Celia has been recognised as a leading practitioner for insurance law in India for the past several years, including in 2017 by *The Legal 500*, the *Asialaw* Leading Lawyers Survey and *Chambers and Partners*.

Tuli & Co
Solicitors and Advocates

Tuli & Co was established in 2000 to service the Indian and international insurance and reinsurance industry. Tuli & Co is an insurance-driven commercial litigation and regulatory practice and has working associations with firms in other Indian cities as well as globally via our association with Kennedys. We offer a "cradle to grave" service within the insurance industry from drafting and revising policy wordings, interpretation and handling of coverage disputes, to setting up distribution and service networks and providing industry-specific corporate and commercial advice. We also provide general advice on the impact of new or anticipated legislation and developments in the industry.

Current titles in the ICLG series include:

- Alternative Investment Funds
- Anti-Money Laundering
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Investigations
- Corporate Recovery & Insolvency
- Corporate Tax
- Cybersecurity
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Family Law
- Fintech
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Outsourcing
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Investment Funds
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks
- Vertical Agreements and Dominant Firms

glg global legal group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: info@glgroup.co.uk

www.iclg.com