Insurance & Reinsurance

Contributing editors
William D Torchiana, Mark F Rosenberg and Marion Leydier

2018

GETTING THE DEAL THROUGH

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Insurance & Reinsurance 2018

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Eleventh edition

Getting the Deal Through is delighted to publish the eleventh edition of *Insurance and Reinsurance*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes Israel and Zambia.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, William D Torchiana, Mark F Rosenberg and Marion Leydier, of Sullivan & Cromwell LLP, for their continued assistance with this volume.

GETTING THE
DEAL THROUGH

London
May 2018

India

Neeraj Tuli and Celia Jenkins

Tuli & Co

Regulation

1 Regulatory agencies

Identify the regulatory agencies responsible for regulating insurance and reinsurance companies.

Insurance and reinsurance companies and insurance intermediaries in India are governed by the Insurance Regulatory and Development Authority of India (the IRDAI). The primary legislation regulating the Indian insurance sector comprises of the Insurance Act 1938 (Insurance Act) and the Insurance Regulatory and Development Authority Act 1999 (IRDA Act). Pursuant to the powers granted to it under the IRDA Act, the IRDAI has issued various regulations for governing the licensing and functioning of insurers, reinsurers and insurance intermediaries. The IRDAI has also released the IRDAI (Registration and Operations of Branch Offices of Foreign Reinsurers other than Lloyd's) Regulations 2015 (Branch Office Regulations), that govern the establishment and functioning of branch offices in India set up by foreign reinsurers (foreign reinsurer branch), and has also notified regulations pertaining to the entry of Lloyd's into the Indian market.

Although the Insurance Laws (Amendment) Act 2015 (the Amendment Act), which was passed in March 2015, introduced a plethora of changes to the Insurance Act and the insurance regulatory framework in general, the primary insurance regulator continues to be the IRDAI. Appeals from orders issued and decisions made by the IRDAI may be referred before the Securities Appellate Tribunal (SAT). Subsequently, the procedural rules for filing appeals from the IRDAI orders or decisions with the SAT are also notified.

2 Formation and licensing

What are the requirements for formation and licensing of new insurance and reinsurance companies?

Under the Insurance Act, an Indian insurance company is permitted to carry out insurance business in India. An Indian insurance company is a public limited company formed under the Companies Act 2013 (the Companies Act), that exclusively carries out life insurance business or general insurance business or health insurance business or reinsurance business. An entity desirous to carry out insurance business is required to apply for a certificate of registration from the IRDAI in accordance with a three-stage process set out under the IRDA (Registration of Indian Insurance Companies) Regulations 2000 (the Registration Regulations). A certificate for registration is required for each category of insurance business (ie, life, general, stand-alone health and reinsurance). In addition, the Registration Regulations also set out the essential requirements that an applicant applying for registration is required to fulfil, including, but not limited to:

- permissible foreign investment limits;
- minimum capitalisation requirements;
- minimum qualifications of the directors and principal officers;
- planned infrastructure; and
- general track record of conduct and performance of each of the Indian promoters and foreign investors in the business or profession they are engaged in.

The applicant must also provide adequate documentation in support of its application as prescribed under the Registration Regulations.

Further, the Amendment Act permitted the establishment of foreign reinsurer branches and setting up of service companies under the Lloyd's India framework. The Branch Office Regulations prescribes that a foreign reinsurer is required to apply for registration of a foreign reinsurer branch. The Branch Office Regulations specify the eligibility criteria of a foreign reinsurer, such as credit rating, infusion of minimum assigned capital into the foreign reinsurer branch, in-principle clearance from home country regulator and commitment to meet all liabilities of the foreign reinsurer branch. In addition, syndicates of Lloyd's may participate under the Lloyd's India framework (Syndicates of Lloyd's India) through a service company set up in India in accordance with the IRDAI (Lloyd's India) Regulations 2016 (Lloyd's India Regulations).

3 Other licences, authorisations and qualifications

What licences, authorisations or qualifications are required for insurance and reinsurance companies to conduct business?

Other than registration under the Insurance Act and general company law, no additional licences, authorisations or qualifications are required for insurance and reinsurance companies to conduct business. Banks that intend to set up insurance joint ventures with equity contributions on a risk participation basis or make investments in insurance companies are required to obtain prior approval of the Reserve Bank of India before engaging in such business.

4 Officers and directors

What are the minimum qualification requirements for officers and directors of insurance and reinsurance companies?

The Registration Regulations prescribe that the IRDAI will consider the following when considering granting registration to an insurance or reinsurance company:

- the performance record of the directors and persons in the management of the promoter of the applicant and the applicant;
- the level of actuarial and other professional expertise within the management of the applicant company; and
- the academic and professional qualifications, professional experience, reputation and character of the directors and key persons, and whether any censure or disciplinary actions, dismissals and litigations have been instituted against them.

In addition to the foregoing, the application process for registration requires substantial details about the qualifications and professional background of the top management of the applicant.

The Branch Office Regulations, which prescribe similar requirements as above, require the key management persons of the foreign reinsurer branch to be appointed with the prior approval of the IRDAI. Moreover, an executive committee of the foreign reinsurer branch is required to be constituted by the board of directors of the foreign reinsurer to perform the functions of the board with clearly defined delegation from such board of the foreign reinsurer. Lloyd's is required to obtain a prior approval from the IRDAI for the appointment, removal or managerial remuneration payable to the Chief Executive

Officer of Lloyd's India. Further, the details of the key management persons of service companies along with their bio data are required to be submitted at the time of registration with the IRDAI. Any change in the details submitted is required to be intimated to the IRDAI.

5 Capital and surplus requirements

What are the capital and surplus requirements for insurance and reinsurance companies?

Insurance companies are required to have a minimum paid-up equity capital of 1 billion rupees, while a minimum paid-up capital of 2 billion rupees has been prescribed for reinsurance companies. For foreign reinsurer branches, the minimum assigned capital shall be 1 billion rupees. In addition, minimum assigned capital of 1 billion rupees is required to be infused in Lloyd's India by Lloyd's. Syndicates of Lloyd's India are required to maintain an assigned capital of 50 million rupees through their service companies in India.

6 Reserves

What are the requirements with respect to reserves maintained by insurance and reinsurance companies?

Insurance and reinsurance companies are required to maintain at all times an excess value of assets over the amount of liabilities of not less than 50 per cent of the amount of the minimum capital requirement of such insurance or reinsurance company. In addition, insurance and reinsurance companies are also mandated to maintain a minimum solvency margin. The required solvency margin is calculated by insurance companies themselves on the basis of their mathematical reserves and the sum at risk. The IRDAI periodically specifies the factors that are considered in the calculation of the required solvency margin. The Branch Office Regulations prescribe that the foreign reinsurer setting up a foreign reinsurer branch shall fully comply with the solvency margin requirements under the home country's regulatory requirements. Moreover, the foreign reinsurer branch and the service companies registered under the Lloyd's India framework are also required to maintain their solvency margin in accordance with the applicable regulations issued by the IRDAI.

7 Product regulation

What are the regulatory requirements with respect to insurance products offered for sale? Are some products regulated by multiple agencies?

The IRDAI (Protection of Policyholders' Interests Regulations) 2017 (the Policyholders Regulations) prescribe certain terms to be incorporated in life insurance, general insurance and health insurance policies. For life insurance policies, the IRDAI requires insurance companies to include, inter alia:

- name and Unique Identification Number (UIN) allotted by the IRDAI for the product governing the policy, its terms and conditions, the name, code number and contact details of the person involved in sales process;
- whether it is participating in profits, whether it is linked or non-linked;
- the manner of vesting or payment of profits such as cash bonus, deferred bonus, simple or compound reversionary bonus;
- benefits payable and the contingencies on which these are payable and the other terms and conditions of the insurance contract;
- the name of nominee(s), age of nominee(s) and their relationship and name of guardian in case of minor nominees;
- details of riders being attached to the main policy;
- date of commencement of risk, the date of maturity and the date on which survival benefits, if any, are payable;
- the premiums payable, periodicity of payment, grace period allowed for payment of the premium, the date of last instalment of premium, the implication of discontinuing the payment of an instalment(s) of premium and also the provisions of guaranteed surrender value;
- the details of revival schemes provided for reviving a lapsed policy and requirements to be submitted for revival there under. The insurers shall use term 'revival' which is in vogue for renewing a lapsed insurance policy;
- name, address, date of birth and age of the insured as at the date of commencement of the policy;
- the policy conditions for:
  - conversion of the policy into paid-up policy;
  - surrender;
  - foreclosure;
  - non-forfeiture; and
  - discontinuance provisions in case of linked policies.
- contingencies excluded from the scope of the cover, in respect of both the main policy and the riders;
- the provisions for nomination, assignment, loans on security of the policy and a statement that the rate of interest payable on such loan shall be as prescribed by the insurer at the time of taking the loan;
- any special clauses, exclusions or conditions imposed on the policy;
- the address, email ID of the insurer to which all communications in respect of the policy shall be sent;
- the notes to policyholder highlighting the significance of notifying timely the change of his or her address;
- details of insurer's internal grievance redressal mechanism along with address and contact details of the Insurance Ombudsman within whose territorial jurisdiction the branch or office of the insurer or the residential address or place of residence of the policyholder is located; and
- the list of documents that are normally required to be submitted by a claimant in case of a claim under the policy.

For general insurance policies, insurance companies are required by the Policyholders Regulations to incorporate, inter alia:

- names and addresses of the insured and of any banks or any other persons financial interested in the subject matter of insurance, UIN of the product, name, code number and contact details of the person involved in sales process;
- full description of the property or interest insured;
- location or locations of the property or interest insured under the policy and, where appropriate, with respective insured values;
- period of insurance;
- sums insured;
- perils that are covered and not covered;
- franchise or deductible applicable;
- premium payable and where the premium is provisional subject to adjustment, the basis of adjustment of premium be stated;
- policy terms, conditions and warranties and exclusions, if any;
- action to be taken by the insured upon occurrence of a contingency likely to give rise to a claim under the policy;
- the obligations of the insured in relation to the subject matter of insurance upon occurrence of an event giving rise to a claim and the rights of the insurer in the circumstances;
- any special conditions attached to the policy;
- the grounds for cancellation of the policy which in the case of a retail policy, for the insurer, can be only on the grounds of misrepresentation, non-disclosure of material facts, fraud or non-cooperation of the insured
- the address of the insurer to which all communications in respect of the insurance contract should be sent;
- the details of the endorsements, add-on covers attaching to the main policy;
- that, on renewal, the benefits provided under the policy or terms and conditions of the policy including premium rate may be subject to change; and
- details of insurer's internal grievance redressal mechanism along with address and contact details of insurance ombudsman within whose territorial jurisdiction the branch or office of the insurer or the residential address or place of residence of the policyholder is located.

For health insurance policies, insurance companies are required by the Policyholders Regulations to incorporate, inter alia:

- the name of the policyholder and the names of each beneficiary covered, UIN of the product, name, code number, contact details of the person involved in sales process;
- date of birth of the insured and corresponding age in completed years;

- the address of the insured;
- the period of insurance and the date from which the policyholder has been continuously obtaining health insurance cover in India from any of the insurers without break;
- the sums insured;
- the sub-limits, proportionate deductions and the existence of package rates if any, with cross reference to the concerned policy section;
- co-pay limits if any;
- the pre-existing disease waiting period, if applicable;
- specific waiting periods as applicable;
- deductible as applicable – general and specific, if any;
- cumulative bonus, if any;
- periodicity of payment of premium instalment
- policy period;
- policy terms, conditions, exclusions, warranties;
- action to be taken on the occurrence of a claim for cashless and reimbursement options separately;
- details of third-party administrators (TPA), if any engaged, their address, toll free number, website details;
- details of grievance redressal mechanism of insurer;
- free look period facility and portability conditions;
- policy migration facility and conditions where applicable;
- that, on renewal, the policy could be subject to certain changes in terms and conditions including change in premium rate;
- provision for cancellation of the policy; and
- address and other contact details of ombudsman within whose territorial jurisdiction the branch or office of the insurer or the residential address or place of residence of the policyholder is located.

Where exclusions are to be stipulated in the policy, the Policyholders Regulations require that, wherever possible, Insurers shall endeavour to classify the exclusions into the following:

- standard exclusions applicable in all policies;
- exclusions specific to the policy that cannot be waived; and
- exclusions specific to the policy that can be waived on payment of additional premium.

Similarly, so as to give clarity and understanding of the conditions to the policyholder, insurers are also required to endeavour to broadly categorise policy conditions into the following:

- conditions precedent to the contract;
- conditions applicable during the contract;
- conditions when a claim arises; and
- conditions for renewal of the contract.

Additionally, under the IRDAI (Health Insurance) Regulations 2016, the IRDAI has specified a number of regulatory requirements and conditions that are required to be incorporated into health insurance policies, making such policies highly regulated. The IRDAI has also prescribed a standard set of definitions, standard nomenclature for critical illnesses, and a standard list of generally excluded expenses in relation to health insurance policies.

It is relevant to note that insurance contract wording is highly regulated. 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' and other forms of specialised insurance covers), insurance companies are permitted to issue only those policy terms and conditions, endorsements and other ancillary documentation that have been approved by and filed with the IRDAI under the relevant product filing procedures. The Guidelines on Product Filing Procedures for General Insurance Products of 18 February 2016 require that all retail products (ie, those products that are sold to individual customers including their families) be filed with the IRDAI under the File and Use Procedure before these are marketed. On the other hand, commercial products (ie, those products that are sold to entities other than individuals, including firms, companies, trusts etc.) fall under the Use and File Procedure, which enables an insurer to market the products on being filed with and a UIN being allotted by the IRDAI, subject to certain conditions.

8 Regulatory examinations

What are the frequency, types and scope of financial, market conduct or other periodic examinations of insurance and reinsurance companies?

Insurance companies, reinsurance companies and insurance intermediaries are amenable to inspections and investigations by the IRDAI. No specific frequency has been prescribed for such investigations and inspections. With the passing of the Amendment Act, even service providers and contractors to insurance companies or intermediaries are obliged to furnish to the IRDAI, if required, during any investigation or inspection, all such books of account, registers, other documents and databases in their custody or power that relate to the affairs of the insurance company or intermediary. Directors and other officers of such service providers or contractors may also be called on by the IRDAI to furnish statements on oath.

9 Investments

What are the rules on the kinds and amounts of investments that insurance and reinsurance companies may make?

Investments made by insurance and reinsurance companies are governed by the Insurance Act, the IRDAI (Investment) Regulations 2016 (the Investment Regulations), Investments - Master Circular – IRDAI (Investment) Regulations 2016 of 3 May 2017 (the Master Circular) and various circulars issued by the IRDAI. The Insurance Act mandates that assets of life insurers should be invested as follows: 25 per cent in government securities, a further sum equal to not less than 25 per cent in government securities or approved securities, and the balance in any other approved investment in accordance with the Investment Regulations. General insurers are required to invest 20 per cent of the assets in government securities, a further sum equal to not less than 10 per cent of the assets in government securities or approved securities, and the balance in any other approved investment in accordance with the Investment Regulations. Reinsurers and foreign reinsurer branches are required to invest and keep invested at all times 20 per cent of the assets in government securities, a further sum equal to not less than 10 per cent of the assets in government securities or approved securities, and the balance in any other approved investment in accordance with the Investment Regulations.

The Investment Regulations, which contain the exposure or prudential norms, set out, inter alia, the limits on investments to be made by insurers or reinsurers on the basis of the investee company, group or industry. In addition, subject to the Investment Regulations, insurers cannot invest more than 5 per cent of their assets in companies belonging to promoters. Moreover, insurers are also prohibited from investing the funds of policyholders, directly or indirectly, outside India.

10 Change of control

What are the regulatory requirements on a change of control of insurance and reinsurance companies? Are officers, directors and controlling persons of the acquirer subject to background investigations?

Per section 6A of the Insurance Act read with the IRDAI (Transfer of Equity Shares of Insurance Companies) Regulations 2015, prior approval from the IRDAI must be obtained in the event of a change in shareholding of an insurance or reinsurance company where, after the transfer, the total shareholding of the transferee is likely to exceed 5 per cent of the total paid-up capital of the company.

In addition, prior approval of the IRDAI must also be obtained in the event the nominal value of the shares intended to be transferred by any individual, firm, group, constituents of a group or body corporate under the same management, jointly or severally, exceeds 1 per cent of the total paid-up capital of the insurance or reinsurance company.

Note that there are no specific provisions dealing with background investigations of officers and directors of acquirers. However, while obtaining the IRDAI's approval, information regarding whether the directors of the transferee have ever been refused a licence or authorisation in the past to carry out regulated financial business or whether any company, firm or organisation with which such directors have been associated as directors, officers or managers has been investigated by a regulatory or professional body may be required to be submitted.

11 Financing of an acquisition

What are the requirements and restrictions regarding financing of the acquisition of an insurance or reinsurance company?

The Indian insurance regulatory framework does not expressly regulate financing of the acquisition of an Indian insurance or reinsurance company.

12 Minority interest

What are the regulatory requirements and restrictions on investors acquiring a minority interest in an insurance or reinsurance company?

There are no specific provisions or requirements under the Indian insurance regulatory framework on the acquisition of a minority interest in an insurance company or reinsurance company.

13 Foreign ownership

What are the regulatory requirements and restrictions concerning the investment in an insurance or reinsurance company by foreign citizens, companies or governments?

With the passing of the Amendment Act, foreign investment in insurance and reinsurance companies was increased from 26 per cent to 49 per cent of the paid-up equity capital. In order to implement the changes introduced by the Amendment Act, the Ministry of Finance notified the Indian Insurance Companies (Foreign Investment) Rules 2015 (the Foreign Investment Rules) on 19 February 2015. The Foreign Investment Rules provided that approval of the Foreign Investment Promotion Board (FIPB), set up under the Ministry of Finance, will be required for any foreign investment over 26 per cent and up to the permissible limit of 49 per cent. However, on 16 March 2016, the Foreign Investment Rules were amended to reflect that foreign investment up to 49 per cent of the total paid-up equity capital of an insurance or reinsurance company shall be allowed on the automatic route (ie, without requiring any approval from the FIPB) subject to verification by the IRDAI. Subsequently, the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry notified the Consolidated Foreign Direct Investment Policy on 7 June 2016 to ensure uniformity with the Foreign Investment Rules.

In addition, the Amendment Act also mandated that insurance and reinsurance companies must be 'Indian owned and controlled'. The Foreign Investment Rules read with the Guidelines on 'Indian owned and controlled' of 19 October 2015 (the IOC Guidelines) provide that 'Indian ownership' means that more than 50 per cent of the equity capital is beneficially owned by resident Indian citizens or Indian companies, which are owned and controlled by resident Indian citizens. Further, 'Indian control' of an insurance or reinsurance company shall mean control of such company by resident Indian citizens or Indian companies, which are owned and controlled by resident Indian citizens. 'Control' includes the right to appoint a majority of the directors or to control the management or policy decisions by virtue of shareholding, management rights or shareholders agreements or voting agreements.

The IRDAI has also issued the Investment by Private Equity Funds in Indian Insurance Companies Guidelines of 5 December 2017 (the PE Guidelines) to regulate the investment of Private Equity Fund (PEF) or Alternative Investment Fund (AIF) in Indian insurance companies either as investor or promoter.

14 Group supervision and capital requirements

What is the supervisory framework for groups of companies containing an insurer or reinsurer in a holding company system? What are the enterprise risk assessment and reporting requirements for an insurer or reinsurer and its holding company? What holding company or group capital requirements exist in addition to individual legal entity capital requirements for insurers and reinsurers?

In relation to the IRDAI's supervision of the group to which an insurance company, reinsurance company or insurance intermediary belongs, it should be noted that the IRDAI directly regulates only those insurance companies, reinsurance companies and insurance intermediaries operating in the Indian insurance sector, and currently does not regulate the operations of the group entities of such insurance companies or insurance intermediaries. However, there are some restrictions on insurance companies and insurance intermediaries operating in the same group, where the IRDAI has discretion (in some cases) to determine the scope of 'group':

- an Indian corporate group can have an insurance company and an insurance broker within the same group, subject to certain conditions being fulfilled;
- typically, within a group, the IRDAI will grant one certificate of registration only one entity for insurance intermediation unless a case on merits and with no conflict of interest is made before the IRDAI;
- a web aggregator cannot be a related party of an insurance company;
- there is no express restriction on insurance companies and surveyors operating in the same group, but the IRDAI is likely to view this as an inherent conflict of interest;
- there is no express restriction on insurance companies and TPAs operating in the same group; and
- an insurance agent or insurance intermediary is not permitted to be a director of an insurance company.

15 Reinsurance agreements

What are the regulatory requirements with respect to reinsurance agreements between insurance and reinsurance companies domiciled in your jurisdiction?

In relation to reinsurance contracts, the reinsurance regulations issued by the IRDAI define a contract of reinsurance as a legally binding document on all the parties that provides a complete, accurate and definitive record of all the terms and conditions and other provisions of the reinsurance contract. The reinsurance arrangements do not need to be pre-approved by the IRDAI, but they must be documented and filed with the IRDAI within the stipulated time frame.

The overarching regulatory framework for the reinsurance of general insurance risks in India is set out in the IRDAI (General Insurance – Reinsurance) Regulations 2016 (General Reinsurance Regulations), and in the case of life insurance risks, in the IRDA (Life Insurance-Reinsurance) Regulations 2013 (the Life Reinsurance Regulations). The guiding principle is maximising retention within India, so each Indian Insurer must maintain the maximum possible retention commensurate with its financial strength and volume of business. An Indian insurer is also strictly prohibited from fronting for a foreign insurer or reinsurer. There is no statutory or regulatory definition of what amounts to fronting, but this will essentially be a question of, inter alia, the extent of control that is exercised by the foreign insurer or reinsurer over functions such as whether to write a risk, the price to quote for the risk, the setting of discretionary limits and the handling of claims.

Further, Indian insurers are required to mandatorily cede a certain percentage of the sum assured on each policy for different classes of insurance written in India to Indian Reinsurer(s) as defined under the provisions of the Insurance Act. Apportionment of obligatory cession for the FY 2017–18 is 5 per cent and 0 per cent between General Insurance Corporation of India (GIC Re) and ITI Reinsurance Ltd, respectively.

In addition, subject to the retention limit and the mandatory cession to the Indian Reinsurer for reinsuring the remaining insurance risks, every Indian insurer, with effect from 16 January 2017, is required to comply with the 'order of preference for cession' prescribed under R28(9) of the Branch Office Regulations. An Indian insurer is now required to first offer its facultative and treaty surpluses to Indian reinsurers having a minimum credit rating that denotes good financial characteristics for the preceding three years (currently, GIC Re) and thereafter to foreign reinsurer branches that have been registered under Category I of the Branch Office Regulations (ie, where foreign reinsurer branch maintains a minimum retention of 50 per cent of the Indian reinsurance business). The Indian insurer may then proceed to offer the surplus to other Indian reinsurers or to those foreign reinsurer branches registered under Category II of the Branch Office Regulations (ie, where the foreign reinsurer branch maintains a minimum retention of 30 per cent of the Indian reinsurance business), followed by foreign reinsurer branches set up in special economic zones, and the balance, if any, may be offered to other Indian insurers and overseas reinsurers.

Note that Indian insurers are also required to comply with various requirements set out in the reinsurance regulations, including filing requirements for the reinsurance programme, and the wording of the reinsurance treaty contract and excess of loss cover note, as well as every new reinsurance arrangement entered into.

The IRDAI has also released the 'Draft Insurance Regulatory Authority of India (Reinsurance) Regulations 2018' of 5 January 2018 (the Reinsurance Exposure Draft). The Reinsurance Exposure Draft proposes to amend certain provisions of IRDAI (Registration and Operations of Branch Offices of Foreign Reinsurers other than Lloyd's) Regulations 2015 (Branch Office Regulations) and IRDAI (Lloyd's India) Regulations 2016 (the Lloyd's Regulations). Among other changes, the Reinsurance Exposure Draft proposes the following Order of Preference:

(i) to Indian Reinsurers who have been transacting business for not less than past three continuous years and then to other Indian Reinsurers;
(ii) Foreign Reinsurance Branches and thereafter to the International Financial Service Centre Insurance Office (IIO) or Cross-Border Reinsurer (CRB) which provided lead terms with meaningful capacity of not less than 5 per cent for treaties and 10 per cent for facultative reinsurance business;
(iii) to IIOs, other than those as at (ii) above, transacting reinsurance business and other Indian Insurers; and
(iv) to CBRs, other than those as at (ii) above.

The Reinsurance Exposure Draft also proposes to do away with the categories of reinsurance branches.

16 Ceded reinsurance and retention of risk

What requirements and restrictions govern the amount of ceded reinsurance and retention of risk by insurers?

As mentioned above, Indian insurers are mandated to retain risk proportionate to their financial strength and business volumes. The IRDAI has not issued any specific guidance on the appropriate minimum amount to be retained by insurers. Further, Indian insurers are also required to mandatorily cede the prescribed percentage of the sum assured on each policy for different classes of insurance written in India to the Indian Reinsurer. So far as the 'order of preference for cession' (see question 15) is concerned, no specific amount or percentage has been prescribed for placement of reinsurance risks by an Indian insurer with the relevant entities set out therein.

Per the reinsurance regulations, surplus over and above the domestic reinsurance arrangements shall be placed outside India with only those reinsurers (cross border reinsurers (CBR)) that satisfy the prescribed criteria and have made the relevant filing with the IRDAI. Specifically, the General Reinsurance Regulations stipulate the maximum limit on reinsurance cession that can be made by an Indian insurer to a particular CBR under any insurance segment and is as follows:

- if the Standard and Poor's (S&P) rating of the CBR is BBB and BBB+, then up to 10 per cent cession is allowed;
- if the S&P rating of the CRB is greater than BBB+ and up to and including A+, then up to 15 per cent cession is allowed; and
- if the S&P rating of the CRB is greater than A+, then up to 20 per cent cession is allowed.

Any cession to a CBR that does not satisfy the eligibility criteria or where the cession is above the prescribed limit requires the prior approval of the IRDAI for placement.

17 Collateral

What are the collateral requirements for reinsurers in a reinsurance transaction?

The Indian insurance regulatory framework does not specify any collateral requirements for reinsurance companies in a reinsurance transaction.

18 Credit for reinsurance

What are the regulatory requirements for cedents to obtain credit for reinsurance on their financial statements?

The Indian insurance regulatory framework does not presently expressly regulate requirements for cedents to obtain credit for reinsurance on their financial statements.

19 Insolvent and financially troubled companies

What laws govern insolvent or financially troubled insurance and reinsurance companies?

The insolvency and bankruptcy law in India has recently been overhauled by way of the Insolvency and Bankruptcy Code 2016 (the Insolvency and Bankruptcy Code). The Insolvency and Bankruptcy Code provides the insolvency and liquidation process for corporate persons. However, it is relevant to note that insurers have been excluded from the scope of 'corporate debtor' as defined under the Insolvency and Bankruptcy Code.

The Insurance Act specifically provides that the winding up of an insurance company shall be in accordance with the procedure laid out in the Companies Act 2013 (the Companies Act). In addition, the Insurance Act specifies certain other conditions under which the court may order the winding up of an insurance company.

The process for winding up involves compliance with various procedural requirements set out in the Companies Act. The process includes:

- the appointment of a company liquidator;
- realisation of the assets of the company;
- repayment of all the outstanding creditors and any other statutory dues owed by the company; and
- dissolution of the company.

In relation to repayment of the creditors and outstanding dues of the company, the Companies Act provides that certain dues are required to be paid in priority, including dues to workmen and employees of the company, and the statutory dues owned to governmental authorities.

Further, the Insurance Act provides that the voluntary winding up of an insurance company is subject to certain restrictions. An insurance company cannot be wound up voluntarily except for the purpose of effecting an amalgamation or a reconstruction of the company, or on the ground that by reason of its liabilities it cannot continue its business.

An insurance company may also be partially wound up, whereby a class of their business is wound up but another class either continues to operate or is transferred to another insurance company. In such a scenario, a scheme may be prepared and submitted in court that should provide for the following: the allocation and distribution of the assets and liabilities of the company between any classes of business affected (including the allocation of any surplus assets that may arise on the proposed winding up) for any future rights of every class of policyholders in respect of their policies; and the manner of winding up any of the affairs of the company that are proposed to be wound up. The scheme may also include provisions for altering the memorandum of association of the company with respect to its objects and such further provisions as may be expedient for giving effect to the scheme.

In addition to the above, the Insurance Act also authorises the IRDAI, after affording opportunity to be heard, to appoint an administrator to manage the affairs of the Insurer (under the direction and control of IRDAI), if at any time IRDAI has reason to believe that the Insurer carrying out life insurance business is acting in a manner likely to be prejudicial to the interests of holders of life insurance policies. In June 2017, the IRDAI, in exercise of this authority, appointed an administrator for Sahara Life Insurance Company.

20 Claim priority in insolvency

What is the priority of claims (insurance and otherwise) against an insurance or reinsurance company in an insolvency proceeding?

The Indian insurance regulatory framework does not specifically regulate the priority of claims against an insurance or reinsurance company in an insolvency proceeding. However, because the winding up of an insurance company would be in accordance with the Companies Act, the priority of claims prescribed thereunder would apply to an insurance and a reinsurance company as well.

21 Intermediaries

What are the licensing requirements for intermediaries representing insurance and reinsurance companies?

The IRDAI regulations govern all insurance agents and insurance intermediaries, that is:

- corporate agents;
- insurance brokers;
- insurance marketing firms (IMFs);
- TPAs;
- surveyors and loss assessors; and
- web aggregators.

Insurance intermediaries need to obtain licences and registrations pursuant to the provisions of the specific regulations that are applicable to them in view of the nature of the business proposed to be undertaken by them. The IRDAI has issued regulations setting out the licensing or registration requirements (including eligibility criteria, capital and net worth requirements, qualification requirements of the principal officer, directors or partners of the concerned entity) and procedures for all the above-mentioned intermediaries. Licence or registration is typically granted for a period of three years, and may be renewed thereafter. Insurance intermediaries (except corporate agents whose principal business is other than insurance distribution) are not permitted to have more than 49 per cent (under automatic route (ie, without requiring any prior government approval)) as foreign direct investment and such entities must be 'Indian owned and controlled'.

Insurance agents

An individual may be appointed as an insurance agent by an insurer on complying with the conditions provided under the regulations notified by the IRDAI in this regard. An insurance agent is required to have passed the relevant examination and is also required to possess the requisite knowledge for soliciting insurance business and providing necessary services to policyholders. An insurance agent is permitted to solicit insurance business for only:

- one life insurer;
- one general insurer;
- one health insurer; and
- one each of the mono-line insurers.

Corporate agents

Entities eligible to operate as corporate agents include:

- firms;
- banks;
- non-banking financial companies;
- cooperative societies;
- non-governmental organisations; and
- companies.

An entity registered as a corporate agent may either exclusively carry out the business of insurance distribution or engage in any business other than insurance distribution as its main business. Where a corporate agent has a main business other than insurance distribution, then that agent is not permitted to make the sale of its products contingent on the sale of an insurance product, or vice versa. A corporate agent may have arrangements with a maximum of three insurers in each category of life, general or health insurance.

Insurance brokers

Insurance brokers are required to exclusively carry out the distribution of insurance products. Any company, limited liability partnership or cooperative society may apply to the IRDAI for the grant of an insurance broker certificate of registration. Applicants may register as direct broker (life), direct broker (general), direct broker (life and general), reinsurance brokers or composite brokers (involved in both direct and reinsurance broking). The minimum capital for direct brokers is 7.5 million rupees, 40 million rupees for reinsurance brokers and 50 million rupees for composite brokers. All insurance brokers are required to be members of the Insurance Brokers Association of India.

IMFs

Entities such as companies, limited liability partnerships or cooperative societies that are registered as IMFs are permitted to distribute insurance products along with mutual funds, pension products and certain other financial products, provided that permissions from the respective regulator are in place to distribute these financial products. IMFs are permitted to distribute the insurance products of only two life insurers, two general insurers and two health insurers at any one time, and a change in the insurer whose products are to be distributed may take place only on the prior approval of the IRDAI. IMFs are required to have a minimum capital of 1 million rupees, and are also permitted to undertake survey functions through licenced surveyors on its rolls, policy servicing activities and other activities that are permissible to be outsourced by insurers under the applicable regulatory framework.

Web aggregators

The IRDAI has recently released regulations that supersede the previous regulations governing web aggregators. An entity such as a company or a limited liability partnership that is registered as a web aggregator is permitted to display on its website information on insurance products of those insurers with whom the web aggregator has entered into an agreement. The web aggregator is also permitted to display product comparisons on its website, carry out activities for lead generation and share leads with insurers. A web aggregator is required to have a minimum capital of 2.5 million rupees.

Insurance claims and coverage

22 Third-party actions

Can a third party bring a direct action against an insurer for coverage?

There is no equivalent in India of the UK Third Parties (Rights against Insurers) Act 2010. As a general rule, Indian law recognises the principle of privity of contract, and thus a third party would be unable to bring a direct action against an insurer.

It is common practice, however, for third parties to name the defendant's insurer in motor accident-related proceedings. The Motor Vehicles Act 1988 (MVA) 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 MVA empowers the Motor 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. However, the Motor Vehicles (Amendment Bill) 2017 seeks to limit the insurer's liability with respect to a third-party insurance as follows:

- 1 million rupees in case of death; and
- 500,000 rupees in case of grievous hurt.

23 Late notice of claim

Can an insurer deny coverage based on late notice of claim without demonstrating prejudice?

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

In practice, however, irrespective of whether the notice clause is expressed as a condition or a condition precedent, courts previously have stated that the condition relating to notice should not prevent settlement of genuine claims where there is a delay in intimation or in submission of documents owing to unavoidable circumstances. This is the position that the IRDAI also recommends in its circulars where insurers have been directed not to reject claims unless and until the reasons of delay are specifically ascertained and recorded, and the insurers are satisfied that the delayed claims would have been rejected even if they had been reported in time. The June 2017 IRDAI Circular has advised all insurers to ensure scrupulous compliance with the circulars. Courts and consumer fora have also followed the view that clauses limiting the period for notification of claims are not to be construed strictly, and have often overturned the rejection of claims where the delay was reasonably justifiable.

However, in recent times, the courts and consumer forums have strictly applied this condition. For instance, in 2015 the National Consumer Disputes Redressal Commission held that any delay in the notification of loss to the insurer is fatal to the claim when there was no plausible explanation for the delay (*Saurashtra Chemicals Ltd v National Insurance Co Ltd I* (2015) CPJ351 (NC)). The principle was followed in *Reliance General Insurance Co Ltd v Jai Prakash* (Revision Petition No. 2479 of 2015, decided on 11 January 2016) and *Cosmic Trends Pvt Ltd v Ors Oriental Insurance Company Limited* (Revision Petition No. 447 of 2016, decided on 19 May 2016), whereby the National Consumer Dispute Redressal Commission held that the requirement of immediate intimation of the loss to the insurer is not a mere formality. The purpose of the intimation is to enable the insurer to verify the alleged loss a time when the evidence is still available and the insurer is entitled to repudiate a claim because of late notification.

Recently, on 15 February 2017, in *Gopinath v UII*, MANU/CF/0092/2017, the court held that the repudiation of claim because of a delay of three months in informing the insurer was justified. But on the same day in J*agjit Singh v Cholamandalam*, MANU/CF/0099/2017, the court considered it sufficient that the 'complainant has been able to provide adequate explanation for the delay in giving intimation' and 'the Insurance Company has not been able to state or prove anywhere, as to what prejudice had been caused to them if intimation reached their office after nine to 10 days of the occurrence'.

In *Om Prakash v Reliance Insurance* (Civil Appeal No 15611 of 2017) decided on 4 October 2017, the Supreme Court of India said that if an insured has given cogent reasons for delay in notifying a claim then it should not be rejected solely on that ground. Recently in *Gurshinder Singh v Sriram General Insurance* decided on 9 January 2018, the Supreme Court of India has referred the question of effect of late intimation of claim by the Insured to a larger bench to take a final view on the issue.

24 Wrongful denial of claim

Is an insurer subject to extra-contractual exposure for wrongful denial of a claim?

Insurance companies in India must have an internal grievance redressal mechanism that addresses complaints raised against them by insured parties. If a policyholder feels that an insurance company has not adequately addressed his or her grievance, he or she may approach the Grievance Cell of the IRDAI or the Insurance Ombudsman (depending on the nature of grievance), or initiate formal legal proceedings against the insurance company before the consumer protection fora. The consumer fora, and the Indian courts in general, often award reasonable sums against insurance companies as compensation for the consequential loss, harassment and legal costs of policyholders in cases where it is deemed that the claim was wrongly denied, especially where the conduct of an insurance company is inferred to be arbitrary or harmful. In *Pinki Devi v NIA*, MANU/CF/0257/2015, the National Consumer Disputes Redressal Commission imposed punitive damages of 1 million rupees on an insurance company for pursuing a meritless litigation. The damages were recovered from the salaries of the delinquent officials of the insurance company.

25 Defence of claim

What triggers a liability insurer's duty to defend a claim?

A liability insurer's 'duty to defend' a claim is determined by the terms of the insurance policy. The insurer usually has either a 'right to defend' or a 'duty to defend'. The 'duty to defend' is when a claim made against the insured is to be defended by the insurer, even if it is subsequently found to be not covered. Until such time as a claim is admitted or repudiated, an insurer has to manage the claim defence. On the other hand, if the wording is 'right to defend' then the insurer can opt to defend or associate with the defence.

26 Indemnity policies

For indemnity policies, what triggers the insurer's payment obligations?

Once an insured has established that the claim (usually defined to mean a written demand or civil suit, etc.) falls within the insuring clause and the insurer is satisfied that none of the exclusions apply and none of the conditions have been breached, the insurer's obligation to pay would trigger as soon as the insured incurs and satisfies a liability.

27 Incontestability

Is there a period beyond which a life insurer cannot contest coverage based on misrepresentation in the application?

As per the provisions of the Insurance Act, a life insurance policy cannot, on any grounds whatsoever, be called into question by the insurer three years after the date of issuance or commencement of risk, or the date of revival of the policy or the date of the rider to the policy, whichever is latest.

28 Punitive damages

Are punitive damages insurable?

There are no judicial precedents in India to suggest that punitive damages are insurable. In the authors' experience, insurance policies typically exclude punitive damages from the scope of insurance cover.

29 Excess insurer obligations

What is the obligation of an excess insurer to 'drop down and defend', and pay a claim, if the primary insurer is insolvent or its coverage is otherwise unavailable without full exhaustion of primary limits?

There is no legislative or regulatory obligation that requires excess insurers to defend and pay a claim if the primary insurer is insolvent or its coverage is unavailable without full exhaustion of the primary limits.

30 Self-insurance default

What is an insurer's obligation if the policy provides that the insured has a self-insured retention or deductible and is insolvent and unable to pay it?

Self-insured retention or deductible are not governed by any statute or regulation as such. The respective obligations of the insurer and the insured with regard to deductible or self-insured retention are usually governed by the wording of the policy or the insurance contract.

The obligation to make payment, if any, to the insolvent insured will be in accordance with the general insolvency or bankruptcy laws. In our view, the insolvency of the insured will not affect the liability of the insurer to pay the insured. If the insurer is to recover the retention amount or deductibles from the insolvent insured then, for the purposes of such recovery, the insurer will be treated as an unsecured creditor whose claim will be settled in accordance with the insolvency laws.

31 Claim priority

What is the order of priority for payment when there are multiple claims under the same policy?

The terms of the insurance policy entered into between the insurer and the insured usually determine the order of priority for payment when there are multiple claims under the same policy. For example, there are order of payments clauses in some directors' and officers' policies, that specify that the losses would be satisfied in the order in which such loss is presented to the insurer.

32 Allocation of payment

How are payments allocated among multiple policies triggered by the same claim?

The allocation of payments between the various insurers depends on the allotment of risk set out in the policy. Most policies contain an 'other insurance' clause that sets out that the policy in question would sit in excess of any other existing and valid insurance that has been taken out by the insured in respect of the same insurable interest.

33 Disgorgement or restitution

Are disgorgement or restitution claims insurable losses?

Claims for restitution and disgorgement are usually not covered under insurance policies in India.

34 Definition of occurrence

How do courts determine whether a single event resulting in multiple injuries or claims constitutes more than one occurrence under an insurance policy?

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

35 Rescission based on misstatements

Under what circumstances can misstatements in the application be the basis for rescission?

Under Indian law, an insurance contract is one of the utmost good faith, and insurers are entitled to a fair presentation of any risk prior to inception. If there has been a misrepresentation or non-disclosure of a material fact, an insurer may avoid the policy ab initio. Unless the misrepresentation or non-disclosure was fraudulent, the premium must be tendered back to the policyholder. However, under the terms of the Insurance Act, in India a life insurance policy cannot be called into question on any grounds whatsoever (including fraud) after the passing of three years from the date issuance or commencement of the risk. Further, an insurer may expressly or impliedly waive his right to rescind. For example, the acceptance of premiums with knowledge of circumstances entitling the insurer to avoid the policy stops him from averring that for that reason it is not a valid policy (*Madhu Ghosh v KK Company* (1999) 2 CALLT 204 (HC)). Sometimes, policies contain wording that takes away the insurer's right to avoid a policy in case of an innocent non-disclosure and only gives the right to exclude the particular claim from the policy cover.

Reinsurance disputes and arbitration

36 Reinsurance disputes

Are formal reinsurance disputes common, or do insurers and reinsurers tend to prefer business solutions for their disputes without formal proceedings?

There have been very few reinsurance disputes in India, and there is therefore very limited Indian case law or judicial guidance with regard to reinsurance disputes. While it is true that, as a general trend, parties do prefer business solutions for their disputes, this is now changing. Reinsurance disputes are being increasingly referred to arbitration and are pending litigation in various courts in India. As, in most of the cases, the disputes have not been finally adjudicated, the case law and precedent on the subject remains limited. However, the general principles of insurance and contract law apply.

37 Common dispute issues

What are the most common issues that arise in reinsurance disputes?

Apart from the questions of, inter alia, coverage, and the applicability of exclusions and non-disclosure that arise in any other insurance dispute, an issue that often arises is whether, in an insurer–reinsurer dispute, an insurer is entitled to approach the consumer fora for adjudication of such dispute as the consumer fora will take a lot less time to adjudicate the dispute. A person availing of a service for commercial purposes is excluded from the purview of a 'consumer' under Indian laws; therefore, the question that arises is whether the insurer opts for reinsurance support for the purposes of indemnifying its losses, or to enable it to insure larger amounts by charging an extra premium (thus making it a commercial purpose). The matter has been decided by the National Consumer Disputes Redressal Commission (NCDRC) in its judgment in *Harsolia Motors v National Insurance Co Ltd I* (2005) CPJ 27 (NC), wherein the NCDRC has clarified the definition of commercial purpose by holding that:

> *[I]t is apparent that even taking wide meaning of the words 'for any commercial purpose' it would mean that goods purchased or services hired should be used in any activity directly intended to generate profit. Profit is the main aim of commercial purpose. But, in a case where goods purchased or services hired in an activity which is not directly intended to generate profit, it would not be commercial purpose.*

The matter has been appealed against and is now pending adjudication in the Supreme Court of India. It is pertinent to mention that the judgment in *Harsolia Motors* was with respect to a dispute between a commercial entity and an insurer. However, disputes between insurer and reinsurer have also been admitted in the past by the NCDRC, but clarity will be obtained only when the case of *Harsolia Motors* is finally adjudicated by the Supreme Court of India.

The pending decision in *Harsolia Motors* is even more significant in light of the fact that the Supreme Court by its order dated 13 February 2018, has upheld the decision of the NCDRC in *M/s Emaar MGF Land Limited & Anr. v Aftab Singh* Consumer Case No. 701 of 2015, wherein it has been held that existence of an arbitration clause shall not bar the jurisdiction of consumer courts. Subject to the view taken by the Supreme Court, in *Harsolia Motors*, a situation can potentially emerge where disputes between insurers and reinsurers are viewed as consumer disputes entitling either party to deny arbitration and seek the consumer court's relief.

38 Arbitration awards

Do reinsurance arbitration awards typically include the reasoning for the decision?

Section 31(3) of the Arbitration and Conciliation Act, 1996 (Arbitration Act) states that an arbitral award shall contain the reasons for the same unless the parties have expressly agreed otherwise or in case of a consent award, where parties settle their dispute pending arbitration. It is rare to find agreements where the parties have dispensed with the obligation of an arbitral tribunal to provide reasons in its award.

39 Power of arbitrators

What powers do reinsurance arbitrators have over non-parties to the arbitration agreement?

It was a settled position of law in India that an arbitrator is a creature of an agreement between the parties; as such, an arbitral tribunal is bound by the agreement between parties and does not have any jurisdiction to either implead or pass an award against a person who is not a party to the said arbitration agreement This principle was enunciated by the Supreme Court of India in the case of *Sukanya Holdings Pvt Ltd v Jayesh H Pandya and Ors*, 2003 (5) SCC 531. A three-judge bench of the Supreme Court in *Chloro Controls (I) Pvt Ltd v Severn Trent Water Purification Inc & Ors* 2013 (1) SCC 641 subsequently carved out an exception to this rule for foreign seated arbitrations alone. It was held that a reference of a party claiming through or under a signatory to the arbitration is permissible, particularly if the agreements are 'intrinsically interlinked' and the

Update and trends

The Indian insurance sector has witnessed significant changes over the past year. The exposure draft on Reinsurance Regulations 2018 that will apply both to life insurers and to general insurers proposes to prescribe a new Order of Preference and cession for Indian insurers that will replace the old Order of Preference and describe the new hierarchy between various entities with which an Insurer can place its reinsurance business.

The IRDAI has notified the IRDAI (Outsourcing of Activities by Indian Insurers) Regulations 2017 to prescribe the norms applicable to Insurers vis-à-vis arrangements with third-party service providers regarding such activities that an insurer is required to ordinarily perform itself. These regulations also expressly set out the list of activities that an insurer is prohibited from outsourcing to third-party service providers.

In addition, the IRDAI has also notified the IRDAI (Protection of Policyholders' interests) Regulations 2017 (the Policyholder Regulations) that set out the standards for the sale, servicing and claim procedure to be followed with respect to insurance policies. Insurers are required to update their existing products to reflect the new provisions of the Policyholder Regulations.

The IRDAI also issued the IRDAI (Insurance Web Aggregators) Regulations 2017 to replace the erstwhile IRDA (Web Aggregators) Regulations 2013. Additionally, the IRDAI has recently issued the IRDAI (Insurance Brokers) Regulations 2018 to replace the previous IRDA (Insurance Brokers) Regulations 2013.

IRDAI has also notified the Motor Insurance Service Providers (MISP) Guidelines to regulate the role of the automobile dealers in the distribution and servicing of motor insurance products. Pursuant to the notification of the MISP Guidelines, a duly registered MISP is permitted to solicit, procure and service motor insurance policies for insurers or insurance intermediaries, as the case may be, in accordance with the provisions of the MISP Guidelines. The IRDAI has also issued the Investment by Private Equity Funds in Indian Insurance Companies Guidelines of 5 December 2017 (PE Guidelines) to regulate the investment of PEF or AIF in Indian insurance companies either as investor or promoter.

ancillary agreements serve no purpose except in connection with the principal agreement that contains the arbitration clause. In other words, a composite transaction can be referred to arbitration even if some of the parties named as respondents are not parties to the arbitration.

The judgment in *Chloro Controls* was, however, limited to Foreign Arbitrations alone and did not extend to domestic arbitrations.

Notably in 2015, arbitration law in India was amended. The effect of the amended Section 8 of the Arbitration Act is that now, 'any person claiming through or under' a signatory to the arbitration agreement can be referred to arbitration. The power under Section 8 of the Arbitration Act is in relation to the Court alone and it is not clear if this power extends to arbitrators as well. The position of law in this respect has not been settled and a clear position of law shall emerge only when the Supreme Court decides the question in *Ameet Lal Chand v. Rishabh Enterprises* [SLP (C) 16798/2017], which is currently pending adjudication. Subject to the view that the courts take of the amended provision, this may ultimately result in reinsurance arbitrators joining non-signatories to arbitration.

40 Appeal of arbitration awards

Can parties to reinsurance arbitrations seek to vacate, modify or confirm arbitration awards through the judicial system? What level of deference does the judiciary give to arbitral awards?

Section 34 of the Arbitration Act gives a party to arbitration proceedings a right to approach a court for the setting aside of the award. However, setting aside is permitted only if the person so challenging the award has proved that one of the grounds laid down in section 34 has been satisfied. The court has limited scope while entertaining a petition under section 34 and, unlike an appellate court, it cannot examine the merits of the award (in other words, the court is not free to interfere with the award merely because it feels, following a review of all the materials, that it would have arrived at a different conclusion); its scope of interference is limited to the grounds laid out in section 34, which include incapacity of a party to enter into arbitration, improper notice of arbitration, ultra vires jurisdiction, invalid composition of the arbitral tribunal, a conflict with the public policy of India and patent illegality appearing on the face of the award. Also, by way of the amendment to the Arbitration Act, the scope of 'public policy' has been narrowed down to include only those instances where: (i) the making of the award is fraudulent or corrupt; or (ii) the award is in contravention of the fundamental policy of Indian law; and (iii) the award is in conflict with the most basic notions of morality or justice.

In cases where the parties are still unsatisfied, the affected party can file an appeal under section 37 of the Arbitration Act, where a court has set aside or refused to set aside an arbitral award under section 34.

The courts place substantial value on a proper arbitral award because the parties themselves have decided on the forum and the members of the tribunal. Therefore, courts will normally refrain from interfering or setting aside an arbitral award unless one of the grounds under section 34 of the Arbitration Act has been satisfied.

Reinsurance principles and practices

41 Obligation to follow cedent

Does a reinsurer have an obligation to follow its cedent's underwriting fortunes and claims payments or settlements in the absence of an express contractual provision? Where such an obligation exists, what is the scope of the obligation, and what defences are available to a reinsurer?

The terms of the reinsurance contract usually govern the rights, obligations and processes of the insurer and the reinsurer in respect of the monitoring of claims and settlements. Claims control and claims cooperation clauses are included in reinsurance contracts, and the contracts will also occasionally contain 'follow-the-settlement' clauses that require the reinsurer to follow any settlement reached by the insurer with the insured. The effect of follow-the-fortunes wording is usually that reinsurers must pay for honest settlements that fall within the four corners of the reinsurance if such settlements have been reached by the cedant in a proper and business-like manner. 'Settlement' includes judgments, awards and reasonable settlements of liability and quantum. Good faith payments by a cedant that are made without admission of liability or on a without prejudice basis, or under a full reservation of rights will not fall within follow-the-fortunes wording and will relieve the reinsurer of his or her liability to indemnify. The intention of the follow-the-fortunes wording is therefore that the cedant, not the reinsurer, undertakes claims adjustment and settlement. If reinsurer wishes to involve themselves in the process then they should insert a proper claims control clause or stronger claims cooperation clause, and in either event remove the follow-the-fortunes wording.

42 Good faith

Is a duty of utmost good faith implied in reinsurance agreements? If so, please describe that duty in comparison to the duty of good faith applicable to other commercial agreements.

Under Indian law, an insurance contract is a contract of the utmost good faith, and insurers are entitled to a fair presentation of the risk prior to inception. 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 tendered back to the policyholder. The duty to disclose material facts is not confined to those facts that are in the knowledge of the insured, but also extends to those facts that the insured should have known as a prudent person. Indian courts have interpreted the expression 'utmost good faith' in insurance law to constitute an obligation to deal 'fairly' and 'honestly' that is almost identical to the definition of 'good faith' under the Indian General Clauses Act No. 10 of 1897.

43 Facultative reinsurance and treaty reinsurance

Is there a different set of laws for facultative reinsurance and treaty reinsurance?

There are no separate laws for facultative reinsurance and treaty reinsurance. The General Reinsurance Regulations and the Life Reinsurance Regulations regulate both these types of reinsurance in India. In addition, as mentioned above, R28(9) of the Branch Office Regulations prescribes the order of preference for cessions by Indian insurers for their facultative and treaty surpluses and does not make a distinction between the two categories.

44 Third-party action

Can a policyholder or non-signatory to a reinsurance agreement bring a direct action against a reinsurer for coverage?

A third party cannot bring a direct action against the reinsurer for coverage because there is no privity of contract between the original policyholder and the reinsurer.

45 Insolvent insurer

What is the obligation of a reinsurer to pay a policyholder's claim where the insurer is insolvent and cannot pay?

There are no legislative or statutory obligations on the reinsurer to pay a policyholder's claim when the insurer is insolvent.

46 Notice and information

What type of notice and information must a cedent typically provide its reinsurer with respect to an underlying claim? If the cedent fails to provide timely or sufficient notice, what remedies are available to a reinsurer and how does the language of a reinsurance contract affect the availability of such remedies?

The type of notice that a cedant must provide and within what time period would be governed by the reinsurance policy wording. For example, notice may be required immediately, or when the insured expects the claim to exceed 50 per cent of the deductible, etc. This requirement may be expressed as a condition or a condition precedent to the insurer's liability under the policy, and the consequences of non-compliance will to some extent depend on whether the notification clause is expressed as a condition or a condition precedent. If the notice clause is a condition, the insurer will have to show that it suffered prejudice on account of the delayed notice. However, if the clause is a condition precedent, then in theory no prejudice is required to be shown for placing reliance on the clause. We also note that IRDAI's notification dated 18 August 2015 specifies that:

In respect of classes with 'No Limit' on cessions marked by an asterisk above [Motor, Workmen's compensation, General Aviation hull/Liability and Other Miscellaneous], the 'Indian Reinsurer' may require the ceding insurer to give immediate notice with underwriting information of any cession to it exceeding an amount per risk specified by it. Cessions in excess of such limits will be binding subject to the notice and information been given.

47 Allocation of underlying claim payments or settlements

Where an underlying loss or claim provides for payment under multiple underlying reinsured policies, how does the reinsured allocate its claims or settlement payments among those policies? Do the reinsured's allocations to the underlying policies have to be mirrored in its allocations to the applicable reinsurance agreements?

There is no statutory guidance in relation to the mode of settlement of such claims, and this usually depends on the treaty or contractual arrangements between the insurers and the reinsurers, and on the conditions specified in the treaty. Regarding facultative reinsurance, the reinsurer has the discretion to accept or reject claims. However, in treaty reinsurances, the liability of reinsurers to settle claims arises from the conditions mentioned in the treaty.

48 Review

What type of review does the governing law afford reinsurers with respect to a cedent's claims handling, and settlement and allocation decisions?

The existing legislation does not provide for a general right of review of the cedent's claims handling, or settlement and allocation decisions; however, there is nothing to stop the reinsurer and the insurance company from contractually agreeing to set up a review and audit mechanism.

49 Reimbursement of commutation payments

What type of obligation does a reinsurer have to reimburse a cedent for commutation payments made to the cedent's policyholders? Must a reinsurer indemnify its cedent for 'incurred but not reported' claims?

Commutation payment terms are set out in reinsurance contracts, and there is no regulatory or legislative direction in this regard.

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50 Extracontractual obligations (ECOs)

What is the obligation of a reinsurer to reimburse a cedent for ECOs?

There are no regulations dealing with obligations on reinsurers to reimburse a cedent for ECOs. The same will be governed by the terms of the reinsurance treaties entered into by the reinsurer and cedent. In practice, several reinsurance treaties specifically relieve reinsurers from the obligation to reimburse cedents for ECOs.

Getting the Deal Through

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Licensing
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Mediation
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Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public-Private Partnerships
Public Procurement
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
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