

THE INSURANCE
DISPUTES LAW
REVIEW

SIXTH EDITION

Editor
Russell Butland

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PREFACE

I am delighted that this is now the sixth edition of *The Insurance Disputes Law Review*. It is a privilege to be the editor of this excellent and succinct overview of recent developments in insurance disputes across 17 important insurance jurisdictions. I am particularly pleased in this edition to welcome chapters from China and Mexico.

Insurance is a vital part of the world's economy and critical to risk management in both the commercial and the private worlds. The law that has developed to govern the rights and obligations of those using this essential product can often be complex and challenging, with the legal system of each jurisdiction seeking to strike the right balance between the interests of insurer and insured and also the regulator who seeks to police the market. Perhaps more than any other area of law, insurance law can represent a fusion of traditional concepts (that are almost unique to this area of law) together with constant entrepreneurial development, as insurers strive to create new products to adapt to our changing world. This makes for a fast-developing area, with many traps for the unwary. Further, as this indispensable book shows, even where the concepts are similar in most jurisdictions, they can be implemented and interpreted with very important differences in different jurisdictions.

To be as user-friendly as possible, each chapter follows the same format – first providing an overview of the key framework for dealing with disputes – and then giving an update of recent developments in disputes.

As the editor, I have been impressed by the erudition of all authors and the enthusiasm shown for this fascinating area. It has also been particularly interesting to note the trends that are developing in each jurisdiction.

An evolving theme in almost every jurisdiction is the increase in protections for policyholders. Much of the special nature of insurance law has developed from an imbalance in knowledge between the policyholder (who had historically been blessed with much greater knowledge of the risk to be insured) and the insurer (who knew less and therefore had to rely on the duties of disclosure of the policyholder). With the proliferation of data, the increasing use of artificial intelligence to assess that data and provide more detailed scope for analysis across risk portfolios, the balance of knowledge has shifted; it will often now be the insurer who is better placed to assess the risk. This shift has manifested itself in tighter rules requiring insurers to be specific in the questions to be answered by policyholders when they place insurance, and in remedies more targeted at the insurer if full information is not provided. Coupled with these trends, however, is the increasing desire by some jurisdictions to set limits on the questions that can be asked so that, for example in relation to healthcare insurance, policyholders are not denied insurance for historical matters.

We can expect that this tussle between the commercial imperative for insurers to price risk realistically and the need to balance consumer protection, government policy and privacy will increasingly be at the heart of insurance disputes.

The past year has been tumultuous. The conflict being fought in Ukraine, and its effect on energy security and global supply chains, comes as a further shock on top of climate events and the legacy of the disruption from covid-19. The effect of the Ukraine conflict is having a substantial effect on the aviation insurance market, with previously lightly litigated policy forms now at the front and centre of major litigation in the US, the UK and Ireland. Business interruption issues from the covid-19 pandemic meanwhile continue to be worked through across the legal systems; key areas of coverage have been addressed but now there are more bespoke issues, for example relating to the application of policy limits.

There has in the past year been particular focus on directors and officers policies. These are under increasing pressure as directors are in the spotlight as a result of strategic climate change litigation (particularly relating to greenwashing and transparency of transition to net zero). Similarly, cyber risks are ever increasing, as the scope of cover and capacity provided by the insurance market retreats.

No matter how carefully formulated, no legal system functions without effective mechanisms to hear and resolve disputes. Each chapter, therefore, also usefully considers the mechanisms for dispute resolution in each jurisdiction. Courts appear to remain the principal mechanism, but arbitration and less formal mechanisms (such as the Financial Ombudsman in the United Kingdom) can be a significant force for efficiency and change when functioning properly. The increasing development of class action mechanisms, particularly among consumer bodies (e.g., in France and Germany), is likely to be an important factor.

I would like to express my gratitude to all the contributing practitioners represented in *The Insurance Disputes Law Review*. Their biographies are to be found in the first appendix and highlight the wealth of experience and learning that the contributors bring to this volume. On a personal note I must also thank Rebecca Daramola at my firm, who has done much of the hard work in this edition. I would also like to thank the whole team at Law Business Research, who have excelled at bringing the project to fruition and in adding a professional look and more coherent finish to the contributions.

Last, but not least, I would like to thank Joanna Page, who co-edited the first five editions of this book. Joanna's leadership and intellect were instrumental in bringing the original concept for this book to fruition, and ensuring that it has gone from strength to strength with each edition. In following Joanna as editor I have big shoes to fill.

Russell Butland

Allen & Overy LLP

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CHINA

Harrison (Hui) Jia, Fu Ranran and Zhang Youran¹

I INTRODUCTION

In recent years, China's insurance market has continued to develop and expand. Although the insurance industry suffered certain impacts and losses due to the covid-19 pandemic which began in 2020, the insurance industry has played an increasingly important role as a social stabiliser and economic shock absorber in the post-pandemic era. In 2022, China achieved growth in insurance premium income against the prevailing trend and ranked second in the world. However, with the rapid development of the insurance market in China, the number of insurance dispute cases is also on the rise. Insurance-related litigation cases have been one of the largest categories of civil and commercial cases heard by the courts at all levels in China, and the number of insurance arbitration cases accepted by the arbitration institutions has also been increasing year on year.

II YEAR IN REVIEW

The courts in China have recently dealt with many significant issues relating to insurance, including jurisdiction over liability insurance contracts, general average in marine insurance contracts and the recognition of the insured person in insurance subrogation, etc. Such cases are instructive for dealing with similar insurance disputes.

i Jurisdiction of liability insurance contract

In a number of employer's liability cases,² the Supreme People's Court of PRC (the Supreme Court) maintained its consistent opinions on whether the place of residence of the insured shall be regarded as the place of jurisdiction of the employer's liability insurance. The Supreme Court held that the subject matter of insurance refers to the subject matter of the insurance contract between the insured and the insurer, such as property, personal health, and life. The liability insurance contract involved in an employer's liability insurance case refers to the liability for property compensation in the event of death or injury of an employee of the insured. Although the liability for property compensation is intangible, the subject that assumes the liability for property compensation is specific, and the form in which the subject assumes the liability for property compensation and pays for compensation is specific as

1 Harrison (Hui) Jia is a partner, Fu Ranran is a lawyer and Zhang Youran is a trainee lawyer at DeHeng Law Offices.

2 [2023] Zui Gao Fa Min Xia No. 21; [2023] Zui Gao Fa Min Xia No. 23; [2023] Zui Gao Fa Min Xia No. 22.

well. The domicile of the insured may be determined as the location of the subject matter of insurance. Meanwhile, if the domicile of the insured is considered as the location of the subject matter of insurance in the liability insurance contract, it will be convenient for the court to investigate the facts and for the parties to participate in the litigation.

ii The establishment or adjustment of the general average and the contribution to the general average

In a marine insurance contract dispute between a Shanghai marine transport company and a property insurance company,³ the Supreme Court ruled on the calculation and contribution of the general average: the carrier and the insurance company entered into a marine insurance contract and agreed on the terms that the coverage scope is the apportioned part of the general average, salvage and salvage expenses, which is legitimate and valid. If the insured vessel, cargo, etc. encounter common danger during the carriage by sea, and the carrier employs other persons to render salvage services to the vessel, cargo, etc., for the common safety, the compensation shall be the general average, different from the contractual provisions on salvage and salvage expenses. Therefore, the insurance company shall pay for the ship's apportioned share of the salvage remuneration after adjustment for the general average.

iii If the affiliated companies of the insured do not constitute the members of the insured as provided in Article 62 of the Insurance Law, the insurer may exercise the subrogation right against the affiliated companies in accordance with the law

The interpretation of Article 62 of the Insurance Law, which states that 'the insurer may not exercise the subrogation right against the family members or employees of the insured' has always been controversial in legal theory and practice. The purpose this provision is to prevent the insured from being unable to actually obtain compensation due to the insurer's exercise of its right of subrogation. Therefore, the identity in terms of economic interests between the insured and the counterpart of the insurer's subrogation right shall be the basis for determining the specific scope of 'members of the insured'.

In a case involving a subrogation dispute between a Qingdao company and the insurer of a property insurance subsidiary,⁴ the plaintiff and the defendant disputed the definition of 'member of the insured'. The court held that, as an affiliated company of the insured, the Qingdao company does not share the same economic interests with the insured, nor does it have any dependency in terms of legal personality with the insured. Therefore, the Qingdao company does not constitute the 'member of the insured' as stipulated in Article 62 of the Insurance Law, and the insurer may exercise the subrogation rights against the Qingdao company after indemnifying the insurance benefits to the insured in accordance with the law.

3 [2021] Zui Gao Fa Min Shen No. 7578.

4 Number eight of the top 10 commercial cases issued by the Supreme Court in 2022.

iv Whether the application for preservation is wrong cannot be judged simply by whether the claim of a petitioner for preservation was supported

In judging whether there is a mistake in an application for preservation, support for the litigation request of the applicant for preservation should not be taken as the sole standard. A comprehensive judgment should be based on the specific circumstances of the case; for example, whether the applicant has intent or is negligent, whether the object of preservation is wrong, or any other factors.

In *Yixing Building Engineering & Installation Co, Ltd v. Zhang Xin and Zhang Xueshan*, the Supreme People's Court held that, because the parties had different legal knowledge, different capability to prove the facts of the case, and different capability to analyse and judge legal relations – that is, they generally had no professional capacity as required for judicial adjudication – their judgement about the issues, rights and obligations might not be the same as the adjudicative results of the court. The due care of a party when petitioning for preservation should not be too harsh. If whether the claim of a petitioner for preservation was supported was the only basis on which to decide whether a petition for preservation was erroneous, the parties in good faith would inevitably be obstructed from defending their rights through the litigation preservation procedure according to the law. The functions of the litigation preservation system would therefore be adversely affected.

III THE LEGAL FRAMEWORK

i Sources of insurance law and regulation

In China, the substantive issues of insurance disputes are mainly governed by the following laws and rules: the Insurance Law of the People's Republic of China (as amended in 2015) (the Insurance Law) and its related Interpretations promulgated by the Supreme People's Court (the Interpretations of the Insurance Law); and the Civil Code of the People's Republic of China and its related Interpretations promulgated by the Supreme Court. Procedural issues are governed by the Civil Procedural Law of the People's Republic of China (as amended in 2017) and its related interpretations promulgated by the Supreme Court.

To support the implementation of the Insurance Law, the Supreme Court successively promulgated four judicial interpretations of the Insurance Law. The first interpretation is aimed at solving the issue of transition from the old Insurance Law to the new Insurance Law amended in 2009; the second interpretation is aimed at solving the problem of application of the rules on general provisions of insurance contracts; the third interpretation is aimed at solving the issue of application of the rules on personal insurance contracts; and the fourth interpretation is aimed at solving the issues of application of the rules on property insurance contracts.

ii Insurable risks

Insurable risks versus uninsurable risks

In China, there is no clear legal definition of 'insurable risks' and 'uninsurable risks'. Generally, risks that are pure, contingent, unexpected, and have the potential for material loss for a large number of subjects and the loss can be measured, are insurable risks. On the other hand, risks that are speculative and certain, that result from intentional acts or failure to take reasonable precautions, or that will involve loss for only one or a small number of subject matters and the loss cannot be measured in monetary terms, are uninsurable risks.

However, the distinction between insurable risks and uninsurable risks is not absolute. In recent years, the scope of insurable risks has been expanding. For example, due to the impact of covid-19, some insurance companies have extended their existing insurance coverage for the coronavirus, and cancelled the waiting periods, deductibles, designated hospitals, and other restrictions, while introducing special types of insurance, such as isolation insurance, new coronavirus insurance, and resumption of work and production insurance. Similarly, with the growing capital of insurance companies, the continuous emergence of new insurance technology, and the expansion of reinsurance market, catastrophes such as earthquakes and floods, which were originally uninsurable, have been included in the insurance coverage of some insurance companies.

Insurable interests

‘Insurable interests’ refers to the legally recognised interests of an insurance applicant or the insured party in the subject matter of the insurance. Article 12 of the Insurance Law provides that an insurance applicant of a personal insurance shall have insurable interests in the insured party at the time of the conclusion of the insurance contract. An insured party in a property insurance contract shall, at the time of occurrence of an insured event, have insurance interests in the subject matter of insurance.

An overseas-based insurer or reinsurer that has not completed the registration process within China cannot write business directly in China. However, a foreign insurance company could write reinsurance of a Chinese domestic insurer. According to Article 19 and Article 21 of the Administrative Provisions on the Reinsurance Business (2021), except for aviation and spaceflight insurance, nuclear insurance, oil insurance and credit insurance, where a direct insurance company cedes out a direct insurance business for property insurance by means of proportional reinsurance, for each risk unit, the total proportion ceded by it to the same reinsurer shall not exceed 80 per cent of the insured amount or the limit of liability under the direct insurance contract undertaken by the cedant. In case of any disputes, the insured shall seek dispute resolution with the insurer in accordance with the insurance contract but not with the overseas-based insurer or reinsurer directly.

iii Fora and dispute resolution mechanisms

In China, the dispute resolution mechanisms for insurance disputes mainly include litigation, mediation, and arbitration.

In terms of the fora, according to Article 25 of the Civil Procedure Law of the People’s Republic of China, a lawsuit brought on an insurance contract dispute shall be under the jurisdiction of the People’s Court of the place where the defendant has their domicile or where the insurance object is located. According to Article 21 of the Interpretation of the Supreme People’s Court on the Application of the Civil Procedure Law of the People’s Republic of China (amended in 2022), for a lawsuit brought on a property insurance contract dispute, if the insurance object is a transport vehicle or goods in transit, the lawsuit may be under the jurisdiction of the People’s Court of the place where the transport vehicle is registered, the destination of transportation, or the place where the insurance accident occurs. For a lawsuit brought on a life insurance contract dispute, the lawsuit may be under the jurisdiction of the People’s Court of the place where the insured is domiciled.

To facilitate the efficiency and the professionalism of the court, some provinces in China exercise a ‘concentrated jurisdiction system’, which designates all cases of a particular kind to be tried in a particular court. For instance, the Beijing Financial Court was established

in March 2021. As declared by the Supreme People's Court, the Beijing Financial Court has jurisdiction over the first-instance trials of all financial civil and commercial cases related to insurance.

Arbitration is an important and popular form of insurance dispute resolution in China. In respect of arbitration cases, the applicable laws and rules include the Arbitration Law of the People's Republic of China (as amended in 2017) and the Interpretations of Supreme People's Court on the Application of the Arbitration Law of the People's Republic of China (as amended in 2008). Many cases concerning the validity of arbitration clauses in insurance-related disputes are about insurance subrogation claims, namely, whether an arbitration agreement reached between the insured and a third party before the insured event is binding on the insurer exercising the right of subrogation.

Alternative dispute resolution (ADR) is encouraged in China. According to the Civil Procedure Law (amended in 2017), there are generally two types of ADR: mediation and arbitration. ADR is highly encouraged and has developed rapidly in the field of insurance dispute resolution. Since 2012, the Supreme Court has been working with the China Banking and Insurance Regulatory Commission to explore the application of ADR in insurance dispute resolution. In 2016, the Supreme Court and the former China Insurance Regulatory Commission jointly issued the Opinions on Comprehensively Promoting the Interconnection System between Litigation and Mediation of Insurance Disputes to establish China's diversified dispute resolution mechanism for insurance disputes. Many ADR organisations, such as the International Commercial Mediation Center for the Belt & Road have emerged and developed rapidly. In practice, the diversified dispute resolution, which is a combination of arbitration and mediation, has become increasingly important.

In respect of the choice of law, according to Article 41 of the Law of the Application of Law for Foreign Related Civil Relations of the People's Republic of China, the parties concerned may choose the laws applicable to contracts by agreement. If the parties do not choose, the laws at the habitual residence of the party whose fulfilment of obligations can best reflect the characteristics of this contract or other laws that have the closest relation to such contract shall apply.

IV THE INTERNATIONAL ARENA

With the increase of foreign trade, economic cooperation and other foreign contacts in China, foreign-related insurance disputes are increasing continuously. In insurance disputes involving international parties, diversified rules on jurisdiction and complicated application of governing laws have become popular topics in foreign-related insurance disputes.

i Jurisdiction rules for foreign-related insurance disputes

The Civil Procedure Law governs the application of law in foreign-related civil litigations in China. However, Article 267 of the Civil Procedure Law also provides that, 'Where the provisions of international treaties concluded or acceded to by China are different from those of this Law, the provisions of such international treaties shall apply, except for those to which China has declared reservation.'

The jurisdiction rules for foreign insurance disputes also follow the principle of the autonomy of the parties' will. The parties to a contract may agree in writing to be subject to the jurisdiction of the courts of the places that have actual connections with such disputes, for example, the defendant's domicile, the place of performance of the contract, the place where

the contract is signed, the plaintiff's domicile, the place where the subject matter is located, etc. In practice, the principle of party autonomy of will prevails in the application, and the court shall respect the party autonomy of will when adjudicating the relevant cases.⁵

ii Application of governing laws for foreign-related insurance disputes

The parties to foreign-related insurance disputes may choose the laws applicable to their dispute in the insurance contract. If the parties fail to agree on any applicable law, the laws of the habitual residence of the party whose performance of the contract best reflects the characteristics of the contract, or other laws most closely connected with the contract may apply, namely, 'the most closely connected law'.⁶ In the case of [2022] Hu 0118, Civil First Instance No. 15057, the parties agreed that the insurance contract should be governed by Korean laws. At trial, the court ruled that the case should be subject to the jurisdiction of and be interpreted according to Korean laws.

iii Enforcement of foreign judgments or awards by a Chinese insurance company

Foreign judgments may only be enforceable in China in accordance with the principle of reciprocity and the provisions of the international treaties concluded or acceded to by the foreign country and China. According to the Civil Procedure Law, if a final judgment or decree of a foreign court requires recognition and enforcement by a court of China, the party concerned may directly apply for recognition and enforcement to the intermediate people's court of China that has jurisdiction.

China joined the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention) in 1986, and foreign arbitration awards could be recognised and enforced by a people's court of China. According to the Civil Procedure Law of the People's Republic of China, if an award made by a foreign arbitration agency requires the recognition and enforcement by a people's court of China, the party concerned shall directly apply to the intermediate people's court in the place where the party subject to execution has its domicile or where its property is located. The people's court shall deal with the matter in accordance with the relevant provisions of the international treaties concluded or acceded to by China or under the principle of reciprocity.

V OUTLOOK AND CONCLUSIONS

According to statistics from the Annual Report on Claims Settlement in the Insurance Industry 2022, insurers in China paid out more than 1.5 trillion yuan in 2022. Policy coverage disputes mainly arose from property and casualty insurance policies, among which motor vehicle insurance disputes accounted for the largest proportion. Among personal insurance-related disputes, the main types of insurance policies involved were illness insurance, accident insurance and medical insurance, and the claims were mainly due to the delayed settlement of claims, disputes over the claimed amount, and the burdensome materials that were required for the settlement.

5 Article 35 of the Judicial Interpretation of the Civil Procedure Law.

6 Article 41 of the Law of the People's Republic of China on Application of Laws for Foreign-related Civil Relations.

In addition, as online insurance has been accelerated by the development of internet technology, online policy claim disputes mainly have related to the notification and exemption clauses. On 1 February 2021, the Measures for the Regulation of Internet Insurance Businesses were officially implemented, clarifying the essence of internet insurance businesses, and establishing a system of rules suitable for the development of internet insurance for various market players.

Climate change has a significant impact on the operations of insurance companies in China. In terms of underwriting and claims, drastic changes in the climate may lead to an increase in the probability of property loss claims, such as claims due to the rainstorm from the end of July to early August 2023 in Beijing and Hebei Province and an increase in underwriting costs.

The war in Ukraine may also be a major factor affecting China's insurance industry. Many countries have announced sanctions on some Russian personnel, companies and goods since the war began. At the same time, many insurance companies refuse to cover goods and properties in Russia. As for cargo insurance, some insurance companies require an additional 'sanction' clause. Shipowners' P&I insurance has also been greatly impacted, since ships travelling back and forth from Russia rarely obtain international coverage. It is expected that property insurance companies might face huge losses, especially in fields such as aviation insurance and cybersecurity insurance. In addition, disputes in relation to marine insurance may occur since international trade and cross-border transportation related to Europe would be adversely affected by these circumstances.

Since 2020, the revision of the Insurance Law has been included in the legislative plan of the Standing Committee of the National People's Congress. During the two sessions of the National People's Congress and the Chinese People's Political Consultative Conference in 2022, some representatives put forward a proposal to revise the Insurance Law, suggesting that insurance business operation rules, risk prevention mechanisms and other aspects should be improved in order to adapt to industry development and regulatory needs. It is estimated that the mainstream opinions on revising the Insurance Law may gradually take shape in 2023, which may have new significant effects on the future insurance dispute resolution mechanisms and the regulation of the insurance industry.

