RPC

Law and jurisdiction in insurance and reinsurance contracts

Asia Pacific

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ADVISORY | DISPUTES | REGULATORY | TRANSACTIONS

RPC

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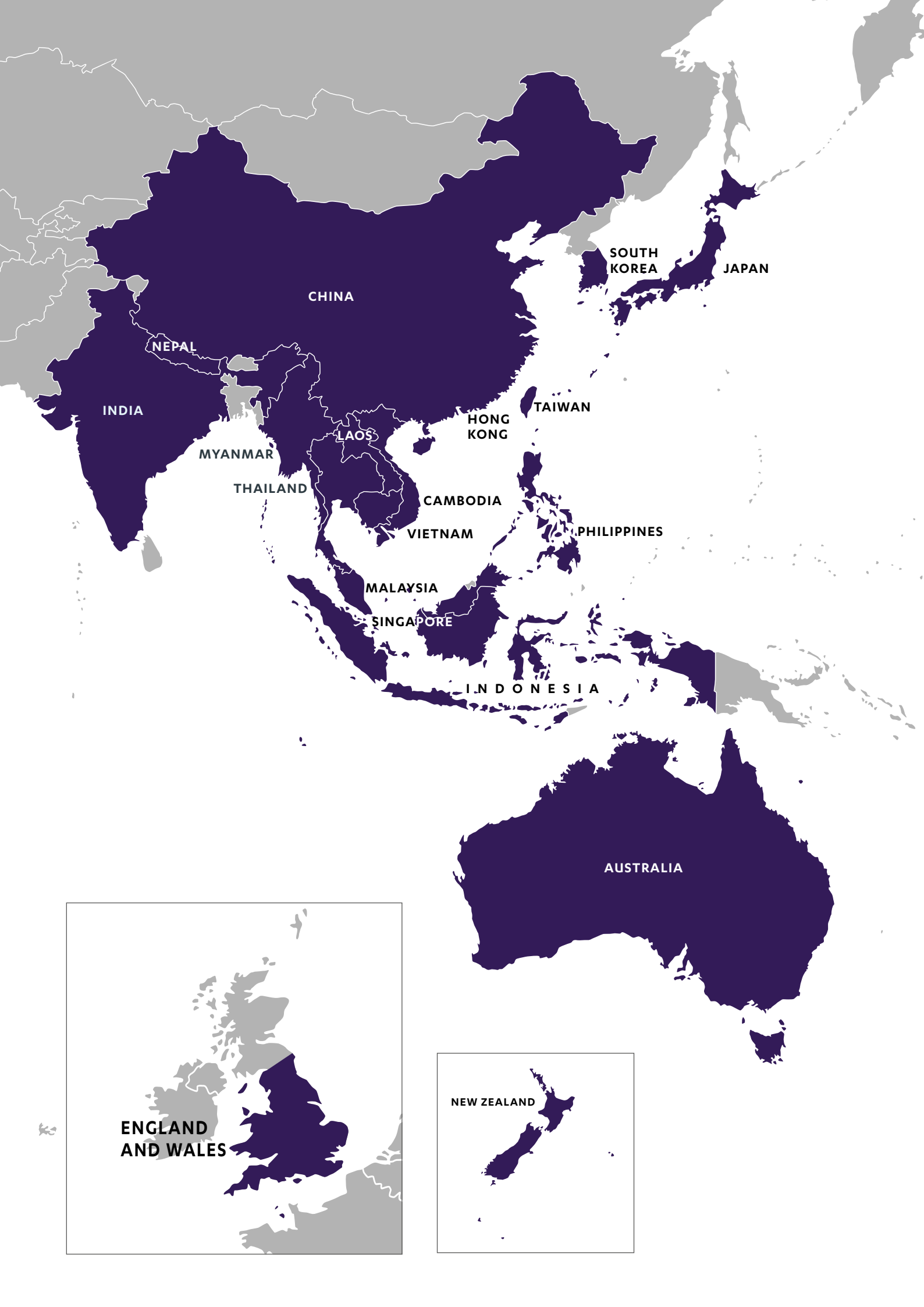
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Introduction

While not always given priority during placement negotiations, governing law clauses, jurisdiction clauses and arbitration clauses are often the most important provisions in any insurance or reinsurance contract. This is because the governing law will determine the meaning and effect of all of the other terms of a policy. While underwriters and brokers may consider they have a good understanding of the terms of cover being bound, this understanding may often be founded on principles they are familiar with (such as English law). However this may be misconceived, where a different selection of governing law dictates the actual effect of the terms of cover, which may be very different from the underwriter's intentions.

There is, therefore, often a stark tension between the 'international understanding' of policy wordings on the one hand (where, for example, underwriters may negotiate terms of cover based upon a 'common law' understanding of policy terms) and local application on the other (where terms of cover may be ascribed very different meanings depending upon the relevant governing law provided for and the approach of local courts).

Significant uncertainty can arise, both as to the meaning of terms and the outcome of a given dispute, due to the potential for local courts to approach the application of contractual terms in a highly incongruous manner. This can be particularly the case in jurisdictions with less mature legal systems. An absence of developed legal principles relevant to specific issues, a lack of specialist judges and a range of other factors may lead to greater levels of uncertainty of outcome.

This situtation is typically much more pronounced at a reinsurance level. While there is significant case authority as to the meaning of reinsurance provisions and concepts as a matter of English law, many countries have only very nascent law in the reinsurance sphere. Since the commencement of the last soft market, this situation has become more pronounced, with underwriters being persuaded to move away from the certainty that came with historic preferences for, and selection of, English governing law in reinsurance contracts.

Suggestions that the same governing law should be provided for in both direct and reinsurance policies, often that of the risk location, can ignore the reality of how incorporated terms will be construed and the protection that a recognised governing law, such as English law, can provide to reinsurers. Historically, it was common to find different law and jurisdiction clauses across the different contracts in the insurance and (re)insurance contractual chain, and this can often be a preferred solution for reinsurers."

Issues of governing law and the applicable court jurisdiction are of course separate, though frequently the distinction is misunderstood or ignored. Two choices are to be made, one in relation to the choice of law clause, the other a jurisdiction clause stating the forum in which any dispute will be determined, either by national courts or, alternatively, in arbitration.

One of the difficulties when selecting governing law is that regulations in certain countries mandate that local law must apply to insurance contracts covering in-country exposures. Likewise, in many countries, courts are very reluctant to give up jurisdiction over disputes. Where insurers have concerns over the determination of disputes by local courts in a particular jurisdiction, the ability to provide for arbitration (importantly for liability as well as quantum matters) under the auspices of internationally recognised institutions and arbitral rules, can provide considerable comfort.

As a general premise, many courts and regulators are inclined to support of the enforcement arbitration clauses. It may be that local courts will require that local law be applied and even, at times, for the arbitration to be heard in that country. However, they may be less likely to interfere with the choice of the tribunal and this can serve to significantly mitigate jurisdictional risks.

A more problematic situation arises where the contract fails to specify a choice of law clause, such that conflict of law rules may be considered (and all I can say is that if you get to that stage you need a lawyer!)

Of course, laws can vary widely across jurisdictions, including the applicable limitation period. For example, absent any contractual specification, a claim may be subject to a two year time bar before the Thai courts, a 30 year limitation period in Indonesia, or in the case of Nepal, no prescription period at all!

Another crucial consideration should of course be the scope for commercial settlement. Many legal systems have compulsory schemes of mediation, as a potential mechanism to seek to resolve a dispute before it proceeds to litigation or arbitration. The recognition of concepts such as "confidentiality" and "without prejudice" varies across different jurisdictions but it is of significant importance when undertaking mediation or communicating settlement offers .

Within the confines of a comparative booklet of this size, it is not possible to provide a definitive statement of all law and procedure on these issues across 18 jurisdictions in Asia Pacific (as well as our 'starting point' of England and Wales). However, working with our friends and colleagues in leading regional legal practices, we have endeavoured to provide an accessible reference point to assist insurers with some immediate considerations, prior to seeking more substantive advice. We hope that this is useful and informative for both underwriting and claims professionals alike.

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England and Wales

Governing Law

Are direct insurance policies in England and Wales required to be subject to local law? If so, what are the provisions that govern this?

No, direct insurance policies do not have to be subject to English law.

The parties to an insurance contract are free to select and agree any law of their choice. There are very limited exceptions or caveats to this. The expressed intention has to be "bona fide and legal" and there cannot be any reason "for avoiding the choice on the grounds of public policy".

Is the position the same, or does it differ, for reinsurance contracts?

The position is the same for reinsurance contracts. However, choice of law, jurisdiction and arbitration clauses will not be incorporated by reference to an underlying insurance policy. Therefore, these matters should be addressed by express provision in reinsurance contracts.

Are floating governing law clauses permitted in insurance and reinsurance policies in England and Wales?

English law does not permit floating choice of law clauses: the parties must know from the outset which law governs their relationship.

Arbitration

Can direct insurance policies in England and Wales provide for arbitration (as opposed to court jurisdiction) as the sole dispute resolution mechanism for coverage disputes? If so, what specific legislation or rules apply to the arbitration of insurance disputes in England and Wales?

Direct insurance policies can provide for arbitration as the sole dispute mechanism for coverage disputes. Arbitration in England and Wales is regulated by the Arbitration Act 1996.

Can the parties choose which (local or international) arbitral rules (including any institutional rules) apply, or is their ability to do so restricted by local law or regulation?

The parties are free to choose a specific institution and its rules, or a specific set of rules, to regulate an arbitration. So, for example, the parties might choose the LCIA, SIAC or the ICC as the institution and the rules of that institution, or a set of rules such as ARIAS, Chartered Institute of Arbitrators (**CIArb**) or UNCITRAL.

Is there a compulsory default appointing body or authority for the appointment of arbitrators (in the event the parties cannot agree) or can the parties choose the default appointing body (by agreement or pursuant to the institutional rules of their choice)?

There is no default appointing body in England and Wales. The parties may agree an appointing body such as the President of CIArb or the President of the Law Society. In the absence of agreeing to an appointing body, application is made to the court under the Arbitration Act 1996.

If the parties have provided for arbitration in their policy can the Insured nevertheless opt to pursue its claim before the local courts?

If the parties have provided for arbitration in their policy, the Insured may not pursue its claim before the courts, as discussed earlier. A party may apply to the court for a stay of the court proceedings under Section 9 of the Arbitration Act 1996.

Does local law or regulation require that the forum of any arbitration is in England and Wales or can the arbitral forum be overseas?

There is no restriction on the location of the forum and/or seat, either of which may be overseas.

Is the position the same on these issues as far as reinsurance contracts are concerned?

The same position applies to reinsurance.

Mediation

Can insurance and/or reinsurance policies in England and Wales provide for mediation of disputes? Can such mediation be compulsory?

Both direct and reinsurance policies can expressly provide for mediation as a means of resolving disputes. Such clauses need careful drafting if the courts are to give effect to them by staying legal proceedings commenced without regard to the agreement to mediate. The courts have compelled the parties to mediate in cases where there is a mediation clause, staying the legal proceedings in the meantime.

The court can encourage the parties to mediate by imposing costs sanctions against a party who does not reasonably engage in mediation.

Would mediation have to be undertaken under the auspices of a local mediation body or the local courts and pursuant to local mediation rules, or can the parties agree to use an international mediation centre, mediator and rules of their choice?

The parties are free to choose how they go about undertaking the mediation process. It may be ad hoc, or under the auspices of an institution such as CEDR. Most commonly mediation is ad hoc in insurance and reinsurance disputes.

Are all mediations conducted on the basis that they are confidential and "without prejudice"? If so, how is this achieved?

In advance of all mediations, parties and the mediator will enter into and sign a mediation agreement, which will govern the relationship between the parties before, during and after the mediation. Mediation agreements will usually include an express provision that the mediation is conducted on the basis that anything said, or any written statements exchanged, in the mediation are "without prejudice" and confidential. Further, given that confidentiality is integral to the mediation process, a confidentiality clause is likely to be implied in the absence of an express confidentiality clause (Farm Assist Ltd v Secretary for State for the Environment, Food and Rural Affairs [2009] EWHC.)

Not all mediations are conducted on a "without prejudice" basis, parties can expressly or impliedly exclude privilege or parties can waive their rights to privilege in court or tribunal proceedings. However, as privilege belongs to both parties to the communication, the author alone cannot waive it.

Limitation

What limitation/time bar provisions apply to claims under insurance and reinsurance policies in England and Wales? Are there any specific issues or challenges these give rise to?

By Section 5 of the Limitation Act 1980, an action on a contract must be brought within six years from the date of the accrual of the action (12 years if the contract is by way of a deed, which would be most unusual in insurance). It is generally accepted that the date on which the Insured's action accrues is the date on which the Insured peril occurs and not on the later dates when the loss is manifested, the Insured incurs expenditure or insurers deny liability. The date is not postponed by reason of the fact the Insured was unaware of the occurrence of the Insured peril.

Under a liability policy, the general rule is that the limitation period commences as soon as the third party has established and quantified the Insured's liability by means of a judgement, arbitration award or binding settlement.

Limitation periods in reinsurance contracts, although the same as in direct policies, can sometimes give rise to complex issues on the facts of particular cases (and there are then different legal theories as to when time begins to run).

General

Are there any other compulsory dispute resolution rules relevant to insurance and/or reinsurance coverage disputes in England and Wales? If so, what are these?

There are no other relevant compulsory dispute resolution rules.

Are there any anticipated/upcoming changes to law and regulation in England and Wales which would impact the litigation, arbitration or mediation of insurance disputes?

The Civil Justice Council has two ongoing reviews into litigation practice which may impact insurance disputes in due course. The first review addresses whether ADR should be mandatory. Following the CJC's June 2021 report endorsing compulsory ADR, and the Ministry of Justice's call for evidence and subsequent report issued in March 2022 on this issue, a public consultation on a proposal to introduce free, mandatory mediation for all defended small claims in the County Court (ie most claims below £10k) ran from July to October 2022. The results from the consultation are awaited, but it would seem likely that lower-value insurance claims will be affected by the proposals. The second review relates to the use of pre-action protocols **(PAP)** to encourage settlements and reduce costs. The CJC has proposed wide-ranging changes to PAPs, including the creation of a new general PAP which would incorporate a "good faith obligation to try to resolve or narrow the dispute at the pre-action stage" and a joint "stocktake" report as a final pre-condition to launching proceedings.

England and Wales
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Australia

Governing Law

Are direct insurance policies in Australia required to be subject to local law? If so, what are the provisions that govern this?

Yes, direct insurance policies in Australia are required to be subject to local law. Though not explicitly stated in a particular legislative provision, the combined operation of Sections 8 and 52 of the *Insurance Contracts Act 1984* (Cth) (**ICA**) means that a foreign jurisdiction clause in a policy of insurance may be invalid. Section 8 of the ICA provides that where the proper law of a policy of insurance would, but for an express provision to the contrary, be local law (ie the law of an Australian State or Territory), then notwithstanding that provision, the proper law of the policy is the local law. Section 52 of the ICA prohibits contracting out of the ICA.

Is the position the same, or does it differ, for reinsurance contracts?

Reinsurance policies are not required to be subject to local law as they are not subject to the ICA.

However, Australian cedants (in the non-life insurance sector) are generally required by the Australian Prudential Regulation Authority (**APRA**) to ensure that any reinsurance agreements – other than for captives – entered into (incepting on or after 31 December 2008) have an Australian governing law clause (Section 34 of the APRA Prudential Standard GPS 230 (Reinsurance Management)). This leads, as a general rule, to the application of Australian law in reinsurance contracts.

Are floating governing law clauses permitted in insurance and reinsurance policies in your jurisdiction?

Floating governing law clauses are not permitted (or rather deemed ineffective) in direct insurance policies by virtue of Sections 8 and 52 of the ICA. Section 8 does not restrict floating governing law clauses in reinsurance policies.

Arbitration

Can direct insurance policies in Australia provide for arbitration (as opposed to court jurisdiction) as the sole dispute resolution mechanism for coverage disputes? If so, what specific legislation or rules apply to the arbitration of insurance disputes in Australia?

Direct insurance policies in Australia cannot provide for arbitration as the sole dispute resolution mechanism for coverage disputes. Section 43 of the ICA renders void any provision in a direct policy of insurance requiring a coverage dispute to be referred to arbitration or any provision which limits the rights otherwise conferred by the policy on the Insured by reference to an agreement to submit a dispute to arbitration.

However, Section 43 does not prevent parties from agreeing to submit a dispute to arbitration if agreement to do so is made after the dispute arises.

Domestic arbitrations are regulated by uniform state-based legislation, for example the *Commercial Arbitration Act 2010* (NSW). International arbitrations are regulated by the *International Arbitration Act 1974* (Cth), which enacts the UNCITRAL Model Law on International Commercial Arbitration (**Model Law**) in Australia. The Model Law therefore applies to international commercial arbitrations where the place of arbitration is Australia.

Can the parties choose which (local or international) arbitral rules (including any institutional rules) apply, or is their ability to do so restricted by local law or regulation?

The uniform state-based legislation provides that the parties to a domestic arbitration are free to agree on the rules of procedure to be followed by the arbitral tribunal conducting the proceedings. Failing such agreement, the arbitral tribunal may, subject to the provisions of the relevant state Act, conduct the arbitration in such a manner as it considers appropriate. See Section 19 of the relevant state Act. The rules used are typically those of an arbitral institution (such as the ACICA Arbitration Rules).

In addition, subject to any contrary agreement of the parties or direction of the arbitral tribunal, the default procedure for arbitral proceedings is set out in the relevant state Act (see Sections 23 and 24 of the relevant state Act).

The position is the same for parties to an international arbitration pursuant to the Model Law.

Is there a compulsory default appointing body or authority in for the appointment of arbitrators (in the event the parties cannot agree) or can the parties choose the default appointing body

(by agreement or pursuant to the institutional rules of their choice)?

Pursuant to the uniform state-based legislation, in a domestic arbitration, the parties are free to agree on a procedure of appointing the arbitrator or arbitrators including the procedure in the event the parties cannot agree (for example, see Section 11 of the *Commercial Arbitration Act 2010* (NSW)). It follows that the parties can agree to the default appointing body by agreement or pursuant to the rules of their choice.

The Australian Centre for International Commercial Arbitration (ACICA) is the only default appointing authority competent to perform the arbitrator appointment functions under the *International Arbitration Act 1974* (Cth) (see Section 18 of the IAA; Section 4 of the *International Arbitration Regulations 2011* (Cth)).

If the parties have provided for arbitration in their policy can the Insured nevertheless opt to pursue its claim before the local courts?

By virtue of Section 43 of the ICA, as discussed earlier, a direct insurance policy cannot provide for arbitration as the sole dispute resolution mechanism for coverage disputes. Therefore, an Insured will always have the option to pursue its claim before the local courts.

Does local law or regulation require that the forum of any arbitration is in Australia or can the arbitral forum be overseas?

Domestic arbitration, which is governed by State-based legislation, is required to be held in Australia. There is no provision in Australian law which requires an international arbitration to be held in Australia. However, it is important to remember that direct insurance policies are required to be subject to Australian law (as discussed in the first question). Therefore, any international arbitration of a coverage dispute would need to apply Australian law.

Is the position the same on these issues as far as reinsurance contracts are concerned?

The arbitral forum for an arbitration of a dispute arising under a reinsurance policy can be overseas. However, it is important to observe that the prudential regulator overseeing the insurance industry, APRA, generally requires reinsurance contracts to have an Australian governing law clause (as discussed in the second question).

Mediation

Can insurance and/or reinsurance policies in Australia provide for mediation of disputes? Can such mediation be compulsory?

Unlike with arbitration, the ICA does not preclude insurance/reinsurance policies from expressly providing for mediation.

However, if a mediation clause is expressed to be an exclusive dispute resolution process, it would likely be rendered unenforceable by the courts. Australian courts have shown a strong tendency to reject any kind of dispute resolution mechanism which purports to exclude a party from access to the judicial system.

Would mediation have to be undertaken under the auspices of a local mediation body or the local courts and pursuant to local mediation rules, or can the parties agree to use an international mediation centre, mediator and rules of their choice?

The parties are free to agree to use any mediation centre, mediator and rules of their choice in the absence of a compulsory court order directing otherwise.

However, as stated above, if the insurance coverage dispute becomes litigated, Australian courts have the power to order the parties to attend compulsory mediation subject to the relevant civil procedure rules in place in each state and territory (ie it would be Section 26 of the *Civil Procedure Act 2005* (NSW) in NSW).

Are all mediations conducted on the basis that they are confidential and "without prejudice"? If so, how is this achieved?

Yes, all mediations are conducted on the basis that they are confidential and "without prejudice", with some exceptions to that blanket privilege under Commonwealth law. The protections are afforded by the various State Evidence Acts, as well as a closely aligned law of evidence at Commonwealth level. The parties are free to enter into mediation agreements and because of the exceptions under the Commonwealth Evidence Act, this is the prevailing practice.

Limitation

What limitation/time bar provisions apply to claims under insurance and reinsurance policies in Australia? Are there any specific issues or challenges these give rise to?

There is no specific limitation period which applies to general insurance contracts. The limitation period applicable in each state and territory for breach of contract is six years from the date the cause of action accrued. In the case of a coverage dispute, that would typically run from when the Insured's entitlement to indemnity occurs, or when refusal to indemnify (declinature) is asserted. The obligation to indemnify is typically only enlivened at the point a judgment, settlement or adjudication is entered. Therefore it is at this point that the limitation period commences.

In terms of claims under insurance policies, limitation/time bar provisions would only come into play if the claimant is seeking to commence proceedings. For example, if the notified claim relates to contract and tort, the limitation period is ordinarily six years from the date the cause of action accrued. In contrast, in the State of Victoria for a building action, the limitation period is 10 years from the date of issue of the occupancy permit or certificate of final inspection of the building works.

General

Are there any other compulsory dispute resolution rules relevant to insurance and/or reinsurance coverage disputes in Australia? If so, what are these?

No.

Are there any anticipated/upcoming changes to law and regulation in Australia which would impact the litigation, arbitration or mediation of insurance disputes in Australia?

Australia is often described as a pro-investment arbitration jurisdiction, for example, last year rejecting an attempt by the Kingdom of Spain to block an arbitration award from being recognised on the basis of foreign state immunity. The arbitration regimes have remained fairly stable and are widely viewed as performing well.

Litigation regimes are generally fit for purpose and are constantly evolving. Perhaps the most significant change to the litigation regime is in the State of Victoria which has become the first jurisdiction to permit lawyers to enter into US style contingent fee agreements in class actions.

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Cambodia

Governing Law

Are direct insurance policies in Cambodia required to be subject to local law? If so, what are the provisions that govern this?

Direct insurance policies as well as insurance agreements are required to comply with the Civil Code in accordance with Article 14 of Sub Decree No. 275 on Insurance dated 30 November 2021 (**Sub Decree 2021**). Sub Decree 2021 sets out updated minimum requirements for insurance policies and establishes the Insurance Regulator of Cambodia (**IRC**), which acts under the supervision of the Non-Banking Financial Services Authority (**NBFSA**), a regulator of the Ministry of Economy and Finances (MEF).

Given that the Civil Code generally supports the concept of freedom of contract, the parties are free to select the law of any country as the governing law of their agreement.

However, Article 15 of Sub Decree 2021 expressly provides that all insurance policies and related insurance agreements shall be written in Khmer language. In the event of a dispute as to the meaning of any policy terms, the Khmer language version will prevail. Further, under Article 17, all insurance policy wordings/schedules must be submitted for review and approval by the IRC prior to execution.

As a result, it is unlikely that the IRC will approve or that the courts will give effect to a foreign governing law clause in an insurance policy issued in Cambodia covering Cambodian risks.

Is the position the same, or does it differ, for reinsurance contracts?

Reinsurance contracts issued in Cambodia are generally subject to local law and are also regulated by the same laws and regulatory body (the IRC), including the need to obtain the IRC's prior approval.

Are floating governing law clauses permitted in insurance and reinsurance policies in Cambodia?

No, it is unlikely that the IRC would approve an insurance or reinsurance policy which does not provide Cambodian law as the governing law.

Arbitration

Can direct insurance policies in Cambodia provide for arbitration (as opposed to court jurisdiction) as the sole dispute resolution mechanism for coverage disputes? If so, what specific legislation or rules apply to the arbitration of insurance disputes?

Yes. According to the Law on Insurance 2014 and the Sub Decree 2021, a direct insurance policy may provide for arbitration as the sole dispute resolution mechanism for coverage disputes. Arbitration is also permitted under the Commercial Arbitration Law of the Kingdom of Cambodia (2006).

Cambodia is a signatory to the New York Convention. Following a 2014 Supreme Court of Cambodia ruling, Cambodia will, in practice, enforce arbitral awards properly issued by reputable arbitral tribunals in jurisdictions that are also parties to the New York Convention.

Can the parties choose which (local or international) arbitral rules (including any institutional rules) apply, or is their ability to do so restricted by local law or regulation?

The parties can choose which arbitral rules apply to the arbitration (for example, SIAC or ICC Rules). The Law on Insurance 2014 and Sub Decree 2021 do not restrict which arbitral rules must apply to disputes arising in relation to the conduct of insurance business.

Is there a compulsory default appointing body or authority for the appointment of arbitrators (in the event the parties cannot agree) or can the parties choose the default appointing body (by agreement or pursuant to the institutional rules of their choice)?

The parties can choose the arbitrators and the manner of their appointment either by agreement or pursuant to the institutional rules of their choice.

If the parties have provided for arbitration in their policy can the Insured nevertheless opt to pursue its claim before the local courts?

If the policy provides for arbitration, the Insured cannot pursue its claim before the local courts. Accordingly, if court proceedings are filed, a party may apply to the court for a stay in light of the arbitration agreement. However, if the existence of the arbitration agreement is not raised by either party, then a local court would likely continue to hear the case.

In Cambodia, arbitration awards are recognised and enforced by the Appellate Court and the Supreme Court as courts of final jurisdiction and in certain limited

situations, the Appellate Court and Supreme Court can set aside arbitral awards.

Does local law or regulation require that the forum of any arbitration is in Cambodia or can the arbitral forum be overseas?

The law in Cambodia places no restrictions on the location/jurisdiction of the arbitral forum.

Is the position the same on these issues as far as reinsurance contracts are concerned?

Yes.

Mediation

Can insurance and/or reinsurance policies in Cambodia provide for mediation of disputes? Can such mediation be compulsory?

Yes. The parties may refer a dispute to the IRC for mediation before engaging in other methods, such as arbitration or litigation. The results of the mediation are recorded by the IRC, including whether the parties have reached an agreement. Any agreement certified by the IRC is effective immediately, and the right to arbitrate or litigate the resolved dispute is automatically lost.

Would mediation have to be undertaken under the auspices of a local mediation body or the local courts and pursuant to local mediation rules, or can the parties agree to use an international mediation centre, mediator and rules of their choice?

As above, mediation of insurance disputes can be undertaken before the IRC and in accordance with the rules provided by the IRC. Parties can also agree that disputes are mediated before a foreign mediation body (such as SIMC in Singapore) and in accordance with the rules of that body.

Are mediations conducted on the basis that they are confidential and "without prejudice"? If so, how is this achieved?

Neither the Insurance Law nor Sub Decree 2021 directly address whether mediations undertaken before the MEF/ IRC are confidential and "without prejudice". However, it would be prudent to assume they are not. The Insurance Law and Sub Decree 2021 provide that the MEF/IRC will record the results of any mediation, and that the record will be signed by and provided to each of the parties.

Sub Decree 2021 states that detailed guidelines on IRC mediation proceedings are to be specified in an implementing regulation to be issued by the NBFSA. In the meantime, the Insurance Law does not prevent the parties from using the mediation record in other proceedings in the event that the mediation does not result in an agreed resolution.

Further, the Insurance Law specifically states that if, during the course of the mediation, the MEF uncovers a mistake by the Insured which the Insured admits to, all the claims made under the policy by the Insured on the basis of such mistake in accordance with the terms of the insurance policy shall be null and void. As such, this provision strongly suggests that mediation hearings are not undertaken on a "without prejudice" basis. In the event that one of the parties later submits a claim to the local courts, in practice, judges would have significant discretion to determine what evidence is permissible including the mediation record.

Limitation

What limitation/time bar provisions apply to claims under insurance and reinsurance policies in Cambodia? Are there any specific issues or challenges these give rise to?

Under Article 31 of Sub Decree 2021, claims under general insurance and reinsurance policies in Cambodia must be brought within five years from the date of the expiration of such insurance agreements. Claims under life insurance policies must be brought within 15 years from the date of the expiration of such life insurance agreements. However, if the beneficiary or Insured party only becomes aware of the covered risks after the respective insurance agreement has expired, the general provisions of the Cambodian Civil Code apply, whereby a party has five years from the time that the claim is capable of being exercised to bring a claim, which generally means five years from the date damages were suffered or the non-performance occurred.

General

Are there any other compulsory dispute resolution rules relevant to insurance and/or reinsurance coverage disputes in Cambodia? If so, what are these?

No, only those outlined above.

Are there any anticipated/upcoming changes to law and regulation in Cambodia which would impact the litigation, arbitration or mediation of insurance disputes in Cambodia?

Cambodia's insurance regulations remain underdeveloped, and the Insurance Law 2014 remains the main law for the Cambodian insurance industry. However, in light of the establishment of the IRC, we expect a number of new regulations and detailed guidelines in the mediation/arbitration of insurance/reinsurance disputes.

In addition, further to an official announcement of the Ministry of Justice in November 2022, the first Cambodian commercial court is expected to launch with the aim of resolving commercial-related disputes from 2023 onwards. The exact details and scope of the upcoming commercial court remains to be seen, but it is possible that insurance disputes will be subject to the jurisdiction of the commercial court.

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China

Governing Law

Are direct insurance policies in the People's Republic of China (China) required to be subject to local law? If so, what are the provisions that govern this?

If an insurance contract solely concerns Chinese interests, Chinese law shall apply to the contract as per Article 3 of the Insurance Law of China. In contrast, if an insurance contract includes foreign interests, pursuant to Article 41 of the Law Applicable to Foreign-related Civil Relations of China (the **Civil Relations Law**), the parties may choose the laws applicable to the insurance contract.

Pursuant to Article 1 of the judicial interpretations of the Civil Relations Law promulgated by the Supreme Court, legal relationships will be treated as having foreign-related elements where: 1) either of the parties are foreign individuals or entities; 2) the habitual residence of either parties is outside the territory of China; 3) the subject-matter is outside the territory of China; 4) the legal fact that generates, modifies or eliminates civil relations occurred outside the territory of China; or 5) there are other circumstances that can be identified as foreign-related legal relationships.

By way of example, English law is frequently chosen by the parties to marine insurance policies, where there will typically be a foreign element.

Is the position the same, or does it differ, for reinsurance contracts?

The position for reinsurance contracts is the same as that of direct insurance contracts.

Are 'floating governing law clauses' permitted in insurance and reinsurance policies in China?

Chinese law does not provide a statutory definition of a 'floating governing law clause' or any similar concept. In principle, any governing law chosen by the parties can be expressly inserted into a contract at the time of conclusion to reflect the true intentions of the parties (unless the contract solely concerns Chinese interests in which case Chinese law will apply).

Arbitration

Can direct insurance policies in China provide for arbitration (as opposed to court jurisdiction) as the sole dispute resolution mechanism for coverage disputes? If so, what specific legislation or rules apply to the arbitration of insurance disputes in China?

Chinese law allows direct insurance policies to provide for arbitration as the sole dispute resolution mechanism for coverage disputes, provided the arbitration clause is valid as a matter of Chinese law. However, where a policy stipulates that a dispute may be submitted either to arbitration or to the jurisdiction of the court, the arbitration clause shall be null and void under Chinese law.

The laws governing the arbitration of insurance disputes in China include the Arbitration Law of China, the Civil Procedure Law of China and the Interpretation on Certain Issues relating to Application of the Arbitration Law of China, the Interpretation on Application of the Procedure Law of China, promulgated by the Supreme People's Court of China.

Can the parties choose which (local or international) arbitral rules (including any institutional rules) apply, or is their ability to do so restricted by local law or regulation?

China adopts a mechanism of institutional arbitration and the parties are allowed to choose the institution and correspondingly apply its arbitral rules.

The parties may specify international arbitral institutions/rules in their direct insurance policy, provided that the policy has foreign factors, for instance, the parties are non-Chinese entities or the insured property is outside of Chinese territory. Otherwise, the Chinese courts will invalidate the arbitration clause by reason of lack of foreign factors.

Pursuant to Article 15 of the Arbitration Law of China, the Arbitration Association of China may formulate rules of arbitrationin accordance with the Civil Procedure Law of China and the Arbitration Law of China. These rules would apply to local arbitrations.

Pursuant to Article 73 of the Arbitration Law of China, the China Chamber of International Commerce may formulate rules and regulations, in accordance with the Civil Procedure Law of China and the Arbitration Law of China, that apply to foreign-related arbitrations. In a

China (continued)

foreign-related arbitration, the parties are otherwise allowed to choose international rules or other institutional rules.

In practice, the rules of the relevant arbitration institution, either local or international, will apply, independent of any rules formulated pursuant to Articles 15 or 73 above.

According to Article 290 of the Civil Procedure Law and Article 72 of the Arbitration Law of China, a foreign-related arbitral award will be enforceable in China, provided that the respondent owns property in China. The fact that China adopts the mechanism of institutional arbitration will not affect the recognition and enforcement of a foreign-related arbitral award delivered by a foreign arbitration institution, an ad hoc arbitration, or an arbitral venue outside of China, provided that the awards are governed by the New York Convention and the recognition and enforcement will not be in violation with Article 290 of the Civil Procedure Law.

Is there a compulsory default appointing body or authority for the appointment of arbitrators (in the event the parties cannot agree) or can the parties choose the default appointing body (by agreement or pursuant to the institutional rules of their choice)?

As institutional arbitration prevails in China, the parties' chosen institution as well as its chairperson will act as the compulsory and default appointing organisation.

In other words, Chinese law does not lay down a particular default appointing body/authority for arbitration. In the event the parties fail to agree on the composition of the tribunal or the selection of chief arbitrator within the time limit, the chairperson of the arbitration commission will act as a default appointing body and appoint the member or chief of the tribunal.

If the parties have provided for arbitration in their policy can the Insured nevertheless opt to pursue its claim before the local courts?

If there is a valid arbitration clause in the policy, the Insured will not be allowed to pursue its claim before a court, as per Article 5 of the Arbitration Law of China.

In practice, it is very common for the Insured to challenge the validity of the arbitration clause by alleging that such clause was manipulated unilaterally by the insurer and therefore should not be binding. However, there is an increasing trend in judicial practice in China to recognise the validity of arbitration clauses and hold that they reflect the true intention of the insurers and the Insured (and to therefore dismiss the Insured's lawsuit challenging the clause).

Does local law or regulation require that the forum of any arbitration is in China or can the arbitral forum be overseas?

There is no Chinese law or regulation that requires the forum of an arbitration must be in China.

The choice of an overseas forum in a local insurance contract is not statutorily prohibited, but it is rare in practice.

Policies involving foreign interests are often more liberal and provide for arbitral forums in either China or overseas.

Is the position the same on these issues as far as reinsurance contracts are concerned?

The position with reinsurance contracts is broadly the same as with direct insurance policies. However, in practice, reinsurance contracts tend to involve sophisticated insurers and professional parties who have more knowledge and experience, and are more likely to freely negotiate the dispute resolution provisions. An arbitration clause in a reinsurance contract is therefore more likely to be binding on the parties involved.

Mediation

Can insurance and/or reinsurance policies in China provide for mediation of disputes? Can such mediation be compulsory?

Mediation may be agreed as a valid dispute resolution mechanism under either direct insurance or reinsurance policies. However, mediation is not generally compulsory under Chinese law.

In China, the local Conciliation Commission for Insurance Contract Disputes is becoming more active in insurance disputes. If mediations are undertaken by the local Conciliation Commission for Insurance Contract Disputes and the parties reach a settlement, the parties may jointly file an application to local courts for judicial confirmation of the mediation agreement within 30 days from the effective date of the agreement pursuant to the People's Mediation Law of China. If the mediation agreements are endorsed by the local courts, this will bind the parties to the agreement.

Chinese law does not confer local courts with power to enforce a mediation clause, as distinguished from an arbitration clause.

Would mediation have to be undertaken under the auspices of a local mediation body or the local courts and pursuant to local mediation rules, or can the parties agree to use an international mediation centre, mediator and rules of their choice?

Mediation will usually happen under the auspices of a local mediation body, the local courts or the arbitral tribunal. In China, mediation is fairly common in litigation or in arbitration; under such circumstances, a written mediation agreement will have binding effect.

It is strongly implied that the local mediation body would be used for policies involving only Chinese interests.

For policies concerning foreign interests, Chinese law does not prevent the parties from agreeing to use an international mediation centre, mediator and/or rules of their choice.

Are mediations conducted on the basis that they are confidential and "without prejudice"? If so, how is this achieved?

Pursuant to Article 107 of the judicial interpretation of the Civil Procedure Law, any facts presented, or compromises made, by parties in mediation cannot be used against that party in subsequent arbitrations or litigations.

Limitation

What limitation/time bar provisions apply to claims under insurance and reinsurance policies in China? Are there any specific issues or challenges these give rise to?

According to the Insurance Law of China, the limitation period for a claim of compensation or indemnity by the Insured or the beneficiary of a non-life insurance policy from the insurer is two years, commencing from the date on which the party bringing the claim becomes aware or should be aware of the occurrence of the Insured event.

The limitation period for a claim by the Insured party or the beneficiary of a life insurance policy is five years, commencing from the date on which the party bringing the claim becomes aware or should be aware of the occurrence of the Insured event.

For marine insurance policies, the limitation period is two years, commencing on the day the peril Insured against occurred.

Practically, these provisions for time limits are very common in commercial activities so they do not really give rise to any specific challenges.

General

Are there any other compulsory dispute resolution rules relevant to insurance and/or reinsurance coverage disputes in China? If so, what are these?

There are no other compulsory rules regarding dispute resolution relevant to insurance and/or reinsurance coverage disputes.

Are there any anticipated/upcoming changes to law and regulation in China which would impact the litigation, arbitration or mediation of insurance disputes in China?

The Civil Code of China was implemented on 1 January 2021 and assumedly it may well influence general civil and commercial disputes from various aspects, which may manifest in the years to come.

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Hong Kong

Governing Law

Are direct insurance policies in Hong Kong required to be subject to local law? If so, what are the provisions that govern this?

No, parties are free to choose a different governing law for their insurance contract and their express choice will be upheld save in exceptional cases; including, for example, if there are reasons to reject the parties' choice on public policy grounds.

Is the position the same, or does it differ, for reinsurance contracts?

The position is the same for insurance and reinsurance contracts alike. Parties should, however, take note that a choice of law clause will not be incorporated into one contract merely by reference to the terms of another. The parties must instead expressly set out the choice of law clause.

In a reinsurance context, this means that parties cannot rely on a governing law clause in an insurance policy as being determinative of the governing law of a reinsurance policy.

Are floating governing law clauses permitted in insurance and reinsurance policies in Hong Kong?

There is nothing expressly prohibiting floating governing law clauses in Hong Kong but it would be risky to rely on one, in particular where parties are unable to reach an agreement on which governing law is applicable in the event of a dispute..

If the parties wish to include a floating governing law clause, it should be drafted with clear and unambiguous language. For example, they should stipulate the circumstances which determine the applicable law with precision and certainty. Parties should also refrain from combining a floating law clause with other clauses, such as a jurisdiction clause, in case it is held to be unenforceable.

Arbitration

Can direct insurance policies in Hong Kong provide for arbitration (as opposed to court jurisdiction) as the sole dispute resolution mechanism for coverage disputes? If so, what specific legislation or rules apply to the arbitration of insurance disputes in Hong Kong?

Yes. The key legislation governing all arbitrations taking place in Hong Kong is the Arbitration Ordinance Cap.609, which is based on the UNCITRAL Model Law. There is, however, nothing in the Ordinance specifically addressing the arbitration of insurance and reinsurance disputes.

Can the parties choose which (local or international) arbitral rules (including any institutional rules) apply, or is their ability to do so restricted by local law or regulation?

The parties are free to choose which arbitral rules apply. The rules need not follow the substantive law, or the geographical location of the arbitration (though there may be practical advantages in the arbitral rules reflecting one or both of these).

If the parties fail to agree which rules apply, the arbitral tribunal may conduct the arbitration in the manner that it considers appropriate, provided that it remains within the (liberal) scope of the Arbitration Ordinance Cap.609.

Is there a compulsory default appointing body or authority in your jurisdiction for the appointment of arbitrators (in the event the parties cannot agree) or can the parties choose the default appointing body (by agreement or pursuant to the institutional rules of their choice)?

The parties are free to agree their own procedure for the appointment of arbitrators, including a default appointing body. In the absence of such agreement, default procedures under the Arbitration Ordinance Cap.609 apply. In the event those procedures fail in some way, the Hong Kong International Arbitration Centre (**HKIAC**) is authorised by the Arbitration Ordinance, on a party's request, to make the appointment.

For ad hoc arbitrations seated in Hong Kong, the HKIAC will be the default statutory appointing body for the appointment of arbitrators.

If one of the parties challenges the standing of an appointed arbitrator or the arbitrator fails to act, the Hong Kong court may be called upon to decide the challenge.

If the parties have provided for arbitration in their policy can the Insured nevertheless opt to pursue its claim before the local courts?

If the parties have agreed to arbitrate any disputes between them, the Hong Kong courts will normally enforce the agreement. A stay of existing proceedings will be granted if there is a good arguable case that an arbitration clause exists. The Hong Kong courts should only refuse an application for a stay if it finds the arbitration clause to be null and void, inoperative or incapable of being performed.

The parties are, however, entitled to request interim relief from the Hong Kong courts before or during arbitration proceedings. Additionally, the Hong Kong courts have certain special powers related to arbitration under the Arbitration Ordinance. These include, for example, the power to order the sale of property relevant to the arbitration and interim injunctive relief.

Does local law or regulation require that the forum of any arbitration is in your jurisdiction or can the arbitral forum be overseas?

No, the parties are free to arbitrate overseas and can include an agreement in the relevant policy (or elsewhere) to that effect.

Is the position the same on these issues as far as reinsurance contracts are concerned?

Yes, they apply equally to reinsurance contracts.

Mediation

Can insurance and/or reinsurance policies in Hong Kong provide for mediation of disputes? Can such mediation be compulsory?

Yes, parties are free to provide for the mediation of disputes in the relevant policy and can make this mandatory. Unless the parties made a contractual agreement to mediate a dispute, parties are not obliged and will not be compelled to attempt mediation.

Would mediation have to be undertaken under the auspices of a local mediation body or the local courts and pursuant to local mediation rules, or can the parties agree to use an international mediation centre, mediator and rules of their choice?

The parties are entitled to agree to use any centre, mediator or rules of their choice.

Are all mediations conducted on the basis that they are confidential and "without prejudice"? If so, how is this achieved?

Yes, mediations are conducted on a confidential and "without prejudice" basis in Hong Kong. In principle, communications made between parties to a dispute with the aim of genuinely attempting to settle that dispute cannot be admitted in evidence. The Mediation Ordinance also expressly stipulates that unless the Court's permission is obtained, any material contained in mediation communications (including documents exchanged for mediation purposes) may not be admitted as evidence in any proceedings. To avoid potential disputes on this, parties would typically sign mediation agreements before conducting the mediation confirming that the Mediation Ordinance applies and that all communications made for mediation purposes are confidential and protected by without prejudice privilege.

Limitation

What limitation/time bar provisions apply to claims under insurance and reinsurance policies in Hong Kong? Are there any specific issues or challenges these give rise to?

Claims under insurance and reinsurance policies fall under Section 4(1)(a) of the Limitation Ordinance Cap.347 which relates to actions founded on simple contract or in tort. Therefore, in the majority of cases, the plaintiff must bring their action within six years from when the cause of action accrued. In the context of insurance disputes, this is generally taken to be the date on which the Insured peril occurs. If the policy is put in place by way of deed, the period is extended to 12 years.

It is open to the parties to vary the limitation period and a court will normally uphold any provisions to that effect.

Issues can arise where the parties seek to vary the date on which the limitation period begins to run and careful language should be used to ensure certainty in that respect (particularly where there are multiple or continuing Insured perils).

General

Are there any other compulsory dispute resolution rules relevant to insurance and/or reinsurance coverage disputes in Hong Kong? If so, what are these?

There are no other relevant compulsory dispute resolution rules.

Are there any anticipated/upcoming changes to law and regulation in Hong Kong which would impact the litigation, arbitration or mediation of insurance disputes in Hong Kong?

"Under Hong Kong law, outcome related fee structures, including "no-win, no-fee" arrangements, remains prohibited. However, this position might change for arbitration-related proceedings following the introduction by the Hong Kong Government of the Arbitration and Legal Practitioners Legislation (Outcome Related Fee Structures for Arbitration) (Amendment Ordinance 2022). The bill is based on the recommendations made in a consultation paper published by a sub-committee of the Hong Kong Law Reform Commission in December 2020 for outcome related fee structures be permitted for arbitration taking place in and outside Hong Kong, subject to certain recommended restrictions, including percentage caps to be placed on the success fees that could be charged.

The proposed changes would supplement the rules on third party funding for parties in arbitration-related proceedings (where the place of arbitration is in Hong Kong) in exchange for a financial benefit if the arbitration is successful.

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India

Governing Law

Are direct insurance policies in India required to be subject to local law? If so, what are the provisions that govern this?

Yes. Direct insurance policies in India must be subject to Indian law. Under Indian contract law, parties' freedom to contract is broadly recognised; however the Indian Contract Act 1872 places certain fetters on that autonomy. Indian courts have held that two Indian parties (such as an insurer and an Insured in a direct insurance policy) cannot contract out of Indian law.

Is the position the same, or does it differ, for reinsurance contracts?

The position may differ for reinsurance contracts, depending on the jurisdiction where the reinsurer and/or the cedant is based. If either one is based outside India, it is permissible for parties to agree to an applicable law that is not Indian law. Accordingly, if an Indian cedant places business with a reinsurer outside India, then the cedant and the foreign reinsurer can agree an applicable law that is not Indian law, but if an Indian cedant places business with another Indian reinsurer then the two Indian companies cannot contract out of Indian law.

Although there is no precedent on this exact point, it is reasonable to assume that an Indian court will enforce a foreign applicable law where the Indian cedant is placing business with overseas reinsurers, but a small line is written by an Indian reinsurer as well.

Are floating governing law clauses permitted in insurance and reinsurance policies in India?

As stated above, for direct insurance policies, the governing law must be Indian law. As for reinsurance policies, we would expect that if the policy contains a floating governing law clause, giving the right to select the applicable law, then it is likely that an Indian court (when faced with this question) would determine the proper law of the contract on the facts and circumstances of the case.

Arbitration

Can direct insurance policies in India provide for arbitration (as opposed to court jurisdiction) as the sole dispute resolution mechanism for coverage disputes? If so, what specific legislation or rules apply to the arbitration of insurance disputes in India?

Yes, direct insurance policies in India can provide for arbitration to be the sole dispute resolution mechanism. Where parties have agreed to arbitrate, the Indian Arbitration and Conciliation Act 1996 (**AC Act**) applies. The AC Act sets out the broad parameters within which arbitration should be conducted and procedural rules. Parties can contract out of these procedural rules and select an alternative procedure, including other institutional rules (discussed below), but cannot contract out of the substantive provisions.

It is common in India for various lines of insurance policies to contain a restricted arbitration clause that applies only for disputes arising in respect of the quantum to be paid under the policy, liability being otherwise admitted. In such case, if liability is declined, then that matter cannot be referred to arbitration because of the restricted wording of the arbitration clause. The courts have upheld the validity of quantum only arbitration clauses in insurance policies.

Can the parties choose which (local or international) arbitral rules (including any institutional rules) apply, or is their ability to do so restricted by local law or regulation?

Parties are at liberty to select any arbitral rules to be applicable, including the rules of an international arbitral institution. As long as parties are not contracting out of Indian substantive law, they can select any rules or procedures. This has been confirmed by the courts.

Is there a compulsory default appointing body or authority for the appointment of arbitrators (in the event the parties cannot agree) or can the parties choose the default appointing body (by agreement or pursuant to the institutional rules of their choice)?

Parties are free to select the appointing authority that would appoint an arbitrator if the parties are unable to jointly agree upon the identity of an arbitrator(s). If the parties have not selected an appointing authority, then in accordance with the AC Act, either party can approach the courts to appoint an arbitrator. In a domestic arbitration, this would be a High Court having territorial jurisdiction in the matter,

India (continued)

and for an international commercial arbitration, this would be the Supreme Court of India.

If the parties have provided for arbitration in their policy can the Insured nevertheless opt to pursue its claim before the local courts?

No, with the exception of certain cases under the Consumer Protection Act 2019. Indian courts have held that the consumer courts provide a parallel remedy that is available to an Insured notwithstanding the existence of an arbitration agreement between the insurer and the Insured.

Other than in a consumer context, Indian courts have held that if an arbitration clause is valid, the dispute must be referred to arbitration. If a party to the arbitration agreement brings its claim before the court, the other party may oppose this on the basis of the existing arbitration agreement between the parties.

Pursuant to Section 46 of the Insurance Act 1938 (**Insurance Act**), theoretically an Indian Insured can (except in cases of marine insurance policies), notwithstanding anything to the contrary contained in the insurance policy, sue the insurer before an Indian court in accordance with Indian law. However, the Indian courts have not yet considered if an Insured can side-step arbitration on the basis of Section 46 of the Insurance Act. The prevailing trend in India is to favour arbitration and it is unlikely an Insured would be able to rely on Section 46 to maintain a suit in spite of an arbitration clause.

Does local law or regulation require that the forum of any arbitration is in India or can the arbitral forum be overseas?

There is no requirement for the forum of arbitration between two Indian parties to be in India. More recently, it has been held that two Indian parties are permitted to have the seat and venue of the arbitration overseas. Indian courts have interpreted arbitration clauses that provide for the application of rules of an overseas arbitral institution as meaning that the said overseas venue shall be the seat of arbitration. This issue has however not yet been determined in the context of Section 46 of the Insurance Act, which allows an Insured to sue its insurer before an Indian court.

Is the position the same on these issues as far as reinsurance contracts are concerned?

Yes. Very often, one of the parties to a reinsurance contract is a foreign party. In that case, the provisions of the AC Act allow for foreign seated international commercial arbitration and enforceability of the foreign arbitral award.

Mediation

Can insurance and/or reinsurance policies in India provide for mediation of disputes? Can such mediation be compulsory?

Yes, policies can provide for mediation. It is, however, uncommon to find mediation clauses in Indian insurance or reinsurance contracts.

The Commercial Courts Act 2015 (**CC Act**) makes mediation compulsory before a claim may be brought to court, except in cases where any urgent relief is sought (which provision may be used by Insureds to side-step the mandatory mediation process). Insurance and reinsurance disputes are considered "commercial" disputes within the meaning of the CC Act, and are therefore subject to compulsory pre-court mediation.

Courts would also expect parties to exhaust mediation if it is a pre-condition to arbitration/litigation in the policy, unless it is apparent that there is no scope for settlement.

Although mediation (which is sometimes used interchangeably with the statutory term "conciliation" under the AC Act) is an accepted form of alternative dispute resolution, the process is not binding on the parties.

Would mediation have to be undertaken under the auspices of a local mediation body or the local courts and pursuant to local mediation rules, or can the parties agree to use an international mediation centre, mediator and rules of their choice?

The parties are at liberty to either opt for mediation governed by the mediation rules of the court of the appropriate jurisdiction, or of the mediation centre designated by such courts, or for mediation to be conducted under the auspices of an institution in which case the rules of that institution would apply. Parties can also opt for an ad hoc conciliation under the AC Act, by a neutral conciliator appointed by the parties themselves by mutual consent.

In respect of pre-court action mediation and mediation at the direction of consumer forums, their respective mediation rules apply and the mediation is run under the auspices of the respective court/consumer forums.

Are all mediations conducted on the basis that they are confidential and "without prejudice"? If so, how is this achieved?

India does not have any one particular statute dealing with mediation. The protection of confidentiality therefore depends on the relevant rules parties adopted in their mediation. The Supreme Court of India has held that mediations are confidential, providing an added measure of comfort to parties even if the rules adopted by them do not have express confidentiality provisions. It would, however, be wise for parties to ensure that the mediation rules adopted by them contain confidentiality provisions or to include them in the mediation agreement separately. As for conciliations held under the AC Act, Section 75 provides for confidentiality of all matters relating to the conciliation proceedings.

The concept of "without prejudice" is recognised under Section 23 of the Indian Evidence Act 1872. Communications will only be protected by "without prejudice" privilege if they are for the purpose of a genuine attempt to compromise a

dispute between the parties, which is the bedrock of mediations. Courts will look to the substance and not the form of such communications when deciding if without prejudice privilege applies.

In practice, therefore, mediations in India are conducted on a confidential and without prejudice basis.

Limitation

What limitation/time bar provisions apply to claims under insurance and reinsurance policies in India? Are there any specific issues or challenges these give rise to?

The time bar provisions for claims are governed by Article 44 of the Schedule to the Limitation Act 1963.

In respect of court actions or arbitrations, a limitation period of three years applies from the date when the claim is denied or disputed. In respect of consumer courts, the limitation period is two years from the date "on which the cause of action has arisen" (which practically, in most instances, is considered as the date on which the claim is denied/disputed).

Problems may arise in claims files that are kept open without any definitive decision for a number of years, in which case an Insured has to decide the appropriate stage at which to initiate action against the Insurer.

Further, certain insurance contracts provide that unless litigation has been commenced in respect of a particular claim within a specified period (usually 12 months) from the date of loss, no claim shall lie under the insurance policy. Although, generally, parties cannot contract out of limitation provisions in India, such clauses in policies have been upheld by Indian courts by distinguishing them as being extinguishment clauses rather than those that restrict the limitation period.

General

Are there any other compulsory dispute resolution rules relevant to insurance and/or reinsurance coverage disputes in India? If so, what are these?

No, there are no such mandatory rules that are relevant to insurance or reinsurance coverage disputes in India.

However, there are certain regulations made by the insurance regulator (**IRDAI**) that are relevant to the manner in which coverage is considered in India, such as the IRDAI (Protection of Policyholders' Interest) Regulations 2017.

Are there any anticipated/upcoming changes to law and regulation in India which would impact the litigation, arbitration or mediation of insurance disputes in India?

The amendments incorporated in the AC Act and the CC Act in 2018 will impact arbitration and mediation across a variety of sectors including insurance. Both are generally aimed at a speedy resolution of disputes.

More recently, a draft Mediation Bill has been circulated seeking comments from the public. It is anticipated that this standalone law will provide a fillip to mediation and encourage parties to resolve disputes outside the realm of the slow-moving litigation process or relatively expensive arbitration. This is expected to have a positive impact on the way in which insurance disputes are resolved in India.

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Indonesia

Governing Law

Are direct insurance policies in Indonesia required to be subject to local law? If so, what are the provisions that govern this?

The governing law for direct insurance policies issued by Indonesian insurers is generally Indonesian law, although this is not mandated by Indonesian law or regulation.

Financial Services Authority (*Otoritas Jasa Keuangan* or **OJK**) Regulation No. 23/POJK.05/2015 (**OJK Reg 23/2015**) regarding Insurance products and the marketing of insurance products sets out the requirements for insurance products in Indonesia, including mandatory policy provisions. While it does not stipulate that policies be subject to Indonesian law, it does require that insurance policies marketed in Indonesia be in the Indonesian language or in a bilingual format.

Nevertheless, it is generally accepted that insurance policies issued by Indonesian insurers should be subject to Indonesian law as there must be a reasonable nexus between the chosen law, the parties' nationalities, the place where the policy is executed, and/or the place of the policy's performance. The choice of a foreign law to govern an insurance policy may raise the issue of the enforceability of the policy before the Indonesian courts because of a weak legal nexus.

Is the position the same, or does it differ, for reinsurance contracts?

The same applies for reinsurance policies issued by Indonesian reinsurers. However, where an international reinsurer is concerned, the reinsurance policy is more likely to be subject to the laws and regulations of the country where the reinsurer is based or some other governing law.

Are "floating governing law" clauses permitted in insurance and reinsurance policies in Indonesia?

There is no specific restriction on "floating governing law" clauses. However, as explained above, the governing law for insurance policies issued by Indonesian insurers and reinsurance policies issued by Indonesian reinsurers is as a matter of practice generally Indonesian law. If an Indonesian insurer has an insurance policy that stipulates a "floating governing law", that policy will most likely be interpreted and enforced under Indonesian law, as a result of being the most reasonable nexus.

Arbitration

Can direct insurance policies in Indonesia provide for arbitration (as opposed to court jurisdiction) as the sole dispute resolution mechanism for coverage disputes? If so, what specific legislation or rules apply to the arbitration of insurance disputes in Indonesia?

Insurance policies in Indonesia cannot provide for arbitration as the sole dispute resolution mechanism for coverage disputes. However, policies must provide for an alternative form of dispute resolution mechanism outside of the courts (see OJK Reg 23/2015).

The explanatory guidance to OJK Reg 23/2015 further provides that the dispute resolution provisions in an insurance policy cannot limit dispute settlement to just one mechanism.

OJK Regulation No. 61/POJK.07/2020 ("OJK Reg 61/2020") provides that any financial sector dispute (including insurance and reinsurance disputes) resolved outside the court's jurisdiction shall be settled through the OJK-approved Alternative Institutions for Financial Services Sector Dispute Settlement (*Lembaga Alternatif Penyelesaian Sengketa Sektor Jasa Keuangan* or "LAPS SJK").

However, as a rule of thumb, use of LAPS SJK is voluntary and the parties may opt for a different institution if they prefer.

LAPS SJK, which received an operation permit from the OJK in December 2020, provides dispute resolution services through mediation and arbitration.

Can the parties choose which (local or international) arbitral rules (including any institutional rules) apply, or is their ability to do so restricted by local law or regulation?

If the parties opt for arbitration by LAPS SJK, the LAPS SJK Rules will apply. However, under the LAPS SJK Arbitration Rules, parties also have the freedom to choose other arbitral rules, provided these other rules are not contrary to the prevailing laws and regulations or LAPS SJK policy. This means the parties are able to choose local or international arbitration rules.

Is there a compulsory default appointing body or authority for the appointment of arbitrators (in the event the parties cannot agree) or can the parties choose the default appointing body (by agreement or pursuant to the institutional rules of their choice)?

Indonesia (continued)

Where the parties agree to refer any dispute arising from an insurance contract to LAPS SJK for arbitration, either in an arbitration agreement or subsequently , Article 12 of LAPS SJK Reg. 2 stipulates that the parties may agree on an odd number of arbiters. If the Arbitration Agreement does not specify the number of arbitrators, it is assumed that three will be chosen. Alternatively, per Article 13 of LAPS SJK Reg. 2, a sole arbitrator may be chosen by the parties from the LAPS SJK List of Arbitrators within ten days from the registration of the petition for arbitration.

LAPS SJK will have the authority to appoint arbitrators, both sole arbitrator and tribunals, if the parties cannot agree.

The specific default appointing body pursuant to the LAPS SJK Arbitration Rules is the Administrator of LAPS SJK (appointed by a general meeting of members in accordance with LAPS SJK's articles of association).

If the parties have provided for arbitration in their policy, can the Insured nevertheless opt to pursue its claim before the local courts?

No. Article 3 of Law No. 30 of 1999 regarding Arbitration and Alternative Dispute Resolution, dated 12 August 1999 ("Arbitration Law"), provides that the district courts do not have the authority to adjudicate disputes between parties that are bound by an arbitration agreement. If one of the parties refers the dispute to a district court, the district court must refuse to hear such dispute.

Does local law or regulation require that the forum of any arbitration is in Indonesia or can the arbitral forum be overseas?

There is no local law or regulation that requires the forum of the arbitration to be in Indonesia. The LAPS SJK Arbitration Rules stipulate Jakarta as a default location for arbitration. The LAPS SJK Arbitration Rules, however, do not prohibit the parties from choosing an overseas forum for the arbitration with the approval of the arbitrator(s). If the parties decide to conduct the arbitration online, the place of arbitration is assumed to be the LAPS SJK secretariat in Jakarta unless specified otherwise.

Is the position the same on these issues as far as reinsurance contracts are concerned?

The above responses apply equally to reinsurance contracts. There is no requirement that reinsurance contracts provide an option for the parties to resolve the dispute either through the courts or, alternatively, outside of the court's jurisdiction.

Mediation

Can insurance and/or reinsurance policies in Indonesia provide for mediation of disputes? Can such mediation be compulsory?

Yes, insurance and reinsurance policies can provide for mediation of disputes, but it is not mandatory.

If mediation is stated as the first step in the dispute resolution mechanism of the insurance policy, the parties must first attempt mediation for any dispute. However, because this is contractual in nature, the parties can agree to waive the mediation clause and refer the dispute directly to arbitration or court if they wish.

Would mediation have to be undertaken under the auspices of a local mediation body or the local courts and pursuant to local mediation rules, or can the parties agree to use an international mediation centre, mediator and rules of their choice?

As mentioned above, pursuant to OJK Reg 23/2015, an insurance policy must provide an alternative dispute resolution option, including mediation. The OJK established LAPS SJK as an alternative dispute resolution institution for the financial services sector, complete with a mediation centre.

As discussed above, OJK Reg. 61/2020 regulates that any financial services sector dispute settled outside the court jurisdiction shall be through LAPS SJK. While OJK Reg. 61/2020 does not explicitly prohibit the use of an international mediation centre, the foregoing provision presumably compels any mediation for insurance disputes to be referred to LAPS SJK.

Are mediations conducted on the basis that they are confidential and "without prejudice"? If so, how is this achieved?

Yes. In a mandatory mediation process through the courts the principle of confidentiality is explicitly guaranteed. Article 5 paragraph (1) of Supreme Court Regulation No. 1 of 2016 regarding In-Court Mediation (SC Reg 1/2016) regulates that the mediation process is a closed and confidential process, except as agreed otherwise by the parties.

Article 35 of SC Reg 1/2016 explicitly provides that if the parties in dispute cannot reach an amicable settlement, any statement or information disclosed during the mediation process cannot be used as evidence in a litigation. Also, the mediator shall destroy their notes taken during the mediation process and cannot be a witness in any litigation process.

The confidentiality principle is adopted in the LAPS SJK Mediation Rules (Rules of LAPS SJK No. Per-01/LAPS-SJK/I/2021 regarding Mediation Rules and Proceedings, dated 4 January 2021). Article 4 provides that mediation is confidential in nature. This confidentiality can apply in certain circumstances, including:

As agreed by the relevant parties in dispute;

- As required to achieve an amicable settlement;
- Due to a court order and/or the order of another government authority;
- Academic research, keeping the identities of the relevant parties and mediator confidential.

The LAPS SJK Mediation Rules clearly regulate the use of any material disclosed during the mediation process, especially if the parties fail to reach an amicable settlement. No material or information disclosed in mediation can be used by the parties if they continue the dispute to LAPS SJK Arbitration.

The LAPS SJK Mediation Rules are silent on whether material and information disclosed during mediation can be used in court proceedings, in case the relevant parties refer the dispute to a district court. Ethically speaking, such disclosure should not occur. But to avoid this possibility, the dispute settlement clause in an insurance policy/agreement should articulate that any material and/or information disclosed in any mediation process is confidential and without prejudice.

Limitation

What limitation/time bar provisions apply to claims under insurance and reinsurance policies in Indonesia? Are there any specific issues or challenges these give rise to?

The time limit to make a claim may be stipulated in the insurance/reinsurance policy. Otherwise, the general statute of limitation under the Indonesian Civil Code applies, which is 30 years.

General

Are there any other compulsory dispute resolution rules relevant to insurance and/or reinsurance coverage disputes in Indonesia? If so, what are these?

There are no compulsory dispute resolution regulations or rules other than the Arbitration Law, OJK Reg 61/2020, and the LAPS SJK Rules (if the parties so choose) relevant to insurance disputes.

Are these any anticipated/upcoming changes to law and regulation in Indonesia which would impact the litigation, arbitration or mediation of insurance disputes in Indonesia?

Given how recently OJK Reg. 61/2020 was enacted and LAPS SJK was established, we do not anticipate any additional changes that would impact the litigation, arbitration or mediation of insurance disputes happening soon. However, in general, changes to the Indonesian Civil Code are regularly discussed by the Government of Indonesia and the House of Representatives so it is always possible these will affect dispute resolution in the insurance sector.

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Japan

Governing Law

Are direct insurance policies in Japan required to be subject to local law? If so, what are the provisions that govern this?

There is no specific law or regulation in Japan requiring insurance policies to be governed by Japanese law. However, insurance policies sold to residents in Japan, whether governed by the laws of Japan or otherwise, are subject to the mandatory provisions specified in Articles 7, 12, 26 and 33 (the **Mandatory IA Provisions**) of the Insurance Act of Japan (Act No. 56 of 2008, as amended; the (**IA**)).

The Mandatory IA Provisions operate to invalidate contractual terms that are unfair to policyholders or Insureds. However, Article 36 of the IA provides an exemption from Mandatory IA Provisions for insurance of certain types, such as non-life insurance policies that insure against damages incurred from business operations. Marine insurance, such as international cargo insurance (which are typically governed by English law), are also exempt from the Mandatory IA Provisions. Insurance provided to Japanese consumers is beyond the scope of the exemption and will therefore be subject to the IA.

Separately, the Insurance Business Act (Act No.105 of 1995, as amended (the **IBA**)) regulates the activities of insurers in Japan. For example, the IBA requires foreign insurers wishing to establish an insurance business in Japan to first obtain an insurance business licence under Article 185 of the IBA.

Insurance policies are generally subject to approval from the regulator (ie the Financial Services Agency of Japan) pursuant to Articles 123 and 207 of the IBA. Insurance policies that target Japanese consumers but are not governed by the laws of Japan would not be approved.

Is the position the same, or does it differ, for reinsurance contracts?

Reinsurance contracts are exempt, under Article 36(iv) of the IA, from the Mandatory IA Provisions. In other words, parties to a reinsurance contract can agree to override the provisions of the IA. This includes the Mandatory IA Provisions and, accordingly, reinsurance contracts may be governed by foreign law without being overridden by the IA Mandatory Provisions.

Additionally, Article 186 (1) of the IBA, read with Article 19 (i) of the Order for Enforcement of the IBA (Order No. 425 of 1995, as amended (the **IBA Order**)), enables foreign insurers to underwrite insurance in Japan without undergoing licencing in Japan. However, non-licensed foreign insurers are not permitted to engage in solicitation in respect of reinsurance contracts in Japan. They can only market their products in Japan through the intermediation of registered insurance brokers (Article 275 (1) (iv) of the IBA, read with Articles 19 (i) and 39-2 of the IBA Order).

Are floating governing law clauses permitted in insurance and reinsurance policies in Japan?

"Floating governing law clauses" are not specifically addressed under Japanese law. However, such clauses are rarely seen in insurance or reinsurance contracts in Japan.

Arbitration

Can direct insurance policies in Japan provide for arbitration (as opposed to court jurisdiction) as the sole dispute resolution mechanism for coverage disputes? If so, what specific legislation or rules apply to the arbitration of insurance disputes in Japan?

Yes, direct insurance policies in Japan are permitted to provide for arbitration as the sole dispute resolution mechanism. Arbitration clauses are more commonly found in insurance or reinsurance contracts between businesses and are rarely found in insurance contracts between insurers and policyholders who are individuals.

The Arbitration Act (Act No. 138 of 2003, as amended (the **AA**)) will generally apply.

Can the parties choose which (local or international) arbitral rules (including any institutional rules) apply, or is their ability to do so restricted by local law or regulation?

Contractual parties are permitted to choose either local or international arbitral rules. Where contractual parties specify an established arbitration institution (such as the International Chamber of Commerce or the Japan Commercial Arbitration Association) by which to administer their disputes, or the rules under which such arbitration will be conducted, their choice would generally be upheld.

Consumers have the discretionary right to cancel arbitration agreements with business operators, under Article 3(2) of the supplementary provisions to the AA, unless they choose to resolve their dispute through arbitration proceedings.

Is there a compulsory default appointing body or authority for the appointment of arbitrators (in the event the parties cannot agree) or can the parties choose the default appointing body (by agreement or pursuant to the institutional rules of their choice)?

The procedures applicable for appointment of arbitrators depend on the arbitral rules adopted by the contractual parties. Where the choice of arbitral rules is not indicated in a contract, Article 17 of the AA, which prescribes procedures for the appointment of arbitrators, will apply.

Under Article 16(2) of the AA, three arbitrators will be appointed by default in a dispute between two parties. Each of the parties will be entitled to appoint one arbitrator, with the third arbitrator to be appointed by the two arbitrators that have been appointed by the parties (Article 17(2) of the AA). In situations where the disputing parties agree to appoint only one arbitrator, but fail to reach agreement on the appointee, the arbitrator will be determined by a court (Article 17(3) of the AA).

If the parties have provided for arbitration in their policy can the Insured nevertheless opt to pursue its claim before the local courts?

Parties to an arbitration agreement would be deemed to have agreed on arbitration as the exclusive means by which to resolve their disputes. Accordingly, where either party files with a local court any claim that is subject to an arbitration agreement, such claim will be dismissed by the court at the other party's request (Article 14(1) of the AA). However, consumers can unilaterally terminate or opt out from arbitration agreements, as described above.

Does local law or regulation require that the forum of any arbitration is in Japan or can the arbitral forum be overseas?

Any forum, whether domestic or overseas, is permissible under Japanese law.

Is the position the same on these issues as far as reinsurance contracts are concerned?

Arbitration-related rules in Japan apply equally to both insurance and reinsurance contracts.

Mediation

Can insurance and/or reinsurance policies in Japan provide for mediation of disputes? Can such mediation be compulsory?

Mediation procedures in connection with insurance contracts are regulated by the IBA.

More specifically, Article 308-2 of the IBA provides for the mediation procedures that will apply in disputes relating to insurance contracts. General market practice in Japan dictates that insurance policies involving consumers omit mediation clauses. However, consumers have the right to seek resolution of disputes through the mediation procedures under the IBA, regardless of what the insurance policies provide.

Some dispute resolution institutions, such as the Life Insurance Association and the General Insurance Association of Japan, are authorised under the IBA to administer mediation proceedings.

Insurance companies licensed in Japan are required to conclude contracts with an authorised dispute resolution institution, to entrust such institution with the handling of insurance contract-related mediation proceedings (Articles 105-2(1), 105-3(1) and 199 of the IBA).

Where a customer of a licensed insurance company files a complaint with the relevant dispute resolution institution against the insurance company, such company would be required to respond under a mediation process administered by the dispute resolution institution (Article 308-7(2) (ii) of the IBA).

Would mediation have to be undertaken under the auspices of a local mediation body or the local courts and pursuant to local mediation rules, or can the parties agree to use an international mediation centre, mediator and rules of their choice?

As noted above, under the IBA, mediation proceedings in connection with insurance contracts have to be handled by an authorised dispute resolution institution. Mediation between a licensed insurance company and its customer administrated by an international mediation centre that is not authorised under the IBA will not meet the requirements of the IBA.

Are all mediations conducted on the basis that they are confidential and "without prejudice"? If so, how is this achieved?

Mediation proceedings under the IBA are held in private, and subsequent submission of a mediated dispute to court for litigation is not prohibited.

The concept of "without prejudice" is not applicable to mediation proceedings under the IBA. Therefore, unless otherwise agreed between the parties, arguments and submissions made in the course of mediation proceedings may be subsequently submitted to court in litigation proceedings and the court is permitted to take these arguments and submissions into consideration in the course of the litigation proceedings.

Limitation

What limitation/time bar provisions apply to claims under insurance and reinsurance policies in Japan? Are there any specific issues or challenges these give rise to?

A right to claim insurance proceeds and/or a return of insurance premiums will be extinguished by prescription if it is unexercised for three years or more (Article 95(1) of the IA).

General

Are there any other compulsory dispute resolution rules relevant to insurance and/or reinsurance coverage disputes in Japan? If so, what are these?

No.

Are there any anticipated/upcoming changes to law and regulation in Japan which would impact the litigation, arbitration or mediation of insurance disputes in Japan?

No.

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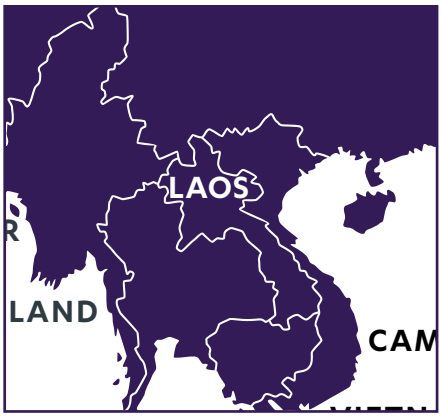

Governing Law

Are direct insurance policies in Laos required to be subject to local law? If so, what are the provisions that govern this?

No. There are no express provisions in the Civil Code No. 55/NA, dated 6 December 2018 (the **Civil Code**) or the Law on Insurance No. 78/NA, dated 29 November 2019 (the **Insurance Law**) requiring that insurance policies be governed by Lao law. However, in practice the Lao People's Court will not apply foreign law to any cases before it. If the Lao People's Court agrees to hear a claim based on an insurance contract governed by foreign law, it will adjudicate the matter by applying Lao law.

Is the position the same, or does it differ, for reinsurance contracts?

The position is the same with respect to reinsurance contracts.

Are floating governing law clauses permitted in insurance and reinsurance policies in Laos?

Although it is not illegal, floating governing law clauses remain uncommon, and Lao courts will not apply foreign law when adjudicating any matter.

Arbitration

Can direct insurance policies in Laos provide for arbitration (as opposed to court jurisdiction) as the sole dispute resolution mechanism for coverage disputes? If so, what specific legislation or rules apply to the arbitration of insurance disputes in Laos?

The Insurance Law does not prohibit an arbitration clause in an international or domestic insurance contract. Article 23 of the Insurance Law simply provides that an insurance contract must provide the method of dispute resolution. This would appear to suggest that it is at the parties' discretion how they resolve any coverage dispute. Similarly, the Civil Code does not prohibit arbitration clauses in insurance contracts.

The Amended Law on the Resolution of Economic Disputes (Nº 51/NA, 22 June 2018) (the **Economic Disputes Law**), which applies to insurance contracts as well as others, sets out a framework for the settlement of disputes via the Economic Dispute Resolution Centre, another domestic arbitration centre, or an international arbitration centre.

Can the parties choose which (local or international) arbitral rules (including any institutional rules) apply, or is their ability to do so restricted by local law or regulation?

Neither the Economic Disputes Law nor the Law on Civil Procedure No. 13/NA 4 July 2012 (the **Law on Civil Procedure**) place any restrictions on the choice of the arbitral rules, including institutional rules. The choice of the arbitral rules is a matter that is left to the discretion of the parties.

Local arbitration proceedings are governed by the Economic Disputes Law and are heard by a panel located in Laos at the Economic Dispute Resolution Centre. International arbitration is not defined under Lao law; however, it would generally refer to disputes settled before an arbitration panel that is located abroad (eg, SIAC).

The Lao People's Supreme Court has also issued Instruction No.62, dated 7 February 2019, which sets some more conditions for an award to be valid and enforceable in Laos. Arbitral award will not be valid if, for example, the arbitral award has not yet been enforced by the parties, or has been cancelled or suspended by the court; or the dispute cannot be resolved according to Lao law; the parties did not agree to resolve the matter via mediation, arbitration, or the agreement to do so is void.

The enforcement of foreign awards remain relatively rare in Laos. Given the lack of precedent and formal guidance on these additional conditions, it is difficult to anticipate how exactly the courts will interpret these conditions set by the Lao People's Supreme Court.

Before opting to pursue arbitration before the local EDRC, or an international arbitration centre, operators should consider several factors. Opting for the local Economic Dispute Resolution Centre may prove faster and increase the chances of the timely enforcement of the arbitration award. However, arbitrators cannot be freely appointed as they must be part of a list of arbitrators appointed by the Ministry of Justice. Save for a few

Laos (continued)

exceptions, all arbitrators are Lao nationals, and the vast majority work in the public sector. Accordingly, they may lack the expertise to understand the issues at stake.

For high value matters, international arbitration is the most appropriate. However, enforcement of the arbitration award will be subject to screening by the Lao authorities, and operators should expect that it will take some time to obtain a formal response from the Lao authorities regarding the recognition of the award.

Is there a compulsory default appointing body or authority for the appointment of arbitrators (in the event the parties cannot agree) or can the parties choose the default appointing body (by agreement or pursuant to the institutional rules of their choice)?

The law is silent on international arbitration, meaning the parties are free to choose any appointing body.

For local arbitration before the Economic Dispute Resolution Centre, the parties can choose the arbitrator from the list of arbitrators that have been duly appointed and approved by the Ministry of Justice. The parties can consult the list of approved arbitrators at the Economic Dispute Resolution Centre. These arbitrators may come from the private or public sector but must be appointed by the Ministry of Justice. In practice, the vast majority of arbitrators have a background in the public sector. The Economic Disputes Law does not preclude foreign nationals from being certified as arbitrators in Laos. To date, however, only one foreign arbitrator has been appointed by the Ministry of Justice.

By law, it is possible to select just one arbitrator. However, in practice, three arbitrators are selected: one selected by each party and one selected by both parties together.

If the parties have provided for arbitration in their policy can the Insured nevertheless opt to pursue its claim before the local courts?

No. Where the parties have chosen to resolve their dispute through arbitration, the Lao People's Court will not permit the Insured to pursue its claim before it. Freedom of contract is respected, provided, however, the contract does not conflict with local laws, culture or the "fine traditions of the country", and it does not endanger public order and the stability of the contract.

Does local law or regulation require that the forum of any arbitration is in Laos or can the arbitral forum be overseas?

Lao law does not make any specific provision about this matter. However, arbitration that is conducted through the Economic Dispute Resolution Centre must be conducted in the territory of Laos.

As Laos is a signatory to the New York Convention, foreign arbitral awards may be enforced in Laos. This includes arbitral awards issued by an arbitration panel based outside Laos, as is commonly provided for in contracts.

Is the position the same on these issues as far as reinsurance contracts are concerned?

Yes. There is no specific provision in relation to reinsurance contracts. The comments above apply equally to reinsurance.

Mediation

Can insurance and/or reinsurance policies in Laos provide for mediation of disputes? Can such mediation be compulsory?

The Civil Procedure Law does not prohibit parties mediating through the Economic Dispute Resolution Centre, except for matters that involve public bodies, family law, or that are not of an economic nature.

The Civil Procedure Law provides that for cases of high value, the litigant may request that the matter be filed directly with the Lao People's Court. The term "high value" is not defined.

If the parties intend to undergo local arbitration, they may decide to skip mediation, which would also be conducted by the Economic Dispute Resolution Centre. If the contract is silent on this matter, it will be left to the agreement of the parties. If one party wishes to pursue mediation, it is likely that mediation will be required prior to arbitration.

Would mediation have to be undertaken under the auspices of a local mediation body or the local courts and pursuant to local mediation rules, or can the parties agree to use an international mediation center, mediator and rules of their choice?

The law is silent on whether parties can agree to use a local or an international mediation centre before bringing a dispute before a local court or an arbitration centre. Freedom of contract will prevail.

Mediation can be carried out by local authorities, such as the Lao People's Court, the Ministry of Finance, which is the ministry responsible for insurance, or the Economic Dispute Resolution Centre. Other more localised mediation procedures may be available, depending on the size of the dispute.

Are all mediations conducted on the basis that they are confidential and "without prejudice"? If so, how is this achieved?

The concept of without prejudice is not recognised under Lao law. However, mediations are generally subject to confidentiality. In practice, only the parties to the mediation have access to the information disclosed during the procedure. Third parties cannot have access to the content of the mediation

procedure. The Economic Dispute Law, Article 14, provides that "*...a mediator or mediation committee..., the parties to the dispute and any other participants have no rights to disclose any confidential information and the various documents submitted for use during the mediation... unless otherwise authorised from the disputing parties*".

There is no formal guidance on this duty, so it is difficult to anticipate to what extent it applies, and if it may prevent, for instance, declarations made during the mediation procedure from being used before the Lao People's Court.

Limitation

What limitation/time bar provisions apply to claims under insurance and reinsurance policies in Laos? Are there any specific issues or challenges these give rise to?

If no minimum period is specified in the contract, a claim under a policy must be made within three years from the date on which the Insured event occurs. Any period during those three years which is affected by a force majeure or unforeseen event will not be included when calculating the time limit.

If the policyholder does not know the specific date on which the Insured event first occurred, the time period shall be calculated from the date on which the policyholder first became aware of the event.

In the case of liability policies, the time-limit starts from the date on which a third party makes a claim against the Insured.

General

Are there any other compulsory dispute resolution rules relevant to insurance and/or reinsurance coverage disputes in Laos? If so, what are these?

No.

However, in respect of insurance matters, an administrative remedy can be triggered by filing a complaint directly with the Ministry of Finance and the relevant department that is responsible for insurance matters. This could trigger a mediation process.

Are there any anticipated/upcoming changes to law and regulation in Laos which would impact the litigation, arbitration or mediation of insurance disputes in?

No.

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Malaysia

Governing Law

Are direct insurance policies in Malaysia required to be subject to local law? If so, what are the provisions that govern this?

The Financial Services Act 2013 (**FSA**) regulates the insurance industry in Malaysia.

All companies carrying on insurance business in Malaysia are subject to the FSA.

Whilst there are no express provisions in the FSA which provide that direct insurance policies must be subject to local law, there is a presumption that local law would apply given that:

- The companies that are carrying on insurance business in Malaysia are subject to FSA and are regulated by the Central Bank of Malaysia; and
- Direct insurance business is limited to insurance companies operating within Malaysia, and there are restrictions on soliciting insurance business overseas.

As such, in practice, direct insurance policies are subject to Malaysian law.

Is the position the same, or does it differ, for reinsurance contracts?

The position is the same for reinsurance contracts issued by domestic companies within Malaysia. For reinsurance contracts issued by companies outside of Malaysia, a governing law other than Malaysian law may be selected by the parties.

Are floating governing law clauses permitted in insurance and reinsurance policies in Malaysia?

Floating governing law clauses are not permitted in Malaysia and are held to be invalid and unenforceable (see *Q2 Engineering Sdn Bhd v PJI – LFGC (Vietnam) Ltd & Ors* [2012] MLJU 583).

Arbitration

Can direct insurance policies in Malaysia provide for arbitration (as opposed to court jurisdiction) as the sole dispute resolution mechanism for coverage disputes? If so, what specific legislation or rules apply to the arbitration of insurance disputes?

Yes, an arbitration clause can state that arbitration is the sole dispute resolution mechanism, but it cannot purport to prevent any party from filing a claim in court. Under Malaysian law, any agreement to restrict legal proceedings is considered void. As such, a party can always bring proceedings in the local courts.

If an arbitration clause exists, the Malaysian Arbitration Act requires the Court to stay proceedings which concern matters that are subject to the arbitration agreement. The local courts will refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

The specific legislation and rules that apply to arbitrations are the Arbitration Act 2005 and Arbitration Amendment (No. 2) Act 2018.

Can the parties choose which (local or international) arbitral rules (including any institutional rules) apply, or is their ability to do so restricted by local law or regulation?

Yes, parties are able to choose which arbitral rules apply.

Is there a compulsory default appointing body or authority in for the appointment of arbitrators (in the event the parties cannot agree) or can the parties choose the default appointing body (by agreement or pursuant to the institutional rules of their choice)?

The parties are free to choose the default appointing body. In the event that the parties fail to agree on the appointing body, the default appointing body in Malaysia is the Director of the Asian International Arbitration Centre.

If the parties have provided for arbitration in their policy can the Insured nevertheless opt to pursue its claim before the local courts?

Yes, however court proceedings will usually be stayed so that arbitration can take place. Whilst the Insured can proceed to file their claim in the local courts, the insurer can apply to stay proceedings pending arbitration pursuant to Section 10 of the Arbitration Act 2005 provided that:

- There is an arbitration agreement between the parties (and that the agreement is not null and not void, not inoperative or not incapable of being performed);
- There is a dispute between the parties that calls for arbitration; and
- The defendant (insurer) has not taken any other steps in the proceedings.

The stay would operate akin to a perpetual stay of the proceedings, ie that the claim filed in the local courts will not be dismissed at the conclusion of the arbitration, but the parties would not be able to take any further steps in relation to the proceedings in court.

Once the arbitration award is obtained, pursuant to Section 38 of the Arbitration Act 2005, an application can be made to the local High Court to recognise the award as binding and enforceable by entry as judgment in terms of the award. The application must be accompanied by the duly authenticated original copy of the award or a duly certified copy of the same, and the original arbitration agreement or a duly certified copy of the same.

Does local law or regulation require that the forum of any arbitration be in Malaysia or can the arbitral forum be overseas?

There are no local laws or regulations which require the arbitral forum to be in Malaysia. The parties are free to agree on the forum of the arbitration.

Is the position the same on these issues as far as reinsurance contracts are concerned?

Yes.

Mediation

Can insurance and/or reinsurance policies in Malaysia provide for mediation of disputes? Can such mediation be compulsory?

Yes, insurance and/or reinsurance policies in Malaysia can provide for mediation of disputes. The mediation can be made compulsory by way of a contractual agreement between the parties.

Would mediation have to be undertaken under the auspices of a local mediation body or the local courts and pursuant to local mediation rules, or can the parties agree to use an international mediation centre, mediator and rules of their choice?

The mediation does not have to be undertaken under a local mediation body, local courts or the local mediation rules. Parties are free to agree to use an international mediation centre, mediator and the rules of their choice.

Are mediations conducted on the basis that they are confidential and "without prejudice"? If so, how is this achieved?

In Malaysia, all mediations are conducted on the basis that they are private, confidential and "without prejudice". Section 16(1) of the Malaysian Mediation Act 2012 states that as a general rule any mediation communication is privileged and is not subject to discovery or admissible in evidence in any proceedings.

Limitation

What limitation/time bar provisions apply to claims under insurance and reinsurance policies in Malaysia? Are there any specific issues or challenges these give rise to?

Claims under insurance and reinsurance policies constitute a "claim in contract" and are therefore subject to a six year limitation period, in accordance with Section 6 of the Malaysian Limitation Act 1953.

General

Are there any other compulsory dispute resolution rules relevant to insurance and/or reinsurance coverage disputes in Malaysia? If so, what are these?

Aside from the Malaysian Rules of Court 2012, which contain the compulsory rules to adhere to in the event of litigation in Malaysian courts, there are no other relevant dispute resolution rules in Malaysia.

Are these any anticipated/upcoming changes to law and regulation in Malaysia which would impact the litigation, arbitration or mediation of insurance disputes in Malaysia?

Currently there are no anticipated changes which would impact the litigation, arbitration or mediation of insurance disputes.

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Myanmar

Governing Law

Are direct insurance policies in Myanmar required to be subject to local law? If so, what are the provisions that govern this?

Insurance policies are highly regulated in Myanmar, in particular by the Insurance Business Law, and Directives issued by the Insurance Business Regulatory Board (**IBRB**). All policies must be issued by local licensed insurers and all policy wordings require approval from the IBRB. In practice, this means that direct insurance policies cannot be subject to foreign law, as the IBRB is highly unlikely to approve such a provision.

The insurance market in Myanmar underwent dramatic changes in 2019, with the opening up of the market to limited foreign competition in both the life and non-life sectors, by granting licences to certain 100% foreign-owned insurers and allowing others to operate in joint venture with local insurers.

Is the position the same, or does it differ, for reinsurance contracts?

The approach for reinsurance is different. Previously, domestic insurers could not reinsure foreign insurance undertakings and it was uncommon for domestic reinsurers to seek to enter into reinsurance contracts with domestic insurers which were governed by foreign law.

On 12 May 2020, the IBRB issued Directive 4/2020 (effective from 1 October 2020). As a result of this directive, insurance companies (or cedants) are able to obtain reinsurance from other insurers or reinsurers in Myanmar or abroad, with certain restrictions.

Although the requirement that local insurers must cede their risk specifically to Myanma Insurance (the state-owned insurance company) has been relaxed, Myanma Insurance still plays a vital role in the reinsurance market. In addition, the requirement for IBRB approval for reinsurance wording is silent.

Accordingly, with respect to reinsurance contracts, if they are not specifically required by Myanma Insurance to use local law (such requirement is uncommon), then adopting foreign law is permissible and not uncommon in Myanmar. Reinsurance policies are therefore now more likely to be governed by a law other than Myanmar.

Are floating governing law clauses permitted in insurance and reinsurance policies in Myanmar?

Use of floating governing law clauses are uncommon in Myanmar. Myanmar courts do not usually allow adjudication of matters subject to foreign law.

Arbitration

Can direct insurance policies in Myanmar provide for arbitration (as opposed to court jurisdiction) as the sole dispute resolution mechanism for coverage disputes? If so, what specific legislation or rules apply to the arbitration of insurance disputes in Myanmar?

The law is silent on this issue. Direct insurance policies may therefore provide for arbitration, so long as approval is granted by the regulator, the IBRB, and the clause is compliant with the requirements of the 2016 Arbitration Law of Myanmar.

Can the parties choose which (local or international) arbitral rules (including any institutional rules) apply, or is their ability to do so restricted by local law or regulation?

Subject to the arbitration agreement having been approved by the IBRB, the parties may choose the arbitration rules, the institution and the venue, in accordance with the Arbitration Law of Myanmar.

Is there a compulsory default appointing body or authority for the appointment of arbitrators (in the event the parties cannot agree) or can the parties choose the default appointing body (by agreement or pursuant to the institutional rules of their choice)?

The Arbitration Law of Myanmar provides that the parties are free to agree on a procedure for appointing the arbitrator or arbitrators. Any party may, in the event the parties cannot agree, request the Chief Justice, or any person/institution selected by the Chief Justice, to appoint the arbitrators.

If the parties have provided for arbitration in their policy can the Insured nevertheless opt to pursue its claim before the local courts?

Under the Arbitration Law of Myanmar, if a claim that is subject to an arbitration agreement is brought before a court, the court shall refer the claim to arbitration if requested by either party *"not later than when submitting his written statement on the substance of the dispute"* unless the arbitration agreement is null and void, inoperative or incapable of being performed.

Local courts have no ability to intervene in an ongoing arbitration process, except at the request of a party under specified limited circumstances, such as a claim for injunctive relief, the appointment of a receiver, or the taking or preserving of any evidence.

Does local law or regulation require that the forum of any arbitration is in Myanmar or can the arbitral forum be overseas?

The Arbitration Law of Myanmar allows the parties to choose a forum, which can be either in Myanmar or overseas.

Is the position the same on these issues as far as reinsurance contracts are concerned?

There are no specific provisions or regulations on these matters in respect of reinsurance. International reinsurance contracts, at present, can be subject to arbitration in accordance with international practice and norms.

Mediation

Can insurance and/or reinsurance policies in Myanmar provide for mediation of disputes? Can such mediation be compulsory?

Formal mediation of disputes is uncommon in Myanmar and there are no mediation bodies. However, an Insured or a beneficiary can file a petition to the IBRB for mediation without prejudice to their rights to file a claim in the applicable court. In practice, the IBRB usually acts as the mediation body in these circumstances.

Would mediation have to be undertaken under the auspices of a local mediation body or the local courts and pursuant to local mediation rules, or can the parties agree to use an international mediation centre, mediator and rules of their choice?

There is a legal mechanism for court-led mediation under the latest amendment to the Civil Procedure Code in 2021. However, that mechanism is not compulsory and only applies to cases that are voluntarily referred to mediation by the parties to the dispute, where legal proceedings have already been instigated before a competent court in Myanmar.

Are mediations conducted on the basis that they are confidential and "without prejudice"? If so, how is this achieved (ie because the concept of a "without prejudice" attempt to settle a dispute is recognised as a principle of local law or otherwise)?

Section 89-A(3) of the Code of Civil Procedure, as amended in 2021, states that mediation proceedings are confidential and that any communication, statement and admission made during the mediation process shall not be admissible in any subsequent hearing or proceedings relating to the same matter. Therefore, mediation proceedings are confidential and "without prejudice".

Limitation

What limitation/time bar provisions apply to claims under insurance and reinsurance policies in Myanmar? Are there any specific issues or challenges these give rise to?

According to the Limitation Act, a claim must be made within three years from the date *"when proof of the death or loss is given or received to or by the insurer, whether by or from the plaintiff, or any other person."*

General

Are there any other compulsory dispute resolution rules relevant to insurance and/or reinsurance coverage disputes in Myanmar? If so, what are these?

There are no compulsory dispute resolution rules relevant to insurance and reinsurance disputes. An Insured or a beneficiary under an insurance policy can file a petition to the IBRB, or to a competent court, in accordance with provisions of the Civil Procedure Code.

Are there any anticipated/upcoming changes to law and regulation in Myanmar which would impact the litigation, arbitration or mediation of insurance disputes in?

The IBRB is drafting a new Insurance Business Bill. A public consultation on the Bill is ongoing. It had previously been expected that the Bill would be passed by Parliament in 2020/2021. However, the future progress of the Bill is now uncertain as a result of the instalment of the military government in February 2021.

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Nepal

Governing Law

Are direct insurance policies in Nepal required to be subject to local law? If so, what are the provisions that govern this?

Yes, direct insurance policies are governed by and subject to Nepalese law in accordance with the Insurance Act 2079 (2022) (**Insurance Act**) which recently came into effect (8 November 2022). Insurance business and insurance policies must also comply with the directives of the Nepal Insurance Authority (**NIA**), the regulatory body.

Direct insurance policies between a Nepalese entity and a foreign entity (licensed to operate in Nepal) are also required to be governed by and subject to Nepalese law.

Is the position the same, or does it differ, for reinsurance contracts?

Reinsurance business conducted in Nepal is also required to comply with the Insurance Act and the directives of the NIA. Reinsurance contracts are subject to NIA's approval. However, there is no requirement that reinsurance contracts executed with foreign reinsurers must adopt Nepalese law as the governing law of the policy.

Are floating governing law clauses permitted in insurance and reinsurance policies in Nepal?

All direct insurance policies under the purview of the Insurance Act are governed by the laws of Nepal. In cases of direct insurance policies, floating governing law clauses are therefore not permitted.

With respect to reinsurance policies executed with foreign reinsurers, neither the Insurance Act nor any other laws impose any prohibition on adopting floating governing law clauses.

Arbitration

Can direct insurance policies in your jurisdiction provide for arbitration (as opposed to court jurisdiction) as the sole dispute resolution mechanism for coverage disputes? If so, what specific legislation or rules apply to the arbitration of insurance disputes in your jurisdiction?

Direct insurance policies may provide for arbitration as a dispute resolution mechanism for coverage disputes. However, the Insurance Act is silent on whether arbitration can be designated as the exclusive mechanism for dispute resolution.

Under Section 130 of Insurance Act, the NIA may, either upon either party's request or of its own accord resolve a dispute by way of arbitration. Under Section 13(f) of the Insurance Act, the Chairperson of the NIA is authorised to act as arbitrator to settle disputes, including coverage-related disputes, between insurer and Insured arising from direct insurance policies. To date, there have been no further rules prescribing the conditions to be followed by the NIA when deciding whether to adopt arbitration as the dispute resolution mechanism over other options, such as adjudication or mediation.

An Insured may also file a complaint with the NIA against the insurer in relation to coverage issues, which may be adjudicated or amicably settled by NIA. As yet, there is no clear indication that the existence of an arbitration clause in the relevant policy will negate the jurisdiction of NIA to decide to adjudicate the matter.

When parties have an arbitration agreement in place, Section 39 of the Arbitration Act 2055 (1999) removes a court's jurisdiction with respect to deciding the merits of the dispute. However, the Arbitration Act is silent in the case of an arbitration facilitated by a regulatory body such as the NIA under the provisions of separate legislation such as the Insurance Act.

Can the parties choose which (local or international) arbitral rules (including any institutional rules) apply, or is their ability to do so restricted by local law or regulation?

The Insurance Act is silent on whether parties may choose arbitral rules. When the NIA exercises its authority to conduct arbitration, it may apply its own procedure. However, the procedure for arbitration through the NIA has not yet been established. In the absence of specific rules, it is likely that the procedure under the Arbitration Act may be followed.

In the event the NIA permits parties to conduct arbitration under their own terms, the parties may choose local or international arbitral rules including any institutional rules, provided they are in accordance with the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958, to ensure the enforceability of any subsequent award.

Nepal (continued)

Is there a compulsory default appointing body or authority for the appointment of arbitrators (in the event the parties cannot agree) or can the parties choose the default appointing body (by agreement or pursuant to the institutional rules of their choice)?

When the NIA exercises its authority to conduct an arbitration, its Chairperson will act as the arbitrator. In the event the NIA permits the parties to conduct arbitration under their own terms, there is no restriction under the Insurance Act or Arbitration Act on the parties appointing an arbitrator of their choice.

For arbitrations outside the NIA, Section 7 of the Arbitration Act provides that the High Court is the default appointing body. A party may submit an application to the High Court for the appointment of arbitrators, if the parties fail to appoint arbitrators following the procedure mentioned in the agreement. Decisions made by the High Court shall be final on this matter.

If the parties have provided for arbitration in their policy can the Insured nevertheless opt to pursue its claim in the local courts?

In the case of direct insurance policies, regardless of whether the parties have provided for arbitration in their policy or not, the Insured may not opt to pursue its claim in the local courts, since any such claim will first have to be presented to the NIA for adjudication, amicable settlement or arbitration. The NIA's decision in relation to an insurance claim or any other form of compensation may, however, be appealed at the appropriate High Court. The Insurance Act is however silent on whether an arbitral award issued by the NIA may be challenged.

In the case of reinsurance policies which are not required to be arbitrated by the NIA, an Insured may not pursue its claim in the local courts where there is a valid arbitration agreement, as provided under Section 39 of the Arbitration Act. Under Section 30 of Arbitration Act, an Insured may file a motion to reconsider an arbitration award at the High Court. This right would be available against an arbitral award resulting from an arbitration conducted in Nepal.

Does local law or regulation require that the forum of any arbitration is in your jurisdiction or can the arbitral forum be overseas?

The Arbitration Act does not mandate that Nepal must be the forum for any arbitration involving a Nepalese party. In general, the Arbitration Act allows enforcement of foreign arbitral awards under the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958.

However, where insurance claims or other disputes are arbitrated by the NIA, the arbitration forum will be Nepal.

Is the position the same on these issues as far as reinsurance contracts are concerned?

Reinsurance contracts (including the dispute resolution clause) are subject to the NIA's approval. Where a dispute under a reinsurance contract is referred to the NIA (usually when Nepalese reinsurers have issued the reinsurance), the arbitration forum will be Nepal. In other instances, the parties to a reinsurance contract can choose any local or international arbitral forum. To ensure the enforceability of the arbitral award, the parties must comply with the Arbitration Act and New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958.

Mediation

Can insurance and/or reinsurance policies in Nepal provide for mediation of disputes? Can such mediation be compulsory?

The Insurance Act makes no reference to mediation and places no restriction on insurance and/or reinsurance policies in Nepal providing for mediation as a dispute resolution mechanism. As mentioned above, the Insurance Act authorises the NIA to take steps to resolve insurance disputes amicably and for that purpose, the NIA may facilitate mediation between the parties.

Would mediation have to be undertaken under the auspices of a local mediation body or the local courts and pursuant to local mediation rules, or can the parties agree to use an international mediation centre, mediator and rules of their choice?

The NIA has not yet formulated rules for facilitating amicable settlement or mediation between parties to an insurance contract. In the absence of NIA rules, it may adopt the rules of the Mediation Act 2068 (2011) (**Mediation Act**), which is the general law governing mediation in Nepal.

Section 3(1) of the Mediation Act provides that in the event of a valid mediation agreement, any dispute subject to that agreement shall be settled through mediation according to the procedure prescribed in that agreement. There is no requirement that mediation be undertaken under the auspices of a local mediation body or the local courts. Section 4(1) of the Mediation Act provides that the appointment of a mediator shall be in accordance with the agreement. Hence, under the provisions of the Mediation Act, the parties can agree to use an international mediation centre, mediator or rules of their choice.

In the case of reinsurance policies, the Insurance Act does not specify that the NIA may facilitate an amicable solution of any disputes. In such cases, parties may conduct mediation under the provisions of the Mediation Act as stated above or according to other rules of their choice.

Are mediations conducted on the basis that they are confidential and "without prejudice"? If so, how is this achieved (ie because the concept of a "without prejudice" attempt to settle a dispute is recognized as a principle of local law or otherwise)?

There are no specific regulations concerning mediation facilitated by the

NIA. The Mediation Act as the general law governing mediation provides for confidential proceedings unless decided otherwise by the parties or as provided under applicable law.

The Mediation Act also provides that, notwithstanding any provision of applicable law, statements made by a party during mediation shall not be used as evidence against such party in court. Once a settlement deed is signed by the parties pursuant to a mediation process, the same shall be binding upon the parties.

Limitation

What limitation/time bar provisions apply to claims under insurance and reinsurance policies in your jurisdiction? Are there any specific issues or challenge these give rise to?

The Insurance Act does not prescribe any limitation period for claims under insurance and reinsurance policies. As per Section 129(2), the authority to prescribe limitation periods through enactment of regulations, directives etc rests with the government and its agencies. In the absence of a specific statutory limitation period, where insurance and reinsurance policies are governed by the laws of Nepal, the limitation period in the contract, if specified, shall apply. The Supreme Court has held that in the event an insurance or reinsurance policy does not specify a limitation period, there is no time bar to make a claim.

The limitation period for contractual claims is ordinarily two years from the date on which the cause of action arises, pursuant to Section 503 of the National Civil Code 2074 (2017). However, this is not applicable for insurance and reinsurance contracts. As per Section 48 of National Civil Procedure Code 2074 (2017), when the concerning law does not prescribe a limitation period for a specific matter, the lawsuit may be commenced at any time.

In reinsurance contracts which adopt a governing law other than Nepal, the statute of limitation specified in the applicable law shall apply to those reinsurance contracts.

General

Are there any other compulsory dispute resolution rules relevant to insurance and reinsurance policies in your jurisdiction? If so, what are these?

No.

Are these any anticipated/upcoming changes to law and regulation in your jurisdiction which would impact the litigation, arbitration or mediation of insurance disputes in Nepal?

The Government of Nepal is expected to issue insurance regulations to supplement the provisions of the Insurance Act. Insurance regulations may, among other things, specify a time limit for making a claim under insurance and reinsurance policies, and provide detailed arbitral rules and procedures. Furthermore, the NIA is also expected to amend prior directives or issue new directives to supplement the new Insurance Act.

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New Zealand

Governing Law

Are direct insurance policies in New Zealand required to be subject to local law? If so, what are the provisions that govern this?

There is no statutory or regulatory requirement for insurance policies to be subject to New Zealand law. However, it is not possible to contract out of certain statutes, including the Insurance Law Reform Act 1977 and certain parts of the Insurance Intermediaries Act 1994. It is assumed that the prohibition on contracting out precludes the choice of a foreign law where that law would not – under New Zealand conflicts rules – be the governing law.

Insurance policies in New Zealand typically expressly select New Zealand jurisdiction. In the absence of an express choice of jurisdiction clause, the courts take into account a wide range of (mainly practical) factors, including:

- whether the agreement is governed by New Zealand law;
- where the parties, witnesses and evidence are located;
- whether overseas proceedings have been issued;
- the effectiveness of the relief that the New Zealand court could grant; and
- limitation aspects.

Is the position the same, or does it differ, for reinsurance contracts?

The position for reinsurance contracts is the same as for insurance contracts.

Are floating governing law clauses permitted in insurance and reinsurance policies in New Zealand?

There are no specific rules set out in legislation or regulation about whether floating law clauses in New Zealand insurance and reinsurance policies are permitted. It is standard practice for the governing law to be agreed from the outset of the policy to avoid ambiguity and uncertainty.

Arbitration

Can direct insurance policies in New Zealand provide for arbitration (as opposed to court jurisdiction) as the sole dispute resolution mechanism for coverage disputes? If so, what specific legislation or rules apply to the arbitration of insurance disputes?

Yes, arbitration can be the sole dispute resolution mechanism for coverage disputes arising from non-consumer insurance policies.

Generally, The Arbitration Act 1996 (the **Act**) governs arbitration in New Zealand and provides the rules of procedure to follow when arbitrating in New Zealand. Schedule 1 to the Act is derived from the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law (UNCITRAL).

Under the Act, parties to non-consumer insurance contracts may agree for arbitration to be the sole dispute resolution mechanism for their disputes. The courts endeavour to give effect to the intention of the parties.

This policy reflects the objectives of the Arbitration Act 1996 which include encouraging the use of arbitration in New Zealand to resolve disputes, and reducing court intervention in the conduct of arbitration to limited circumstances only. The High Court may intervene in the arbitration process to make interim orders, to appoint the tribunal where the parties cannot agree on the mechanism, and to provide assistance in taking evidence. The High Court may hear appeals from arbitration awards on the questions of jurisdiction and alleged infringement of the rules of natural justice. Issues of fact cannot be appealed, and there is a limited right of appeal on a point of law if the court gives its permission, which it will do where the issue is of general importance and the tribunal's decision is open to doubt.

Arbitration clauses in contracts for consumer insurance are not binding under Section 8 of the Insurance Law Reform Act 1977. Any such clause in a contract for consumer insurance requiring a dispute to be referred to arbitration, making arbitration a condition precedent to the bringing of other claims or actions, or limiting other actions because of an arbitration or arbitration award will be unenforceable. However, an arbitration agreement is permitted if it is entered into after the dispute has arisen.

Can the parties choose which (local or international) arbitral rules (including any institutional rules) apply, or is their ability to do so restricted by local law or regulation?

Yes. If the parties choose New Zealand as the place (seat) of the arbitration then the application of certain provisions of the

Arbitration Act 1996 are mandatory under Section 6, although if the arbitration is international then others are optional (eg an appeal on a point of law) under Section 7.

The law chosen by the parties or, by default, determined by New Zealand conflict of laws rules as governing the insurance or reinsurance, can potentially be separate from the law governing the arbitration agreement and entirely separate from the law governing the arbitration proceedings. Thus, if the parties entered into a reinsurance agreement governed by New Zealand law but with a SIAC arbitration clause, the seat would almost certainly be regarded by both the New Zealand and Singapore courts as Singapore, and the Arbitration Act 1996 would have no application. The effect would be that the arbitral proceedings would be governed by the Singapore International Arbitration Act and SIAC Rules, but the meaning of the insurance or reinsurance terms and (in the absence of contrary indication) also the validity and scope of the arbitration clause would be governed by the laws of New Zealand.

Is there a compulsory default appointing body or authority for the appointment of arbitrators (in the event the parties cannot agree) or can the parties choose the default appointing body (by agreement or pursuant to the institutional rules of their choice)?

Yes. The Arbitrators' and Mediators' Association of New Zealand (**AMINZ**) was appointed as the compulsory default appointing authority for New Zealand based arbitrations by the Ministry of Justice in March 2017. If AMINZ fails to appoint an arbitrator within 30 days, or a dispute arises in respect of its appointment process, a party may apply to the High Court for an interim order appointing an arbitrator.

If the parties have provided for arbitration in their policy can the Insured nevertheless opt to pursue its claim before the local courts?

The Insured may opt to pursue a claim in the local courts only pursuant to a contract for consumer insurance (as noted above, arbitration clauses in contracts for consumer insurance are not binding). In the case of a non-consumer contract, Section 8 of the Arbitration Act 1996 provides that a court will stay its proceedings where there is an arbitration clause that extends to the dispute in question, unless the clause is null and void, inoperative or incapable of being performed. In that regard New Zealand follows the approach of the Model Law.

The New Zealand Court of Appeal in *Zurich Australian Insurance Limited T/A Zurich New Zealand v Cognition Education Limited* [2014] NZSC 188 considered the position of a party who pursued summary judgment proceedings despite having agreed to arbitrate any disputes. The Court found that it was required to stay the proceedings in accordance with Section 8 of the Arbitration Act 1996 in the absence of the party being able to establish any of the grounds set out in Section 8.

The New Zealand courts also have jurisdiction to grant an injunction restraining a party to an arbitration clause from pursuing judicial proceedings outside of New Zealand.

Does local law or regulation require that the forum of any arbitration is in New Zealand or can the arbitral forum be overseas?

There is no specific requirement pursuant to New Zealand law. Whether arbitration can take place outside of the jurisdiction of New Zealand depends on the wording of the arbitration agreement.

Is the position the same on these issues as far as reinsurance contracts are concerned?

Yes.

Mediation

Can insurance and/or reinsurance policies in New Zealand provide for mediation of disputes? Can such mediation be compulsory?

Yes. Both insurance and reinsurance policies may provide for mediation of disputes. Mediation is not otherwise compulsory, but is preferred as part of dispute resolution in New Zealand for insurance disputes, usually during formal court proceedings and prior to trial.

Many of the dispute resolution bodies that handle consumer insurance disputes use and prefer mediation as part of their resolution process. These bodies include the Insurance and Financial Services Ombudsman, Financial Services Complaints Limited and the Financial Dispute Resolution Scheme.

These services are primarily consumer-focused schemes which provide a mechanism for consumers to resolve consumer complaints about insurance and financial services providers.

Would mediation have to be undertaken under the auspices of a local mediation body or the local courts and pursuant to local mediation rules, or can the parties agree to use an international mediation centre, mediator and rules of their choice?'

New Zealand has an unregulated mediation market. There are no statutory or regulatory restrictions on how insurance disputes are mediated or on parties agreeing to use an international mediation centre, mediator and rules of their choice.

Mediators in New Zealand operate independently and typically are appointed by the parties involved in the dispute, by a dispute resolution clause in the insurance contract. Many mediators (and arbitrators) belong to AMINZ or the Resolution Institute, membership bodies which prescribe rules for and regulate the conduct of their members.

Are mediations conducted on the basis that they are confidential and "without prejudice"? If so, how is this achieved (ie because the concept of a "without prejudice" attempt to settle a dispute is recognised as a principle of local law or otherwise)?

Mediations are ordinarily conducted on a confidential and without prejudice basis. The Evidence Act 2006 recognises "without prejudice" privilege as an available ground of privilege which applies in situations where parties communicate with one another in an attempt to settle, or mediate, their dispute. In addition, typically, mediation agreements will include express confidentiality terms. Parties to a mediation will almost always be required to sign a mediation agreement before embarking upon a mediation. Individuals attending mediations will also typically be required to give personal undertakings to protect the confidentiality of a mediation.

New Zealand (continued)

Limitation

What limitation/time bar provisions apply to claims under insurance and reinsurance policies in New Zealand? Are there any specific issues or challenges these give rise to?

New Zealand has a six year statutory time bar under the Limitation Act 1950 and the Limitation Act 2011 for claims arising out of civil disputes, including insurance claims.

This limitation period gave rise to significant litigation concerns in New Zealand following the Canterbury Earthquakes in 2010 and 2011. In December 2015, members of the Insurance Council of New Zealand agreed not to raise the six-year time bar in defence of any residential claim relating to the Canterbury earthquakes filed before 4 September 2017. This date was extended by most domestic insurers through until the middle of 2018, but the limitation defence was relied upon after that date. These concessions did not apply to the assignees of insurance claims.

General

Are there any other compulsory dispute resolution rules relevant to insurance and/or reinsurance coverage disputes in New Zealand? If so, what are these?

No. It is common for insurers to set out their own dispute resolution process in the policy which will be compulsory for the parties to the policy agreement (excluding for contracts of consumer insurance).

Are there any anticipated/upcoming changes to law and regulation in New Zealand which would impact the litigation, arbitration or mediation of insurance disputes in New Zealand?

In March 2018, the New Zealand government announced its changes to the Earthquake Commission Act 1993 (the **ECA 1993**). The announcement came on the back of a six-year the ECA 1993 by the Government. That review was undertaken following the Christchurch earthquakes in 2010 and 2011.

The amended ECA 1993 received the Royal assent on 18 February 2019 and most of the new provisions came into effect on 1 July 2019. The reforms impact how insurance disputes about earthquake claims are resolved, whether in litigation, arbitration or mediation.

The key changes to the ECA 1993 include:

- increasing the cap limit on Earthquake Commission (**EQC**) residential building cover to NZD150,000
- extending the time frame for the EQC to receive claim notifications from three months to two years
- removing EQC insurance cover for contents

The government announced on 30 September 2021 that from 1 October 2022 the monetary cap on EQC residential building cover would be increased further to NZD300,000 (excl. GST).

In 2022, the Natural Hazards Insurance Bill was introduced to Parliament which aims to replace, simplify and clarify the Earthquake Commission Act 1993. Additionally, the Bill will change the name of the Earthquake Commission to Toka Tū Ake – Natural Hazards Commission. The policy objectives state the Bill will enable better community recovery from natural hazards, it will clarify the role of the Commission and what cover they are to provide, and it will enhance the durability and flexibility of the legislation. Submissions on this Bill were open until 13 May 2022. The key changes include a revised insurance function framed around claims management; requiring the Commission to participate in a dispute resolution scheme to ensure that claimants have an out-of-court dispute resolution option; and setting a monetary cap on residential building cover of NZD300,000 per dwelling (excluding GST).

In May 2018, the Ministry of Business, Innovation and Employment (**MBIE**) released an issues paper outlining an upcoming review of insurance contract law in New Zealand. The review will be undertaken alongside the Financial Markets Authority (**FMA**), the Treasury, the Commerce Commission and the Reserve Bank of New Zealand. The review aims to better understand current issues arising out of the Marine Insurance Act 1908, the Life Insurance Act 1908, the Law Reform Act 1936, the Insurance Law Reform Act 1977, the Insurance Law Reform Act 1985 and the Insurance Intermediaries Act 1994.

An issues and options paper was released in May 2018 and was followed by a period of consultation. Draft legislation was due to be released for further consultation in 2020, however this was delayed due to COVID-19. On 24 February 2022, MBIE released a consultation draft of the Insurance Contracts Bill for public feedback. Submissions closed on 4 May 2022. The four main areas of change are summarised below.

- Insureds' duty of disclosure. Currently, the Insureds (consumers and businesses) must, prior to entering into the insurance contract, disclose to the insurer all material information. The insurer then decides whether to offer insurance and at what premium. The Bill will now require consumers to "take reasonable care not to make a misrepresentation" and answer any questions asked by the insurer truthfully and accurately. Therefore, the insurers have the responsibility to ask questions to obtain the material information.
- Unfair contract terms. As it currently stands, insurance contracts are currently exempted from prohibitions on unfair terms in standard form consumer contracts. The Bill changes this so the only terms which cannot be declared unfair are those which apply to all consumer contracts: clauses defining the main subject matter of the contract, and the price of the contract.
- Plain language policy documents. Consumer insurance policies will be required to be presented and worded clearly. This will be enforced through presentation requirements and specific information which insurers must make publicly available.
- Utmost good faith. This duty will be codified and will apply to both parties in an insurance contract. No pecuniary penalties for a breach of this duty will exist.

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Philippines

Governing Law

Are direct insurance policies in the Philippines required to be subject to local law? If so, what are the provisions that govern this?

Direct insurance policies in the Philippines are ordinarily subject to Philippine law.

Any person transacting in insurance business in the Philippines, including making or offering insurance policies, is required to obtain a Certificate of Authority from the Insurance Commission, and submit itself to the laws of the Philippines and the jurisdiction of the Insurance Commissioner.

However, Article 1306 of the Philippine Civil Code broadly allows parties freedom to contract, provided clauses are not contrary to law, morals, good customs and public policy. Such freedom has been held to include the choice of law to be applied when there is an ambiguity in the terms of the contract, which may be resolved in accordance with foreign law.

It is possible, however, that the Insurance Commission, which has the authority to approve the form of insurance policies to be issued by Philippine insurers, may insist on removing such provision notwithstanding the absence of a legal prohibition against it, leaving the policy wholly subject to Philippine law.

Is the position the same, or does it differ, for reinsurance contracts?

The position is the same with regard to reinsurance contracts issued by reinsurers who are doing business in the Philippines. Reinsurers doing business in the Philippines will be required to obtain a Certificate of Authority from the Insurance Commission and will be subject to the same rules and regulations as insurers. This is because the Insurance Code expressly includes reinsurance in the definition of *"doing an insurance business or transacting an insurance business"*, (Insurance Code, S2 (b)(3)). It is therefore similarly possible that the Insurance Commission may insist on removing a choice of law clause in a proposed reinsurance policy notwithstanding the absence of a legal prohibition against it.

Reinsurance policies issued by foreign reinsurers outside the Philippines are not covered by the Certificate of Authority requirement, and such policies may provide that they will be governed by or interpreted in accordance with a foreign law, without the Insurance Commission objecting to such a clause.

Are floating governing law clauses permitted in insurance and reinsurance policies in the Philippines?

There is no statute or regulatory issuance specifically prohibiting floating governing law clauses in insurance and reinsurance contracts, however such clauses would be subject to the mandatory rules discussed above in relation to first question.

Arbitration

Can direct insurance policies in the Philippines provide for arbitration (as opposed to court jurisdiction) as the sole dispute resolution mechanism for coverage disputes? If so, what specific legislation or rules apply to the arbitration of insurance disputes?

Yes, non-life insurance policies may provide for independent appraisal, compulsory arbitration, or any other form of alternative dispute resolution (compulsory vehicle insurance policies excepted). This includes disputes in relation to the ascertainment of the loss or damage, and the amount for which an insurer may be liable (Section 7.17(a) and (b), Insurance Commission Circular No. 2015-58-A; Insurance Code, §249).

The general governing law on arbitration in the Philippines, Republic Act No. 9284 (the **ADR 2004**), adopts the 1985 Model Law on International Commercial Arbitration (**Model Law**) and applies when the arbitration falls within the definition of an international commercial arbitration under Article 1(3) of the Model Law (Alternative Dispute Resolution Act of 2004, §19).

If the arbitration is a domestic arbitration, it will primarily be governed by the Republic Act No. 876 (**The Arbitration Law**), with some provisions of the Alternative Dispute Resolution Act of 2004 also applicable (A**DRA 2004**, §32-33).

Can the parties choose which (local or international) arbitral rules (including any institutional rules) apply, or is their ability to do so restricted by local law or regulation?

Nothing prevents the parties to a non-life insurance policy from selecting the arbitral rules (for example SIAC or ICC) that will govern arbitration proceedings between them.

Is there a compulsory default appointing body or authority for the appointment of arbitrators (in the event the parties cannot agree) or can the parties choose the default appointing body (by agreement or pursuant to the institutional rules of their choice)?

Philippine law does not prevent the parties from selecting the arbitral rules that will govern the arbitration proceedings between them, including the appointment of arbitrators.

In the event that the parties cannot agree or do not name an arbitral institution or rules, the default appointing authority for international commercial arbitrations is the National President of the Integrated Bar of the Philippines or his duly authorised representative (**ADR 2004**, §26), and for domestic arbitration, the courts (The Arbitration Law §8).

If the parties have provided for arbitration in their policy, can the Insured nevertheless opt to pursue its claim before the local courts?

When the parties have agreed to submit their dispute to arbitration, courts shall refer the parties to arbitration pursuant to the Alternative Dispute Resolution Act of 2004. This is the case even when the arbitration clause in question may be stated in 'permissive language', as held by the Philippine Supreme Court (*UCPB General Insurance Company, Inc. vs. Hughes Electronics Corporation*, G.R. No. 190385 (2016)).

Does local law or regulation require that the forum of any arbitration is in the Philippines or can the arbitral forum be overseas?

Philippine law does not prohibit the parties from locating the arbitral forum overseas.

Is the position the same on these issues as far as reinsurance contracts are concerned?

The foregoing rules and policies apply equally to reinsurance contracts.

Mediation

Can insurance and/or reinsurance policies in the Philippines provide for mediation of disputes? Can such mediation be compulsory?

Non-life insurance policies are required to contain a provision for compulsory mediation (Section 7.17(b), Guidelines on the Approval of Non-Life Insurance Policy Forms).

Would mediation have to be undertaken under the auspices of a local mediation body or the local courts and pursuant to local mediation rules, or can the parties agree to use an international mediation centre, mediator and rules of their choice?

There is nothing in the Alternative Dispute Resolution Act of 2004 (which also governs voluntary mediation) that prevents parties from agreeing to use an international mediation centre or restricts their choice of mediation rules.

Are mediations conducted on the basis that they are confidential and "without prejudice"? If so, how is this achieved (ie because the concept of a "without prejudice" attempt to settle a dispute is recognised as a principle of local law or otherwise)?

Information obtained through mediation is privileged and confidential; it is not subject to discovery and is inadmissible in any adversarial proceeding, whether judicial or quasi-judicial. However, evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its use in a mediation (Alternative Dispute Resolution Act of 2004, §9(a) and 9(c)).

Limitation

What limitation/time bar provisions apply to claims under insurance and reinsurance policies in the Philippines? Are there any specific issues or challenges these give rise to?

Under Article 1144 of the Philippine Civil Code, a claim under a written contract, such as an insurance or reinsurance policy, must be brought within ten years from the time the right of action accrues. Unless otherwise provided in the insurance contract, this period will apply.

However, all criminal actions for the violation of any of the provisions of the Insurance Code must be brought three years from the discovery of such violation, provided that such actions shall in any event prescribe after ten years from the commission of such violation.

General

Are there any other compulsory dispute resolution rules relevant to insurance and/or reinsurance coverage disputes in the Philippines? If so, what are these?

There are no special dispute resolution rules for insurance and/or reinsurance disputes. However, in addition to the laws cited above, the Special ADR Rules promulgated by the Philippine Supreme Court are also relevant, especially with respect to the enforcement or challenge of arbitral awards.

Are there any anticipated/upcoming changes to law and regulation in the Philippines which would impact the litigation, arbitration or mediation of insurance disputes in the Philippines?

None.

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Singapore

Governing Law

Are direct insurance policies in Singapore required to be subject to local law? If so, what are the provisions that govern this?

No, parties are free to choose a different governing law and their express choice will usually be upheld save in exceptional cases (ie public policy grounds).

Is the position the same, or does it differ, for reinsurance contracts?

The position is the same for reinsurance contracts.

However, in the context of a reinsurance contract, the governing law should be expressly stated. In the absence of such a provision, the governing law of the insurance contract will not be incorporated by reference into the reinsurance contract.

Are floating governing law clauses permitted in insurance and reinsurance policies in Singapore?

No. The Singapore High Court in *Shanghai Turbo Enterprises Ltd v Liu Ming* [2018] SGHC 172 has held that floating governing law clauses are not valid under Singapore law, as the proper law of a contract must be ascertainable at the time the contract comes into existence and cannot float in suspense.

Arbitration

Can direct insurance policies in Singapore provide for arbitration (as opposed to court jurisdiction) as the sole dispute resolution mechanism for coverage disputes? If so, what specific legislation or rules apply to the arbitration of insurance disputes in Singapore?

Yes. The applicable legislation in Singapore (inclusive of insurance disputes) is the Arbitration Act (Cap 10) in respect of domestic arbitrations and the International Arbitration Act (Cap 143A) in respect of international arbitrations. There is no separate legislation which governs arbitration of insurance disputes.

Can the parties choose which (local or international) arbitral rules (including any institutional rules) apply, or is their ability to do so restricted by local law or regulation?

There are no such restrictions. Parties are free to agree on the rules which would apply to the arbitration and this should usually be referenced in the arbitration agreement. The rules of the Singapore International Arbitration Centre (**SIAC**) and the International Chamber of Commerce (**ICC**) are among the most common sets of rules adopted in Singapore-seated arbitrations.

In situations where parties have not agreed on a set of rules, the arbitral tribunal is granted broad discretion to determine the applicable rules. Parties are also at liberty to agree and propose the adaptation of institutional rules by the arbitral tribunal post-constitution.

Is there a compulsory default appointing body or authority in Singapore for the appointment of arbitrators (in the event the parties cannot agree) or can the parties choose the default appointing body (by agreement or pursuant to the institutional rules of their choice)?

The parties are free to agree their own procedure for the appointment of arbitrators, including a default appointing body. In the absence of such agreement, the Arbitration Act (Cap 10) and the International Arbitration Act (Cap 143A) provides for the President of the Court of Arbitration of the Singapore International Arbitration Centre to be the default appointing authority.

If the parties have provided for arbitration in their policy can the Insured nevertheless opt to pursue its claim before the local courts?

An arbitration agreement will be upheld and enforced by the Singapore courts. If, for example, notwithstanding an agreement to refer all disputes arising from a policy to arbitration, an Insured commences proceedings before the Singapore courts, the insurer will have the option of (i) waiving the application of the arbitration agreement and submitting to the jurisdiction of the Singapore courts, or (ii) seeking a stay of proceedings pending arbitration.

If a stay of proceedings is sought and subsequently granted, the court proceedings will be stayed and the Insured will have to commence arbitral proceedings against the insurer if it wishes to proceed with its claim. The Singapore courts will usually only refuse such a stay application if it finds the arbitration clause to be unenforceable or incapable of being performed.

Does local law or regulation require that the forum of any arbitration is in Singapore or can the arbitral forum be overseas?

Parties are free to agree on the seat of the arbitration and this will usually be stated in the policy. Furthermore, there is no requirement for proceedings in

a Singapore-seated arbitration to be physically held in Singapore. Parties are free to conduct the hearing overseas (if deemed more convenient).

The seat (or place) is the juridical home of the arbitration and this would dictate which national law governs the arbitration procedure. For example, if parties select Singapore as the seat of the arbitration, this would mean that Singapore arbitral legislation would apply and that Singapore Courts will have supervisory jurisdiction over the arbitration proceedings.

Is the position the same on these issues as far as reinsurance contracts are concerned?

Yes, the same position applies to reinsurance contracts.

Mediation

Can insurance and/or reinsurance policies in Singapore provide for mediation of disputes? Can such mediation be compulsory?

Yes. The dispute resolution provisions of the relevant policies can provide for mediation (be it voluntary or compulsory). However, if mediation is to be made compulsory or a pre-requisite to the commencement of legal/arbitral proceedings, the requirements and relevant timelines must be set out with clarity and precision, to avoid such a clause being utilised as a delaying tactic by the other party or being held unenforceable on account of it being vague and uncertain.

In any event, in the absence of an obligation to mediate, parties are still at liberty to propose, or proceed with, mediation pre or post commencement of proceedings. In fact, whilst parties cannot be compelled to mediate a dispute, a refusal to mediate without reasonable grounds could potentially result in adverse cost consequences in legal proceedings before the Singapore courts.

Would mediation have to be undertaken under the auspices of a local mediation body or the local courts and pursuant to local mediation rules, or can the parties agree to use an international mediation centre, mediator and rules of their choice?

The parties are entitled to agree to use any centre, mediator or rules of their choice. In Singapore, the Singapore International Mediation Centre and the Singapore Mediation Centre are popular mediation centres.

"Are all mediations conducted on the basis that they are confidential and "without prejudice"? If so, how is this achieved?

Yes. All mediations are conducted on the basis that they are confidential and "without prejudice", and the matters discussed in mediation can only enter the public domain in limited circumstances and for limited purposes (such as to prove the existence of a valid settlement agreement). This arises from the common law position that disclosures made in genuine negotiations to settle actual or contemplated litigation are protected.

Limitation

What limitation/time bar provisions apply to claims under insurance and reinsurance policies in Singapore? Are there any specific issues or challenges these give rise to?

Claims under insurance and reinsurance policies are considered contractual claims and would fall under Section 6(1)(a) of the Limitation Act (Cap 163), which mandates that claims founded in contract or on tort be bought within six years from the date on which the cause of action accrued.

In the case of insurance disputes, the cause of action is generally taken to have accrued on the date on which the event of loss occurs. It should also be noted that under Singapore law, the parties are at liberty to vary the limitation period and the Singapore courts will normally uphold any provision(s) to that effect.

General

Are there any other compulsory dispute resolution rules relevant to insurance and/or reinsurance coverage disputes in Singapore? If so, what are these?

There are no compulsory dispute resolution rules which specifically apply to insurance and/or reinsurance coverage disputes in Singapore.

Are there any anticipated/upcoming changes to law and regulation in Singapore which would impact the litigation, arbitration or mediation of insurance disputes in Singapore?

On 1 November 2021, a Bill was introduced in Parliament to allow conditional fee agreements (**CFA**s) to be entered into between lawyers and clients in certain contentious proceedings (including arbitration and matters before the Singapore International Commercial Court). It is anticipated that CFAs will also cover related advice and legal services, and can also be enforceable even where formal legal proceedings are not commenced.

On the insurance front, the Singapore Academy of Law's Law Reform Committee on 28 February 2020 published its Report on Reforming Insurance Law in Singapore (the **Report**). In the Report, the committee recommended, amongst other things, that the framework and provisions of the bifurcated insurance contract law regime enshrined in the UK's Insurance Act 2015 and in the Consumer Insurance (Disclosure and Representations) Act 2012 be adopted insofar as these provisions related to the duty of utmost good faith and related areas of the duty of disclosure, misrepresentation, warranties and remedies of fraudulent claims. It remains to be seen which of these recommendations, if any, will eventually be taken up and accepted by Parliament.

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South Korea

Governing Law

Are direct insurance policies in South Korea required to be subject to local law? If so, what are the provisions that govern this?

No. A direct insurance policy does not have to be subject to Korean law, with the parties being free to choose the governing law. However, even if a contract adopts foreign law as the governing law, it shall still be subject to Korean mandatory laws (social order or public policy) in the event a contractual dispute is heard by Korean courts.

Is the position the same, or does it differ, for reinsurance contracts?

The position is the same with respect to reinsurance contracts.

Are floating governing law clauses permitted in insurance and reinsurance policies in South Korea?

Yes. Though not used frequently in practice, floating governing law clauses may be permissible in the original insurance policy and the reinsurance policy under Korean law.

Arbitration

Can direct insurance policies in South Korea provide for arbitration (as opposed to court jurisdiction) as the sole dispute resolution mechanism for coverage disputes? If so, what specific legislation or rules apply to the arbitration of insurance disputes in South Korea?

Yes. An insurance policy may provide for arbitration as the dispute resolution mechanism. The rules and legislation applicable to the arbitration are usually determined in conjunction with the governing law. For example, in the case of an arbitration agreement in an insurance policy governed by English law, LCIA arbitration rules or SIAC arbitration rules will typically be adopted. In contrast, in the case of an insurance policy governed by Korean law, KCAB arbitration rules or ICC rules are typically adopted.

Often parties to the insurance policy deal with the governing law and dispute resolution on a "give-and-take" basis. For example, parties to an insurance contract might agree to a combination of Korean governing law with foreign arbitration, or English governing law and Korean court jurisdiction.

Can the parties choose which (local or international) arbitral rules (including any institutional rules) apply, or is their ability to do so restricted by local law or regulation?

The parties to an insurance policy may freely choose the arbitration rules that apply. Such capacity is not restricted by any statute or regulation in Korea.

Is there a compulsory default appointing body or authority in for the appointment of arbitrators (in the event the parties cannot agree) or can the parties choose the default appointing body (by agreement or pursuant to the institutional rules of their choice)?

Parties may agree a specific appointing body in the arbitration clause itself, which will be valid and enforceable. If an arbitration clause does not address any specific arbitration rules, or the stated arbitration rules do not address the constitution of the arbitral tribunal but simply state "any dispute shall be resolved by arbitration in Korea in accordance with Korean law", the Korean Arbitration Act in 1999 shall apply.

Under the Korean Arbitration Act, if the parties fail to agree to the appointment of arbitrators, either party may apply to the competent court for appointment of a suitable arbitrator.

If the parties have provided for arbitration in their policy, can the Insured nevertheless opt to pursue its claim before the local courts?

Any lawsuit filed by an Insured in contravention of a valid and binding arbitration clause in the policy shall be dismissed by the court for reason of lack of jurisdiction, subject to the insurer's motion for the same.

In South Korea, the insurer is obliged to explain the material terms of the insurance policy to the Insured, failing which the insurer is not entitled to assert the validity of such material terms. An arbitration clause may be considered a material policy term. Therefore, if the insurer fails to explain the arbitration clause to the Insured, it may be deemed as not constituting the policy terms and therefore, any lawsuit filed by the Insured seemingly in violation of the arbitration clause may be accepted by the Korean courts.

Does local law or regulation require that the forum of any arbitration is in South Korea or can the arbitral forum be overseas?

The forum can be outside South Korea. If the parties choose a venue in a country other than South Korea, they may still opt for KCAB rules. In such a case, the Korean

Arbitration Act will not be applicable. If the parties choose South Korea as the forum, the Korean Arbitration Act will apply to the arbitration.

Is the position the same on these issues as far as reinsurance contracts are concerned?

The position is the same for reinsurance contracts.

Mediation

Can insurance and/or reinsurance policies in South Korea provide for mediation of disputes? Can such mediation be compulsory?

Yes. The parties to an insurance contract may provide for mediation as the dispute resolution method, which need not be compulsory. It is, however, very rare in practice for mediation to be adopted as a dispute resolution mechanism in an insurance contract in South Korea.

Would mediation have to be undertaken under the auspices of a local mediation body or the local courts and pursuant to local mediation rules, or can the parties agree to use an international mediation centre, mediator and rules of their choice?

Mediation does not have to be undertaken under the auspices of a local mediation body or in accordance with local mediation rules. Parties may freely agree the mediation body and mediation rules.

In 2012, KCAB prepared the Mediation Rule in order to promote their mediation services. Thus, if parties to an insurance contract agree that any dispute may be resolved in accordance with the KCAB Mediation Rule, the mediation will be undertaken under the auspices of KCAB.

Are mediations conducted on the basis that they are confidential and "without prejudice"? If so, how is the "without prejudice" privilege is achieved?

If the parties agree that a mediation shall be confidential and subject to "without prejudice" privilege, or if the mediation rules the parties agree to adopt provide for the same, mediation will be conducted on this basis (KCAB Mediation rules provide for a confidentiality obligation and "without prejudice" privilege).

However, there is no statutory law or regulation in South Korea which imposes a confidentiality obligation or "without prejudice" privilege on the parties to a mediation.

Limitation

What limitation/time bar provisions apply to claims under insurance and reinsurance policies in South Korea? Are there any specific issues or challenges these give rise to?

Under Korean law, the time limit for insurance claims is three years (Section 662 of the Commercial Code). This period starts to run from the date when the accident/incident covered by the insurance policy occurred.

General

Are there any other compulsory dispute resolution rules relevant to insurance and/or reinsurance coverage disputes in South Korea? If so, what are these?

There are no other compulsory dispute resolution rules in Korea.

Though not compulsory, there is a unique coverage dispute resolution method in Korea that individual Insureds frequently use. Where the insurer denies coverage or asserts non-liability for a specific event which the Insured alleges should be covered, the Insured may file an application with the Korea Finance Supervision Service (Insurance Dept) to resolve the pending coverage dispute before the Insured initiates a civil lawsuit against the insurer.

Are there any anticipated/upcoming changes to law and regulation in South Korea which would impact the litigation, arbitration or mediation of insurance disputes in South Korea?

At this moment, there are no anticipated changes to law and regulation which may impact dispute resolution methods in the area of insurance.

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Taiwan

Governing Law

Are direct insurance policies in Taiwan required to be subject to local law? If so, what are the provisions that govern this?

Taiwan law does not expressly require that insurance policies be subject to local law. Nevertheless, since insurance policies sold in Taiwan must be submitted to Taiwan's insurance regulator for approval, and the terms and conditions of insurance policies must comply with Taiwan laws, insurance policies sold in Taiwan usually will stipulate that the governing law is Taiwan law, especially if the policyholder is a consumer.

Is the position the same, or does it differ, for reinsurance contracts?

The position might differ with respect to reinsurance contracts because the parties to reinsurance contracts are usually experienced insurers and reinsurers, and almost all reinsurance policies are provided by the international market. Taiwan courts and Taiwan's insurance regulator tend to let the parties decide which law will be the governing law in reinsurance policies.

Are floating governing law clauses permitted in insurance and reinsurance policies in Taiwan?

The position of Taiwan's insurance regulator on this issue is not very clear. In principle, the parties are free to agree to any governing law clause. However, for direct insurance policies, if the floating governing law clause is unfair to the policyholder (especially if the policyholder is a consumer), that clause might be deemed as invalid by Taiwan courts.

For reinsurance policies, since the parties are usually experienced insurers and reinsurers, such a clause is less likely to be deemed as invalid by Taiwan courts.

Arbitration

Can direct insurance policies in Taiwan provide for arbitration (as opposed to court jurisdiction) as the sole dispute resolution mechanism for coverage disputes? If so, what specific legislation or rules apply to the arbitration of insurance disputes in Taiwan?

Yes, policies can provide for arbitration as the sole dispute resolution mechanism. However, if the policyholder is a consumer, such a provision might be deemed as unfair by a Taiwan court because it restricts the policyholder's right to access the court and it would therefore be considered void (please refer to the Consumer Protection Act).

If a direct insurance policy provides for arbitration as just one of the dispute resolution mechanisms (ie the policyholder has options), such a provision is less likely to be deemed as unfair.

If the arbitration clause is valid, the Arbitration Act and the regulation of the arbitration institution chosen by the parties will rule the arbitration.

Can the parties choose which (local or international) arbitral rules (including any institutional rules) apply, or is their ability to do so restricted by local law or regulation?

In principle, the parties can choose which local or international arbitral rules shall apply. However, if the policyholder is a consumer different rules apply. If the policy provides for foreign arbitral rules and arbitration as the sole means of dispute resolution, such a provision might be deemed as unfair by the Taiwan court and have no binding effect on the consumer.

In general, the court will respect the policy provisions. However, pursuant to Articles 71 and 72 of the Civil Code, if the provisions would violate the imperative or prohibitive provision of the law or will be considered as against public policy or morals, the provisions will be considered as void.

Is there a compulsory default appointing body or authority for the appointment of arbitrators (in the event the parties cannot agree) or can the parties choose the default appointing body (by agreement or pursuant to the institutional rules of their choice)?

According to the Arbitration Act in Taiwan, in principle, the parties can stipulate in the arbitration agreement the default appointing body or specify the institutional rules to be applied when choosing arbitrators. If there is no such stipulation in the arbitration agreement, according to the Arbitration Act in Taiwan, the parties may submit a motion to the court for it to appoint the arbitrator.

If the parties have provided for arbitration in their policy can the Insured nevertheless opt to pursue its claim before the local courts?

If the arbitration clause is valid, no. If one party ignores a valid arbitration clause and files a lawsuit, the opposing party may, before making substantive arguments, submit a motion to the court to stay the court proceedings and request an order that the party file arbitration within a specified period. If the party fails to file

arbitration within the specified period, the court will dismiss that lawsuit.

Does local law or regulation require that the forum of any arbitration is in Taiwan or can the arbitral forum be overseas?

In principle, the parties may choose the forum of arbitration (in Taiwan or overseas). However, if the policyholder is a consumer and the arbitration clause is considered as unfair, the clause regarding the overseas arbitral forum might have no binding effect on the consumer.

Is the position the same on these issues as far as reinsurance contracts are concerned?

As mentioned above, because the parties to reinsurance contracts are experienced insurers and reinsurers, and almost all reinsurance policies are provided by the international market, Taiwan courts and Taiwan's insurance regulator tend to leave such issues to the parties.

Mediation

Can insurance and/or reinsurance policies in Taiwan provide for mediation of disputes? Can such mediation be compulsory?

Insurance and reinsurance policies can provide for mediation of a dispute, compulsory or otherwise. However, if the policyholder is a consumer, such a provision might be deemed unfair and invalid. Under Taiwan's Code of Civil Procedure, mediation is in principle compulsory before filing a lawsuit for claims not exceeding NT$500,000.

Would mediation have to be undertaken under the auspices of a local mediation body or the local courts and pursuant to local mediation rules, or can the parties agree to use an international mediation centre, mediator and rules of their choice?

In principle, the parties can stipulate the use of an international mediation centre, mediator and rules of their choice. However, again, if the policyholder is a consumer, the relevant clause may be considered unfair and have no binding effect on the consumer.

"Are all mediations conducted on the basis that they are confidential and "without prejudice"? If so, how is this achieved?

Yes. According to Article 422 of the Code of Civil Procedure, statements made by the parties and any advice provided by the mediator during a mediation shall not be used in subsequent judicial proceedings if the mediation is unsuccessful. In practice, there is in any event seldom any official record of the mediation unless this has been consented to by parties.

Limitation

What limitation/time bar provisions apply to claims under insurance and reinsurance policies in Taiwan? Are there any specific issues or challenges these give rise to?

Under Article 65 of the Insurance Act, any right arising out of an insurance contract is extinguished if not exercised within two years from the day when it becomes possible to exercise the right. If any of the following circumstances exist, the two-year time period begins as follows:

- If there is concealment, non-disclosure, or misrepresentation on the part of the proposer or Insured in the disclosure of risk, the period commences from the day on which the insurer becomes aware of the situation.
- If, after a risk occurs, an interested party can prove that its lack of awareness was not due to negligence, the period begins from the day on which it becomes aware of the situation.
- If the claim of a proposer or Insured against an insurer arises out of the claim of a third party, the period begins from the day on which the proposer or Insured is presented with the third-party claim.

General

Are there any other compulsory dispute resolution rules relevant to insurance and/or reinsurance coverage disputes in Taiwan? If so, what are these?

Under the Financial Consumer Protection Act, if an insurance coverage dispute is related to a consumer, the consumer can file a complaint with the Financial Ombudsman Institution (**FOI**) for review and a decision. FOI is funded by the Taiwan government and started operation in 2012 to resolve disputes between financial consumers and financial services enterprises (insurance companies are one kind of the so-called financial services enterprises).

Are there any anticipated/upcoming changes to law and regulation in Taiwan which would impact the litigation, arbitration or mediation of insurance disputes in Taiwan?

The Insurance Bureau of FSC anticipates that Taiwan's insurance industry will gradually enter the era of full digitisation after the end of 2022. In March 2020, FSC approved a trial of a new blockchain insurance project called the "Preservation/Claims Alliance Chain", which has brought the insurance industry in Taiwan into the digital age and era of convenience. Under the project, if a person needs to change their address and has multiple policies with different insurers, by updating their data once, it will be shared with other insurers. Furthermore, if a person has multiple insurance policies and makes a claim on one, a blockchain smart contract will notify the other companies with which they have cover to initiate a claim. Looking ahead, more digital information will be used in insurance disputes, and we expect this to impact the procedure of litigation, arbitration or mediation of disputes in Taiwan. With more insurance companies participating in the project, within the next three to five years, we anticipate the system of digital settlement of insurance claims will become more comprehensive.

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Thailand

Governing Law

Are direct insurance policies in Thailand required to be subject to local law? If so, what are the provisions that govern this?

There is no legal requirement that insurance policies in Thailand have to be governed by local law.

However, all insurance policy wordings are required to be approved by the Office of Insurance Commission (**OIC**) before issuance. The OIC generally only approves policies that are governed by local law, unless it can be shown that choosing a foreign governing law would be more beneficial to the Insured. Therefore, in practice most insurance policies are governed by Thai law.

Is the position the same, or does it differ, for reinsurance contracts?

Thai law does not distinguish between insurance and reinsurance contracts, and both types of insurance are regulated by the OIC. However, in practice the OIC does not require individual reinsurance contract wordings to be approved in the same way as direct policies. Reinsurance contracts may, therefore, be subject to a foreign governing law.

Are floating governing law clauses permitted in insurance and reinsurance policies in Thailand?

There is no specific legal authority on floating governing law clauses in Thailand, and a floating governing law clause is, in theory, permissible in reinsurance policies, although this approach is not commonly used.

Arbitration

Can direct insurance policies in Thailand provide for arbitration (as opposed to court jurisdiction) as the sole dispute resolution mechanism for coverage disputes? If so, what specific legislation or rules apply to the arbitration of insurance disputes in Thailand?

The OIC mandates that all direct insurance policies issued for consumers must include a dispute resolution clause in a specified form, which provides that the Insured has the option to refer any dispute under the policy for arbitration under the OIC's rules. In policies that contain OIC's standard clause, it is not possible to stipulate arbitration as the sole dispute resolution mechanism and exclude the option of pursuing a claim before the courts (as a means of protecting the consumer).

The OIC's standard clause will be implied into any consumer insurance policy in which it is absent, other than policies covering commercial (as opposed to consumer) risks, and reinsurance policies. These policies commonly contain dispute resolution clauses that do not refer to the OIC's arbitration procedure.

In other words, direct insurance policies for consumers in Thailand cannot provide for arbitration as the sole dispute resolution mechanism. This is because the OIC does not want consumer insureds to be forced to arbitrate rather than opt for court proceedings.

However, consumer Insureds may voluntarily opt for arbitration after policies have been issued, although such revised policies are not common in the context of consumer policies.

Whether specific policies are to be properly regarded as consumer policies or business insurance policies is not always clear cut and, for example, there is a clear risk that property and business interruption policies issued to large companies can be regarded as consumer policies by the court.

Can the parties choose which (local or international) arbitral rules (including any institutional rules) apply, or is their ability to do so restricted by local law or regulation?

The OIC's standard clause, which is implied into all consumer insurance policies as described above, provides for OIC rules of arbitration where the Insured elects to pursue its claim under arbitration. However, business insurance policies and reinsurance contracts do not need to use the OIC's arbitral standard clause, and parties may opt to arbitrate under any local or international rules, pursuant to the freedoms set out in Thai arbitration law.

Is there a compulsory default appointing body or authority in for the appointment of arbitrators (in the event the parties cannot agree) or can the parties choose the default appointing body (by agreement or pursuant to the institutional rules of their choice)?

The OIC is the default appointing body for the appointment of arbitrators, where the OIC's mandatory arbitration clause applies. The arbitration agreement may also specify a different appointing body, in particular if the parties have agreed to follow certain institutional rules, the relevant institutional body may administer the dispute.

If the parties have provided for arbitration in their policy can the Insured nevertheless opt to pursue its claim before the local courts?

Yes, in respect of direct policies that are subject to the OIC's mandatory arbitration clause (expressly or implied). The Insured has the option of pursuing arbitration proceedings under OIC rules, or commencing proceedings in the Thai Civil Court.

Does local law or regulation require that the forum of any arbitration is in Thailand or can the arbitral forum be overseas?

The prescribed OIC clause requires arbitration proceedings to be conducted under the auspices of the OIC in Thailand. However, the general law on arbitration in Thailand recognises arbitration proceedings pursued in any jurisdiction.

Foreign arbitral awards are recognised and enforceable in Thailand under the New York Convention.

Is the position the same on these issues as far as reinsurance contracts are concerned?

The OIC's mandatory arbitration clause does not apply to reinsurance contracts, therefore, reinsurance contracts commonly contain standard local or international arbitration clauses.

Mediation

Can insurance and/or reinsurance policies in Thailand provide for mediation of disputes? Can such mediation be compulsory?

Yes, provided that the mediation clause is drafted clearly to express the intent and will of the parties, and subject to the approval of the OIC in the case of direct insurance policies.

Would mediation have to be undertaken under the auspices of a local mediation body or the local courts and pursuant to local mediation rules, or can the parties agree to use an international mediation centre, mediator and rules of their choice?

There are no specific restrictions on the ability of the parties to agree to local or international mediation, other than the requirement for approval by the OIC in the case of direct insurance policies.

Are mediations conducted on the basis that they are confidential and "without prejudice"? If so, how is this achieved?

Yes. Mediations, both in court and out of court, are confidential and without prejudice. Neither party can subsequently use any information or document from the mediation against the other party in court or in arbitration. Thailand is a civil law system and there is no common law or judicial precedent concerning the "without prejudice" issue. However, said principle of without prejudice is referenced in Section 29 of the Mediation Act B.E. 2562.

Limitation

What limitation/time bar provisions apply to claims under insurance and reinsurance policies in Thailand? Are there any specific issues or challenges these give rise to?

Insurance and reinsurance claims are subject to a two-year prescription period which starts to run from the date of loss. Problematically, Supreme Court decisions in Thailand have also applied the same two-year limitation period to reinsurance claims, meaning that an insurer's right to claim from its reinsurer could be extinguished before claims have been finalised and settled under the underlying insurance policy.

General

Are there any other compulsory dispute resolution rules relevant to insurance and/or reinsurance coverage disputes in Thailand? If so, what are these?

No, there are no specific compulsory dispute resolution rules for insurance and/or reinsurance coverage disputes in Thailand.

Are there any anticipated/upcoming changes to law and regulation in Thailand which would impact the litigation, arbitration or mediation of insurance disputes in Thailand?

Yes, the Mediation Act B.E. 2562 (2019) allows parties to use out-of-court mediation and submit a settlement agreement for consent judgment from the court. This aims to decrease the number of disputes, including insurance disputes, to be litigated in the court.

On 30 September 2021, the Thai Arbitration Institute introduced an expedited procedure for small claims matters with a maximum claim value of THB 5 million. This would have some impact on small insurance claims.

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Vietnam

Governing Law

Are direct insurance policies in Vietnam required to be subject to local law? If so, what are the provisions that govern this?

Direct insurance policies are regulated by the laws of Vietnam. Vietnamese law provides that if all parties to the contract are Vietnamese, then Vietnamese law must be used. If a party is a foreign individual or entity, then foreign law may be used.

There is currently no restriction under Vietnamese law regarding the choice of law in any kind of insurance policy when there are foreign elements in the contract.

Is the position the same, or does it differ, for reinsurance contracts?

Reinsurance contracts are also regulated by the laws of Vietnam, as described above. Therefore, the parties are free to select the governing law of a reinsurance contract, except in the case that both parties are Vietnamese.

Are floating governing law clauses permitted in insurance and reinsurance policies in Vietnam?

Presently, there are no restrictions applicable to insurance and reinsurance policies in relation to floating governing law clauses. Vietnamese law encourages parties to have the freedom of choice to decide the governing law in a contract, except where both parties are Vietnamese entities.

Parties to a commercial transaction with a foreign element may choose to apply foreign law or international commercial practice if such laws are not contrary to the fundamental principles of the laws of Vietnam.

Arbitration

Can direct insurance policies in Vietnam provide for arbitration (as opposed to court jurisdiction) as the sole dispute resolution mechanism for coverage disputes? If so, what specific legislation or rules apply to the arbitration of insurance disputes in Vietnam?

Subject to the requirement for the arbitration clause to be valid according to Vietnam's arbitration law, a direct insurance policy in Vietnam can provide arbitration as the sole dispute resolution mechanism for coverage disputes. There is currently no restriction under Vietnamese law regarding this.

Arbitration for insurance disputes in Vietnam is governed by the Law No. 54/2010/QH12 on Commercial Arbitration dated 17 June 2010.

Can the parties choose which (local or international) arbitral rules (including any institutional rules) apply, or is their ability to do so restricted by local law or regulation?

The parties are free to decide the applicable arbitration rules, except where both parties are Vietnamese entities. If a party is a foreign individual or entity, then a foreign institution, forum, and arbitral rules may be used.

Arbitrators must respect the agreement of the parties, provided the procedural rules do not contravene any legal prohibitions or social ethics. If the parties do not specify any procedural rules, arbitrators are likely to apply the rules of the arbitration centre administering the arbitration.

Is there a compulsory default appointing body or authority for the appointment of arbitrators (in the event the parties cannot agree) or can the parties choose the default appointing body (by agreement or pursuant to the institutional rules of their choice)?

There is no compulsory default appointing body for the appointment of arbitrators in the event that the parties do not agree the appointing body.

Pursuant to Articles 40 and 41 of the *Law on Commercial Arbitration*, the parties are free to agree on the procedure for the appointment of the arbitrator(s). Within 30 days after receiving the claimant's statement of claim, the parties must agree on the selection of a sole arbitrator or request the arbitration centre to appoint a sole arbitrator. Further, a competent court can, at the request of any party, appoint arbitrators.

If the parties have provided for arbitration in their policy can the Insured nevertheless opt to pursue its claim before the local courts?

When a party brings a claim covered by an arbitration agreement to a local court, the court must refuse to accept the case, unless the arbitration agreement is invalid or incapable of enforcement, or such dispute is between an insurer and an end-consumer (who is buying insurance with the aim of consumption for personal or internal purposes).

With respect to disputes between insurers and an end-consumer, the end-consumer shall have the right to select either arbitration or a court to resolve disputes. Moreover, the insurer cannot

Vietnam (continued)

institute arbitration proceedings without the consent of the insurance buyer, even if an arbitration clause has been included in a standard-form insurance contract, according to the *Law on Commercial Arbitration (Article 17)* and the *Law on Protection of Consumers' Rights (Article 38)*.

Does local law or regulation require that the forum of any arbitration is in Vietnam or can the arbitral forum be overseas?

The parties are free to agree on any arbitral forum for resolving potential disputes arising from their insurance contracts, which can be either in Vietnam or abroad, except where both parties are Vietnamese entities.

Is the position the same on these issues as far as reinsurance contracts are concerned?

The arbitration of reinsurance disputes is subject to the same governing laws as insurance disputes.

Mediation

Can insurance and/or reinsurance policies in Vietnam provide for mediation of disputes? Can such mediation be compulsory?

Disputes arising from insurance and reinsurance policies in Vietnam can be mediated. Mediation is not compulsory, and a choice to use mediation as an alternative dispute resolution method must be agreed between the parties. This must be written in the relevant contract or in a separate agreement.

It is very likely that the Court would uphold a mediation clause and request the parties to complete such mediation prior to pursuing a claim in court.

Mediation is generally encouraged in Vietnam. The Court will usually carry out at least two Court-administered mediation sessions before proceeding with the Court case, regardless of the existence of a mediation clause in the policy.

Would mediation have to be undertaken under the auspices of a local mediation body or the local courts and pursuant to local mediation rules, or can the parties agree to use an international mediation centre, mediator and rules of their choice?

The parties to a commercial contract are free to choose the mediation body, place and rules for a mediation, provided that the choice is in accordance with the international treaties of which Vietnam is a member.

Are mediations conducted on the basis that they are confidential and "without prejudice"? If so, how is this achieved?

In principle, information in relation to a commercial mediation is confidential, unless the parties to the dispute agree otherwise.

If the mediation is not successful and the parties proceed to court, the parties have to disclose certain information and evidence to the Court for their handling. Since the concept of "*without prejudice*" is not specifically mentioned under Vietnamese law, information and evidence gathered during the mediation can still be submitted as evidence to the Court.

To achieve the concept of "without prejudice", the parties will have to specifically agree during the mediation on which type(s) of information and evidence can only be used for mediation, and not for court proceedings. If one party breaches the aforementioned agreement, the other party can request the Court to reject the admission of such evidence.

Limitation

What limitation/time bar provisions apply to claims under insurance and reinsurance policies in Vietnam? Are there any specific issues or challenges these give rise to?

Pursuant to Article 30 of the *Insurance Business Law* and Article 336 of the *Vietnam Maritime Code* (Article 336), statutory time limitations applicable to claims under insurance and reinsurance policies are three years with respect to general insurance contracts and two years with respect to maritime insurance contracts, both commencing from the date on which the dispute arose. However, as there are no statutory regulations guiding the determination of the date upon which a dispute arose, this is likely to be differently interpreted and determined by the local courts in each particular case.

An expired limitation period can be recounted in the event that (i) the obligor has acknowledged a part or all of its obligations to the claimant, (ii) the obligor has acknowledged or fulfilled part of its obligations to the person initiating, or (iii) the parties have reconciled between themselves according to the 2015 Civil Code (Article 157).

General

Are there any other compulsory dispute resolution rules relevant to insurance and/or reinsurance coverage disputes in Vietnam? If so, what are these?

Article 55 of the *Insurance Business Law* provides the limit of insurance liability. Pursuant to Article 55(1), to the extent of the sum Insured, an insurer must pay to the Insured person any amount which, by law, the Insured person is liable to pay in compensation to the third party. An insurer must also pay any costs in relation to resolving disputes as to liability, towards the third party and any interest payable to the third party for late payment of indemnity by the Insured person on the instructions of the insurer (Article 55(2)). However, the total amount payable pursuant to the above two clauses shall not exceed the sum Insured (Article 55(3)).

Are there any anticipated/upcoming changes to law and regulation in Vietnam which would impact the litigation, arbitration or mediation of insurance disputes in Vietnam?

With the introduction of Decree No. 22/2017/ND-CP dated 24 February 2017 on commercial mediation and Law on Mediation or Dialogue at Court dated 16 June 2020 on Court-administered mediation sessions, the Vietnamese government is encouraging the use of mediation and conciliation methods to resolve civil disputes in Vietnam. There is a strong signal from the State

to shift dispute resolution towards out-of-court mechanisms.

The new Insurance Business Law No. 08/2022/QH15 was passed on 16 June 2022 and will take effect from 1 January 2023, with some provisions taking effect five years later (ie from 1 January 2028).

The main changes related to dispute resolution under the new Insurance Business Law are as follows:

- Removal of provision on statute of limitation: In particular, the current three year limitation period from the date the dispute arose conflicts with the Civil Code which provides that the three year limitation period starts from the date the infringed party becomes aware that their right is infringed.
- Amendment to provisions on void insurance policies: The new Insurance Business Law provides a definitive list of the specific scenarios that an insurance policy is rendered null and void. The issue with the current Insurance Business Law is that voidable scenarios may also be subject to other laws, hence there is an increased chance of discrepancies.
- New provision on dispute resolution: Under the new Insurance Business Law, if there is any dispute arising from an insurance policy, the parties must first attempt settlement by amicable negotiation. Only in the case of failed negotiations, can the parties proceed to either mediation, arbitration or court proceedings.
- New provision on exclusion of liabilities clauses: In particular, the insurer must provide evidence that it has explained exclusion clauses to the policyholder and that the policyholder has understood such clauses. Such exclusion clauses do not apply in force majeure events.

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Mark leads RPC's insurance and reinsurance practice in Singapore. He specialises in advising insurers and reinsurers on coverage issues, disputes and recoveries, with a focus on large commercial and industrial property, power and energy, engineering and construction and associated BI/DSU/ICOW claims. Having been based in Singapore for more than 20 years, Mark has experience of most major issues encountered by insurers and reinsurers across Asia during that time. He has significant arbitration experience (in Singapore and internationally) and acts as coordinating counsel on subrogated recovery actions internationally. Mark is consistently ranked in Band 1 by Chambers Asia Pacific, and was lauded for his "expert knowledge and unwavering dedication" – Chambers Asia-Pacific 2021.

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Iain moved to Singapore from the London market in 2010 and has developed a strong regional profile in the marine and offshore sectors. Working in the marine insurance market for over 18 years, Iain covers the full needs of the insurance sectors – providing casualty response and investigations, salvage, coverage, product development and recovery work. In the offshore energy sector, Iain has worked on a number of high profile regional losses in Asia, the Middle East, Africa and further afield. Iain is ranked Band 1 by Chambers Asia Pacific 2022 and noted to be "quick to identify the crux of a matter and to offer solutions to deal with these amicably."

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Alexandra advises clients on a variety of construction, energy and insurance related disputes. Her areas of focus include construction, energy and contractual breaches.

Alexandra has particular experience in advising insurers on construction claims, and with respect to policy coverage. She regularly provides advice to insurers regarding claims against construction industry contractors, architects, engineers and surveyors,. Alexandra has experience practising in both an advocacy and advisory capacity in relation to a variety of disputes. Alexandra is also experienced at using alternative forms of dispute resolution such as arbitration, adjudication and mediation.

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