ICLG

The International Comparative Legal Guide to:

Insurance & Reinsurance 2018

7th Edition

A practical cross-border insight into insurance and reinsurance law

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General Chapters:

1 **Aspects of the Impact of Brexit on UK/EEA Insurance and Reinsurance** – Jon Turnbull & Ivor Edwards, Clyde & Co LLP 1

2 **Cyber Insurance at Lloyd's: Coverage and Regulation of Global Digital Risks** – Patrick Davison & David Powell, Lloyd's Market Association 7

3 **Fire and Wire: Canadian Business Interruption Insurance in the Age of Cyber-Risk and Climate Change** – David R. Mackenzie & Dominic T. Clarke, Blaney McMurtry LLP 14

4 **Brexit Relocations: The Story So Far** – Darren Maher, Matheson 21

5 **Trending Tremors: Cat Bond Developments in Mexico and Latin America** – Leonel Pereznieto del Prado & María José Pinillos Montaño, Creel, García-Cuéllar, Aiza y Enríquez, S.C. 23

6 **Reinsurance in an Era of Sanctions** – Lilia Klochenko & Stanislava Adamaytis, AKP Best Advice 27

Country Question and Answer Chapters:

7 **Australia** MinterEllison: Kemsley Brennan & James Stanton 31

8 **Austria** Vavrovsky Heine Marth: Philipp Strasser & Jan Philipp Meyer 38

9 **Azerbaijan** CIS Risk Consultant Company (insurance brokers) LLP (CIS): Homi Motamedi & Valentina Pan 44

10 **Belgium** Steptoe & Johnson LLP: Philip Woolfson & Alexander Hamels 49

11 **Bermuda** Kennedys Chudleigh Ltd.: Mark Chudleigh & Nick Miles 57

12 **Brazil** Tavares Advogados: André Tavares & Daniel Chacur de Miranda 63

13 **Canada** McMillan LLP: Carol Lyons & Lindsay Lorimer 69

14 **Cayman Islands** Maples and Calder: Abraham Thoppil & Luke Stockdale 78

15 **Colombia** DAC Beachcroft Colombia Abogados SAS: Juan Diego Arango Giraldo & Angela María Hernández Gómez 84

16 **Costa Rica** Cordero & Cordero Abogados: Ricardo Cordero B. 91

17 **Denmark** BECH-BRUUN: Anne Buhl Bjelke & Henrik Valdorf-Hansen 96

18 **England & Wales** Clyde & Co LLP: Jon Turnbull & Michelle Radom 102

19 **Finland** Railas Attorneys Ltd.: Lauri Railas 111

20 **Georgia** CIS Risk Consultant Company (insurance brokers) LLP (CIS): Homi Motamedi & Valentina Pan 117

21 **Germany** Clyde & Co (Deutschland) LLP: Dr Henning Schaloske & Dr Tanja Schramm 121

22 **Greece** Christos Chrissanthis & Partners: Dr. Christos Chrissanthis & Xenia Chardalia 128

23 **India** Tuli & Co: Neeraj Tuli & Celia Jenkins 136

24 **Ireland** Arthur Cox: Elizabeth Bothwell & David O'Donohoe 143

25 **Israel** Gross Orad Schlimoff & Co.: Harry Orad 150

26 **Italy** Legance – Avvocati Associati: Gian Paolo Tagariello & Daniele Geronzi 156

27 **Japan** Chuo Sogo Law Office, P.C.: Hironori Nishikino & Koji Kanazawa 163

28 **Kazakhstan** CIS Risk Consultant Company (insurance brokers) LLP (CIS): Homi Motamedi & Valentina Pan 168

29 **Korea** Bae, Kim & Lee LLC: Jong Ku Kang & Jong Min An 173

30 **Malta** Camilleri Preziosi Advocates: Diane Bugeja & Francesca Galea Cavallazzi 179

31 **Mexico** Creel, García-Cuéllar, Aiza y Enríquez, S.C.: María José Pinillos Montaño & Allan Galileo Olmedo Villegas 186

32 **Netherlands** Dirkzwager advocaten & notarissen N.V.: Daan Baas & Niels Dekker 191

Continued Overleaf →

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Country Question and Answer Chapters:

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

EDITORIAL

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

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

It is divided into two main sections:

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

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

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

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

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

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

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1 Regulatory

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

In Canada, responsibility for lawmaking is shared among the federal government and the governments of 10 provinces and three territories ("provinces"). Under Canada's constitution, there is a division of powers between the federal and provincial governments. The federal government makes laws for the whole of Canada in respect of matters assigned to it by the constitution. Likewise, a provincial legislature has legislative jurisdiction relative to the subject matters over which it has been assigned. In the context of insurance, this jurisdiction is shared but somewhat compartmentalised. The federal government has jurisdiction over the *prudential regulation* (*e.g. solvency*) of insurance companies and other entities that are authorised federally to provide insurance products ("insurers"), while the provinces have authority over the *market conduct* of insurers carrying on business in their jurisdictions. (Although, to be complete, insurers can be provincially incorporated, in which case the province in question regulates solvency as well.) Unlike the rest of the Canadian provinces, which are common law jurisdictions, Québec is a civil law jurisdiction. The general principles of Québec insurance law are contained in the *Civil Code of Québec*.

As a result of the shared constitutional jurisdiction, in Canada, there is a federal insurance regulator, the Office of the Superintendent of Financial Institutions ("OSFI"), and each province has its own insurance regulatory authority; for example, the Financial Institutions Commission in British Columbia, Alberta Treasury Board and Finance, the Financial Services Commission of Ontario and *l'autorité des marchés financiers* ("AMF") in Québec. The provincial insurance regulators are typically government agencies that report to the Minister of Finance of the provincial government.

In Canada, reinsurance is regulated in the same manner as insurance. There are no separate regulators, although different rules will apply given the nature of reinsurance, some of which are discussed below.

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

Forms of insurance business

There are two main vehicles for establishing an insurance business in Canada federally: incorporation of a Canadian insurance company; and qualification of a Canadian branch of a foreign insurance company. Insurers may also carry on business in Canada in other forms, such as a fraternal benefit society or a reciprocal exchange, and may be incorporated under the laws of a province. For simplicity, this discussion is restricted to insurers carrying on business in Canada as a company or a branch and whose primary regulator is OSFI. The information requirements and timing for incorporation of a Canadian company and establishment of a Canadian branch are very similar. Both involve an extensive approval application to OSFI. Since a branch is not a separate legal entity from the foreign insurer, one of the main differences between the two vehicles is that a Canadian insurance company requires a board of directors and mandatory board committees, and is subject to the OSFI *Corporate Governance* guideline which contains comprehensive requirements for board and committee oversight. Although a branch operation does not have a board, OSFI requires the Chief Agent of a branch to fulfil many of the corporate governance functions required of a board of a Canadian company. Despite the legal distinction between a company and a branch, from an accounting perspective (e.g. financial and regulatory reporting), the branch is treated as a separate entity. The requirements for incorporation or qualification of a reinsurer are no different than those applicable to a primary insurer, although the business plan, for example (discussed below), would be tailored appropriately if the insurer proposes to limit its activities to the business of reinsurance. In addition, reinsurers may apply to be exempted from certain consumer-related requirements, such as the requirement to establish procedures for dealing with consumer complaints if they do not deal directly with individuals.

Although there are a number of insurers that are incorporated under the laws of a Canadian province, most of the largest insurance companies in Canada are federally incorporated, and many companies that were originally incorporated provincially have migrated into federal jurisdiction where the legislation is comparatively modern and solvency regulation is more robust. One provincial insurance regulatory authority (Ontario) recently considered putting a moratorium on the incorporation of insurance companies under its provincial laws, and requiring existing insurers incorporated in that province (other than reciprocal exchanges and farm mutuals) to transfer to federal jurisdiction or another jurisdiction where the insurer is subject to supervision that meets the new solvency standards set by the International Association of Insurance Supervisors ("IAIS").

Focus of OSFI review – business plan

If an applicant wishes to incorporate a Canadian insurer federally, or establish a Canadian branch, the focus of much of OSFI's review will centre on the proposed business plan that is submitted with the application, including the actuarial calculations and proposed initial capital. The business plan must be comprehensive and include, among other things, descriptions of the proposed activities (by line of business), a complete market analysis/feasibility study, identification of sources of capital, as well as *pro forma* financial statements and solvency ratio calculations, in each case for three years following start up. The business plan must be stress-tested for the three-year period. OSFI, including its actuarial staff, will probe and assess the business plan, including in particular the actuarial calculations and stress testing. The amount of initial capital that OSFI will ultimately require will be determined based on the business plan's contents, stress testing and OSFI's own assessment. OSFI may require the amount of initial capital to be sufficient to maintain at least a 300% solvency ratio for the first three full years of operation.

Summary information for Federal Applications – incorporation and branch

The following chart contains a summary of the processes and requirements to incorporate a Canadian insurer federally and to qualify a Canadian branch, based on OSFI's issued guidance and instructions.

	Incorporation	Branch
Application timeframes	Approximately 12–18 months	Approximately 12–18 months
Application form	■ Letters Patent; and ■ Order to Commence and Carry on Business	Order approving the Insuring in Canada of Risks by a foreign entity
Minimum OSFI Fees	Cdn. $32,000	Cdn. $32,000
Estimated fees for provincial licences – all provinces	Cdn. $65,000	Cdn. $65,000
Minimum capital required	Company to have a minimum of Cdn. $5 million paid in capital (or such greater amount specified by the Minister, e.g. based on the proposed business plan) ■ Business plan to support a regulatory solvency ratio of the proposed company of at least 300%	■ Life: applicant to have consolidated assets of Cdn. $1 billion; capital and surplus of 5%–10% of liabilities ■ Non-life: applicant to have consolidated assets of Cdn. $200 million; capital and surplus of 20% of assets ■ Branch to vest and maintain in trust account under the control of OSFI a minimum of $5 million for three years; business plan to support a regulatory solvency ratio of the branch of at least 300%
Information requirements	Regulatory information for applicant (details of ownership and financial strength; regulation in applicant's jurisdiction, etc.) ■ Financial information (financial statements for applicant, comprehensive business plan for the company – *pro forma* financial statements and solvency test calculations – planned reinsurance arrangements) ■ Criminal background checks for principals and senior officers ■ Copies of governance, risk management and compliance policies and procedures to be submitted	Regulatory information for applicant (details of ownership and financial strength; regulation in applicant's jurisdiction, etc.) ■ Financial information (financial statements for applicant, comprehensive business plan for the branch – *pro forma* financial statements and solvency test calculations – planned reinsurance arrangements) ■ Criminal background checks for Chief Agent and senior employees ■ Copies of governance, risk management and compliance policies and procedures to be submitted
Entity infrastructure/ advisors	Board of directors and statutory and regulatory governance committees (Audit, Conduct Review, Corporate Governance, Risk) ■ Management of Oversight Functions: Finance; Actuarial; Risk Management; Compliance; and Internal Audit ■ Appointed Actuary ■ Governance, risk management and compliance policies and procedures ■ Information Technology ■ External Auditor ■ Peer Review Actuary	■ Chief Agent ■ Management of Oversight Functions: Finance; Actuarial; Risk Management; Compliance; and Internal Audit ■ Appointed Actuary ■ Governance, risk management and compliance policies and procedures ■ Information Technology ■ External Auditor ■ Peer Review Actuary

	Incorporation	Branch
Other	■ Pre-notification publication requirements ■ Name clearance ■ "Support principle" acknowledgment by controlling shareholder ■ "Letter of commitment" regarding notification of material changes to business plan ■ Membership in industry compensation association ■ OFSI on-site review of operations ■ Initial capital injection ■ OSFI approval of any proposed reinsurance by the company with a non-Canadian licensed affiliate	■ Pre-notification publication requirements ■ Name clearance ■ "Letter of commitment" from senior officer of applicant regarding notification of material changes to business plan ■ Membership in industry compensation association ■ OFSI on-site review of operations ■ Establish branch trust account and trust agreement with OSFI, applicant and custodian ■ OSFI approval of any proposed reinsurance by the branch with a non-Canadian licensed affiliate

Provincial licensing

Once qualified as a federal insurance company or branch, the insurer will be required to obtain a licence in each province in which it intends to carry on business. Generally, to attract licensing requirements, the provincial legislation contemplates that the insurer has some kind of presence and/or carries on insuring activities in the province. However, at present, at least three provinces require licensing if the risk (e.g. person or property) or peril is located in the province. Although the legislation of each of the 13 provincial jurisdictions varies, the Canadian Council of Insurance Regulators ("CCIR"), which is an association made up of the insurance regulators of each province and a representative of OSFI, has put together a standardised application form which can be used for applying for a licence in all 13 jurisdictions. Although the CCIR form is standardised, each jurisdiction will conduct its own evaluation of the application and may require additional information and documentation. The depth of provincial review and analysis can vary widely. Accordingly, timeframes for issuance of provincial licences also vary (roughly ranging from one to six months or even longer) and certain provinces may not entertain the insurer's application until after the OSFI qualification process has been completed and the insurer has been fully capitalised.

Compliance with other statutes

If there is a foreign bank in the applicant's corporate group, there are restrictions under the *Bank Act* (Canada) with respect to having a financial establishment in Canada, so that the provisions contained in that statute will have to be reviewed for compliance. Where the applicant is not Canadian, the establishment of a new Canadian insurance business may require a notification filing under the *Investment Canada Act*.

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

The extent to which an unlicensed foreign insurer can write direct business in Canada depends on certain factors. That said, "fronting" arrangements, where a foreign insurer reinsures the business underwritten by a Canadian-licensed direct writer that acts as a "fronter", are as common in Canada as in other jurisdictions. However, they are generally discouraged by OSFI (the Canadian federal insurance regulator).

OSFI Advisory on insuring risks

In 2009, OSFI finalised its Advisory entitled *Insurance in Canada of Risks*. The Advisory describes the circumstances in which a foreign insurer is required to be licensed by OSFI. The Advisory goes hand in hand with changes made to the *Insurance Companies Act* in 2007 (and implemented in 2010). It clarifies that OSFI's approach in determining whether licensing is required for particular insurance transactions is to concentrate on the *location of the insuring activities* rather than the *location of the risk*. As a result, from an OSFI perspective, depending on where the insuring activities (e.g. promoting, soliciting, underwriting, collection of premiums, etc.) take place, foreign insurers may not have to be licensed, and existing licensed branch operations in Canada may not be required to record on the books of their branch operations Canadian risks directly underwritten by them.

Provincial licensing requirements

On the other hand, most of the Canadian provinces and territories ("provinces") – which regulate insurance in their respective jurisdictions – require insurers to be licensed in circumstances where the insurer is *carrying on* or *transacting* insurance business in the jurisdiction, generally determined by enumerated activities that are somewhat similar from jurisdiction to jurisdiction. Most typically, the insurer is caught by the licensing requirements if it has some presence or carries on some activity in the province. However, the legislation in British Columbia (which was amended following OSFI's issuance of the Advisory) and Alberta deem an insurer to be carrying on business in the province if the risk or subject matter of the insurance is property or a person *located in the province*. Manitoba's legislation contains a somewhat similar deeming provision.

Federal and provincial discrepancies and CCIR undertaking

The upshot of the Advisory, taken together with certain provincial legislative changes undertaken in reaction, resulted in discrepancies between the OSFI's approach to licensing – that is, based on the location of the insuring activities in accordance with the Advisory – and the approach of some provincial legislation. It is possible for foreign insurers to insure risks in a manner that, under the Advisory, would not require OSFI licensing, but, for the same transaction, the foreign insurer could be caught by provincial licensing requirements. Ultimately, through the CCIR, provincial regulators requested foreign companies with existing branch operations in Canada to sign, on a voluntary basis, an undertaking stating that, to the extent they insure risks in a manner that would require licensing under provincial legislation, they agree to conduct their insurance activities such that the transaction would constitute *insuring in Canada a risk* under the federal *Insurance Companies Act* (i.e. under the Advisory). By signing the undertaking, foreign insurers with existing branches in Canada have obligated themselves to report the particular business on the books of their Canadian branches (and to maintain corresponding reserves vested in their Canadian branches' trust accounts). Thus, provincial regulators have taken steps to ensure that assets are maintained in Canada in circumstances where foreign insurers are insuring risks or persons located in their jurisdictions.

Unlicensed insurance

In addition to each province's unique indices for carrying on business, most provincial jurisdictions have a regime for "unlicensed insurance". In many cases, an insurance broker with a special licence is required to be involved in the insurance transaction and there are various limitations and other requirements, including in particular reporting of transactions – either by the insured or, where required, by the special broker – for the purpose of the collection of premium taxes and/or application of penalties for unlicensed insurance, depending on the jurisdiction. For example, the charge exacted in Alberta for unlicensed insurance is between 10% and 50% of the premium, depending on whether the insurance is available from Alberta-licensed insurers. These provincial charges are in addition to the federal excise tax of 10% that applies to unlicensed insurance (other than reinsurance and life, among other specified exceptions).

In some provinces, it is an offence for residents to enter into insurance contracts with unlicensed insurers without following the requirements for unlicensed insurance in their regimes. In a number of jurisdictions, the onus is on the unlicensed insurer to ensure that conditions are met before the insurance contract is concluded and losses are inspected and adjusted. In a few provinces, adjusting a loss in the province is one of the indices of carrying on business, and this activity is expressly permitted, without a licence, if the unlicensed insurance regime of that province is complied with. However, this important issue is not dealt with uniformly across the country. In the majority of provinces, prosecuting or maintaining an action in the province in respect of a contract of insurance is also one of the indices of carrying on business and requires licensing. But, unlike loss inspection and adjustment, there is no specified relief from this licensing requirement even if the unlicensed insurance regime is followed. Unlicensed insurers could be faced with potential barriers to the enforcement of their rights under policies.

Unlicensed reinsurance

Certain provincial legislation exempts insurers from the licensing requirements in the province provided that, among other things, the insurer's business in the province is limited to reinsurance. This may present problems if, for example, a foreign insurer wishes to underwrite direct business, as well as reinsurance, in Canada on an unlicensed basis. Other provincial legislation permits provincially licensed insurers to reinsure risks in respect of a contract made in the province with an unlicensed reinsurer, provided the reinsurer's business is transacted outside the province. The lack of uniformity of provincial requirements poses issues for reinsurers wishing to ensure that their reinsurance activities are within legal boundaries in each provincial jurisdiction.

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

As indicated above, the Canadian provinces have jurisdiction over marketplace regulation. Each province has an insurance statute that prescribes certain rights and obligations, mainly on the side of consumer protection, that are deemed to be included in contracts of insurance, depending upon the class of insurance. For example, in Ontario, the entire automobile insurance policy is prescribed by the *Insurance Act* (Ontario). Provincial legislation deals both with the form and the content of contracts of insurance, and includes rules regarding disclosure and misrepresentation in negotiations, entry into force, content of policies, notice and proof of loss, valuation of loss, third party rights and termination of contracts, amongst others. The general principles of Québec insurance law are contained in Chapter XV of the Civil Code of Québec. For the most part, the rules governing insurance in Québec are similar to those elsewhere in Canada. Some of the Civil Code's articles under property insurance are devoted exclusively to fire insurance.

In addition to provincial statutory provisions, courts in the Canadian common law provinces recognise the principle of utmost good faith as a foundational element of insurance contracts, and contracts of insurance are interpreted accordingly. Although the duty of utmost good faith (or *uberrimae fidei*) as recognised in Canada was initially articulated as a duty on the part of the insured to disclose to the insurer all facts material to the risk, it has become an implied obligation in every insurance contract that the insurer will also deal with claims fairly and in good faith.

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

It is a basic principle of Canadian corporation law that a company is permitted to indemnify its directors and officers. The *Insurance Companies Act* (Canada), being the federal statute that governs the vast majority of incorporated insurers, essentially provides for a broad indemnification of directors and officers in respect of any civil, criminal, administrative, investigative or other proceeding in which they are involved because of their association with the company. However, the right to indemnify is conditional upon the director or officer having:

(a) acted honestly and in good faith with a view to the best interests of the company; and

(b) had reasonable grounds for believing that their conduct was lawful, in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty.

In addition, a director or officer is entitled to be indemnified by the company if they:

(c) were not judged by the court to have committed any fault or omitted to do anything that they ought to have done; and

(d) fulfil the conditions in (a) and (b) above.

A company is also entitled to purchase and maintain insurance for the benefit of its directors and officers.

1.6 Are there any forms of compulsory insurance?

Compulsory insurance in Canada comes in many shapes and sizes, generally intended to provide an indemnity to innocent parties against liability or errors and omissions on the part of the person insured. Just a few examples include:

- minimum automobile liability insurance for drivers;
- minimum errors and omissions insurance for insurance intermediaries;
- minimum errors and omissions insurance for lawyers and other professionals; and
- medical liability insurance for physicians in private practice.

Canadian laws requiring compulsory insurance are expanding, possibly as a result of recent world events. For example, Transport Canada is in the process of introducing regulations requiring owners and operators of commercial and public purpose vessels to carry mandatory liability insurance for passenger injuries or deaths.

Canada is unique in comparison to other countries in that it has a number of "compulsory" social insurance programmes. The National Health Insurance Program is designed to ensure that all insured persons (generally, permanent residents) have access to medically necessary hospital and physician services on a prepaid basis. Similar social insurance programmes include the Canada Pension Plan, which every Canadian (other than residents of Québec) contributes to and benefits from. In Québec, the Québec Pension Plan is a compulsory public insurance plan that provides persons who have worked in Québec with basic financial protection in the event of retirement, death or disability. The Canadian Employment Insurance ("EI") programme offers temporary financial assistance to Canadians who have lost their employment through no fault of their own. In certain cases, premiums for these insurance benefits are wholly or partially funded by the individual's employer.

2 (Re)insurance Claims

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

Canadian insurance law generally favours the protection of the insured. Both the common law and regulatory controls in this area are more likely to give the insured the benefit of the doubt, leaving it up to insurers to prove why a consumer's rights should be limited or denied.

For example, there is a general presumption that an insured has complied with its disclosure obligations during the negotiation of the insurance contract. The burden therefore always rests on the insurer to prove that the insured has breached its duty of disclosure. The insured benefits from the assumption at common law that he or she has acted in good faith.

Canadian insurance contracts are also subject to the *contra proferentem* rule, meaning that any ambiguities in a policy are to be interpreted in favour of the party who did not dictate its wording. In that insurers most often provide standard form contracts, this typically implies that insureds benefit from a reading of ambiguous clauses that favours their interests.

Furthermore, Canadian case law has indicated that insurance policies are to be interpreted broadly, with any limits to coverage construed narrowly. Again, this favours the insured by presuming the broadest level of coverage.

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

Generally speaking, the principle of privity of contract applies to insurance contracts. This means that only parties to the contract itself may either benefit from it or be bound by its obligations, and would typically exclude a third party from bringing a direct action against an insurer.

There are, however, some exceptions to the principle of privity of contract in the context of insurance law. Sometimes, third parties may join the contractual relationship by acquiring rights directly from the insured, thereby becoming assignees to the contract. Assignments may occur voluntarily, wherein the insured transfers or sells either the insured object (a house, for example), the insurance policy itself, or the insured's right to receive benefits under the policy to the third party assignee. Assignments can also occur without the insured's consent or by operation of law, for example, upon the bankruptcy or death of the insured.

Sometimes a third party can also become a beneficiary to an insurance contract without actually joining the contractual relationship. Third party beneficiaries are persons who are found to have been within the contemplation of the insurer and the insured when the contract was negotiated and who are therefore exceptions to the principle of privity. For example, an individual who can establish that the insured was acting as his or her trustee or agent when negotiating the insurance contract may be able to sue the insurer if the insured is also joined to the action.

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

Reinsurance is essentially insurance for insurers. The contractual relationship thus exists between the insurer and the reinsurer, and the individual insured is not a party to this contract. Absent any contractual provision establishing a relationship between them, the insured cannot bring a direct action against a reinsurer.

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

Where the insurer can prove, on a balance of probabilities, both that an insured breached its duty of disclosure by intentionally not disclosing or misrepresenting a material fact, and that this non-disclosure prejudiced the insurer, the insurer has three options. Provided that the insurance contract and legislation do not state otherwise, the insurer may: (a) repudiate the contract and repay the premiums paid by the insured after the date of the breach; (b) treat the contract as valid and continuing despite the breach; or (c) treat the contract as valid but subsequently cancel it in accordance with statutory provisions authorising unilateral termination.

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

A material fact is one which, if disclosed, would have adversely affected a reasonable insurer's decision to provide insurance coverage or to do so at that low of a premium. An insured's duty to disclose applies to all material facts within his or her knowledge, irrespective of whether the insurer specifically inquires about them. Conversely, Ontario courts have indicated that not all questions asked by an insurer on an insurance application form are automatically considered to be material.

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

The right to subrogation exists independent of legislation and the terms of individual insurance policies. Under the common law, where the insured has an enforceable right against a third party to recover at least part of his or her losses, and the insured has been fully indemnified, the insurer has the right to subrogate. No separate clause in the insurance policy is required in order for this right to arise.

Legislation has expanded the common law right to subrogation to make it even more accessible by fire and marine insurers. In these instances, statutory provisions give insurers the right to subrogate even if the insurer has only partially indemnified the insured.

Conversely, Ontario's statutory "no fault" auto insurance scheme has considerably restricted the availability of subrogation by insisting that an insured who suffers property damage or personal injury must seek compensation from his or her own insurer irrespective of who is at fault for the damage. Any additional claims against other parties are seriously restricted by statute.

Finally, an individual insurance policy may contain clauses that expand or limit an insurer's common law subrogation rights. Where the right is limited, the clause must be clearly and specifically worded to that effect.

3 Litigation – Overview

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

In Ontario, commercial insurance disputes are generally commenced in a Superior Court. For claims under Cdn. $25,000, the Small Claims Court has jurisdiction. Claims in excess of Cdn. $25,000 but less than Cdn. $100,000 can be commenced under the simplified procedure, whereas claims in excess of Cdn. $100,000 are dealt with using the ordinary civil procedure. A party can opt for a jury at the time that it commences an action, although claims for declaratory relief or forfeiture cannot be heard by a jury. Most claims in Ontario are adjudicated by a judge as opposed to a jury.

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

The waiting time between the initiation of a commercial claim and the final date for trial depends on a number of factors, including the complexity of the legal issues to be argued, the availability of judges, the number of parties and experts involved, the anticipated length of the trial, whether any interlocutory steps are initiated, and the pace at which the parties advance the litigation.

Parties whose matters are being heard in the Superior Court should be prepared for a three- to five-year wait, while those proceeding under the simplified procedure may have a trial date within 18–24 months of the matter being set down for trial.

4 Litigation – Procedure

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

In Ontario, parties to a proceeding have a two-part discovery obligation. First, parties have a continuing duty to disclose the existence of all documents that are relevant to the action, and to produce for inspection by the other parties all such documents over which it is not claiming privilege. Second, each party must be examined for discovery, meaning that he or she must submit to oral questioning under oath about the subject matter of the action before the trial.

A party must always disclose and produce any insurance policy under which an insurer may be liable to satisfy all or part of a judgment resulting from the action, although no information concerning that policy is admissible as evidence unless it is relevant to an issue in the action. This rule exists to promote settlement by enabling each party to know what coverage may be available to satisfy an order.

Where a party fails to disclose or produce a relevant document, the court may order any number of remedies, including that the document may not be used at trial, that a party may not participate in examinations for discovery, and even that an action or statement of defence be dismissed or struck out.

Non-parties may also be subject to court orders related to disclosure and discovery. A party may move for the production of a document in the possession of a non-party. The motion will be granted in rare cases where the document is relevant to a material issue in the action and when it would be unfair to require the moving party to proceed to trial without having had the opportunity to inspect that document.

Likewise, a party may move for leave from the court to examine for discovery a non-party who there is reason to believe has information relevant to a material issue in the action. A fairly stringent test must be satisfied before any such order will be granted.

A court may order a party to disclose relevant documents in the possession of the party's subsidiary or affiliated corporation, even if the latter is not party to the litigation.

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

A party can object to the production of documents that it believes fall within any of these three classes of privilege. The party must nonetheless disclose the existence of these documents by listing and providing a brief description of each one, along with the date of the document and the type of privilege claimed, in a Schedule B to the Affidavit of Documents required as part of documentary discovery.

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

A party who requires the attendance of a person in Ontario as a witness must serve the witness with a summons to attend the trial. A summons may also require a witness to produce, at trial, specific documents or other items in the witness's possession.

The courts have the power to enforce a summons and can find any witness who does not attend the trial and give evidence to be in contempt of court. In some circumstances, a witness who does not attend can be arrested and brought before the court to explain his or her absence and testify before potentially being fined or even incarcerated.

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

When a witness is unable to attend the trial – for example, due to illness or because he or she lives outside of Ontario – a party may, with leave from the court or on consent of the parties, arrange for the evidence of a witness to be taken by examination before the trial. The witness may be examined, cross-examined, and re-examined in the same manner as he or she would have been at trial. The transcript or video of that person's testimony can then be tendered as evidence at the trial.

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

In Ontario, parties are limited to calling three expert witnesses, unless they successfully move for leave from the court to call additional experts.

Before an expert witness can testify at trial, the party who proposes that the expert witness testify must serve on all other parties a pre-trial report setting out the expert's findings, opinions and conclusions on the matter. This report must include a number of details, including the factual information, documents, data and assumptions used by the expert in reaching his or her conclusion(s), as well as his or her employment, education and qualifications.

In a motion by a party or on the judge's own initiative, a judge may appoint one or more experts to inquire into and report on any question of fact or opinion relevant to an issue in the action.

All experts – whether court- or party-appointed – have a duty to provide opinion evidence that is fair, objective, non-partisan, and related only to matters within that expert's area of expertise. Experts also have a duty to provide such additional assistance to the court as may be required to determine a matter. The duty of party-appointed experts to the court therefore prevails over any obligation owed by the expert to the party by whom he or she was hired.

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

A variety of interlocutory or time-limited injunctions are available to litigants in Ontario. Parties may move for prohibitive injunctions, seeking to prevent the other party from doing something – for example, a *Mareva* injunction to restrain another party from disposing of its assets. Parties may also move for a mandatory injunction to force the other side to take a positive action – for example, an *Anton Piller* order requiring the other party to preserve specific evidence.

Interestingly, a potential litigant in Ontario who wants information from a third party before commencing litigation may move for what is known as a *Norwich* order. A *Norwich* order is a pre-action remedy that compels a third party to provide certain information or documents even in advance of an action being commenced.

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

Generally, a litigant has the right to appeal a final decision of a court of first instance without requiring leave. Appeals in Ontario may be heard by the Superior Court, the Divisional Court, or the provincial Court of Appeal, depending on the level of court of first instance and, in certain cases, the amount of damages in issue. Appeals from decisions of the Ontario Court of Appeal may proceed, with leave, to be considered by the Supreme Court of Canada when a matter of national importance is involved.

Appeals from interlocutory orders may also be heard if the appropriate leave is obtained. Again, the court that hears the appeal will depend on the level of court of first instance and the amount of damages in issue.

Appeals are typically limited to issues of law and not of fact. Generally, the appellate court makes its decision on the basis of the record that was before the court below, and new trials are rarely ordered in civil matters.

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

Both pre- and post-judgment interest are recoverable in Ontario. The rates are posted quarterly on the Attorney General's website. The current rate for pre-judgment interest (for causes of action arising after October 23, 1989) is 1.3%, while the current post-judgment rate is 2.0%.

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

When it comes to lawyers' fees and disbursements in litigation, Ontario is a "loser pays" jurisdiction. The general rule is that any party who loses a lawsuit (or a motion or other proceeding for that matter) must pay the winning party's legal fees and disbursements. Thus, under the normal operation of the "loser pays" rule, defendants will be ordered to pay the plaintiffs' costs if the plaintiffs are successful in recovering any damages at trial. Conversely, the plaintiffs will be ordered to pay the defendants' costs if the plaintiffs' case is dismissed.

The amount recovered under this costs rule is generally not 100% of the actual fees and disbursements incurred. Instead, the amount is determined according to a published scale. There is also a fair amount of discretion used by the court in fixing the quantum of costs to be recovered.

There are two cost scales that are used to determine the amount of recoverable costs: the "partial indemnity" scale; and the "substantial indemnity" scale. The partial indemnity scale is the one most often applied, and it will usually result in a recovery of 50 to 70% of the actual costs incurred by the winner. The substantial indemnity scale is applied only in special circumstances. That scale will usually result in a recovery of 70 to 80% of the actual costs incurred.

A defendant can alter the operation of the normal costs rule in its favour by serving a written offer to settle. If the plaintiffs were to establish defendants' liability at trial but were to obtain a judgment less favourable than the offer, the plaintiffs would recover costs on the partial indemnity scale only up to the date of the settlement offer. More importantly, the plaintiffs would have to pay the defendants' costs on the partial indemnity scale from the date of the offer to the end of trial. In other words, by failing to "beat" the defendants' offer, the plaintiffs would have to pay a substantial portion of the defendants' fees and disbursement even though the plaintiffs were technically the "winner" at trial.

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

Mediation has become a significant feature of civil litigation in Ontario. Indeed, mediation is now mandatory for claims commenced in Ottawa, Toronto, Windsor and Essex County. Mediation in these jurisdictions must take place within 180 days of the first defence being filed.

Per Ontario's *Insurance Act*, where a party alleges loss or damage from bodily injury or death as a result of the operation of a vehicle, any insurer defending the claim must submit to mediation at the request of either party. This mediation is therefore mandatory irrespective of where the claim is commenced.

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

A party who refuses to submit to mediation or who mediates in bad faith can face cost consequences, including the quantum of costs being set on a substantial indemnity scale. For example, in 2010, an Ontario insurer who refused to participate in mandatory mediation in an automobile case faced a "remedial cost penalty" of an additional Cdn. $40,000 on top of being ordered to pay the plaintiff's legal costs on a partial indemnity scale.

In some exceptional cases, a claim may even be dismissed or a defence struck for failing to mediate where it is compulsory.

5 Arbitration

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

Canadian courts have taken a relatively hands-off approach to a parties' individual arbitration agreements, favouring the parties' autonomy both in opting for arbitration and in designing the arbitration proceedings.

Where a jurisdictional question arises, Canadian courts are not quick to oust arbitration clauses in favour of adjudication. The general principle is that parties should be required to resolve their disputes by arbitration where they have agreed to do so.

This non-interventionist approach is further reflected by Ontario's *Arbitration Act*, which has introduced major limits to the ability of Ontario courts to intervene regarding the content of arbitration clauses. The courts may now only intervene: to ensure that arbitrations are conducted in accordance with the arbitration agreement; to prevent the unequal or unfair treatment of parties; or to enforce awards.

There are also limited circumstances in which a court may intervene to assist with the conduct of the arbitration. For example, where the parties cannot mutually agree on which arbitrator(s) should conduct the proceeding, a court may, on application by a party, intervene to appoint the arbitrator(s).

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

Parties can opt to engage in arbitration either by specifying it as the preferred or mandatory form of dispute resolution in their original agreement, or by jointly electing to submit to arbitration after a dispute has arisen. In Ontario, arbitration agreements may be made orally or in writing.

Much of the case law suggests that language reflecting the parties' intention for the dispute to be covered by arbitration is sufficient to make an arbitration clause enforceable. However, recent Ontario court decisions have signalled a need to reconsider the use of boilerplate or standard terms arbitration clauses. Courts are more closely scrutinising the scope of arbitration clauses and are increasingly more open to finding that a dispute is not covered by the wording of the clause. Care should be taken to draft an arbitration clause broadly enough to cover the intentions of both parties.

Arbitration clauses are typically treated as severable from the main agreement, such that the rest of the contract will stand even if the arbitration clause is found by a court to be unenforceable.

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

A court can refuse to enforce an arbitration clause if: (a) a party entered into the agreement while under a legal incapacity; (b) the arbitration agreement is invalid; (c) the motion to stay proceedings was brought with undue delay; or (d) the matter is a proper one for default or summary judgment.

There are also some subject matters which are not capable of being arbitrated under Ontario law. Courts can refuse to enforce arbitration clauses in these instances. Arbitration clauses in insurance contracts, however, have generally been upheld and are not statute-barred.

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

In appropriate circumstances, courts can support the arbitration process by granting any of the aforementioned interlocutory injunctions. Courts may also order an anti-suit injunction, compelling parties to submit to the arbitration process before being able to pursue civil litigation. Finally, courts are able to order security for costs or receiverships to ensure that there are sufficient funds to cover an award that may result from any ongoing arbitration.

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

In Ontario, arbitrators must justify an award with written reasons, unless the award was made on consent of the parties. There is some recent case law to suggest that parties may be able to agree to dispense with the requirement for written reasons in their arbitration agreement; however, this has only been allowed, thus far, in the context of international arbitration.

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

The court's respect of the principle of party autonomy also extends to the right of appeal. Parties are typically empowered to specify in the arbitration agreement what right of appeal, if any, exists.

Where the arbitration agreement is silent as to appeals, a party may appeal to the court, with leave, on a question of law. Leave will only be granted where the importance to the parties of the matters at stake justifies an appeal, and where a determination of the question of law would significantly affect the rights of the parties.

A party may also apply to the court to set aside an arbitrator's award. The court will grant the application and set aside the award if one of the 10 circumstances listed in the *Arbitration Act* exists. Examples include where the arbitration agreement is invalid, or where the applicant was not treated equally or fairly during the arbitration process. The court may also remit the award to the arbitrator and give directions about the conduct of the arbitration.

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