

GETTING THE
DEAL THROUGH 

Insurance Litigation 2015

Contributing editor

Barry R Ostrager

Simpson Thacher & Bartlett LLP

Publisher
Gideon Robertson
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Business development managers
Alan Lee
alan.lee@lbresearch.com

Adam Sargent
adam.sargent@lbresearch.com

Dan White
dan.white@lbresearch.com



Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

© Law Business Research Ltd 2015
No photocopying: copyright licences do not apply.
First published 2014
Second edition
ISSN 2055-236X

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of March 2015, be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



CONTENTS

Argentina	5	Korea	42
Daniel Alejandro Russo and Carlos A Estebenet Bulló Tassi Estebenet Lopera Torassa Abogados		Sung Keuk Cho and Dong-Hyun Kim Cho & Lee	
Bermuda	8	Mexico	45
Jan Woloniecki ASW Law Limited		Aldo Ocampo and Jesús Salcedo Bufete Ocampo, Salcedo, Navarro y Ocampo, SC	
Brazil	11	Portugal	48
Ilan Goldberg and Pedro Bacellar Chalfin, Goldberg, Vainboim & Fichtner Advogados Associados		Margarida Lima Rego and Andreia Guerreiro Morais Leitão, Galvão Teles, Soares da Silva & Associados	
Bulgaria	15	Romania	52
Irina Stoeva and Vania Todorova Stoeva, Kuyumdjieva & Vitliemov		Dragos-Mihail Daghie and Nora Andreea Daghie Daghie & Asociații	
China	19	Russia	56
Zhan Hao AnJie Law Firm		Rustam Kurmaev, Anton Gusev and Dmitry Kletochkin Goltsblat BLP	
Denmark	24	Spain	58
Henriette Gernaa, Morten Midtgaard Pedersen and Miya Cara Akselgaard Gorrissen Federspiel		Jorge Angell LC Rodrigo Abogados	
France	28	Switzerland	62
Marie-Christine Peyroux Lefèvre Pelletier & Associés		Dieter Hofmann and Daniel Staffelbach Walder Wyss Ltd	
India	32	Turkey	65
Neeraj Tuli and Rajat Taimni Tuli & Co		Pelin Baysal and Bensu Aydin Gün + Partners	
Italy	36	United Kingdom	69
Alessandro P Giorgetti Studio Legale Giorgetti		Joanna Page and Petya Farnhill Allen & Overy LLP	
Japan	39	United States	74
Keitaro Oshimo Nagashima Ohno & Tsunematsu		Barry R Ostrager Simpson Thacher & Bartlett LLP	

Bulgaria

Irina Stoeva and Vania Todorova

Stoeva, Kuyumdjieva & Vitliemov

Preliminary and jurisdictional considerations in insurance litigation

1 In what fora are insurance disputes litigated?

Regional courts are competent to hear all first instance insurance disputes where the claim does not exceed 25,000 leva (approximately €12,500), and where the claim exceeds this sum, district courts are competent to hear the dispute as first-instance courts.

Decisions of the first instance courts may be appealed before the district courts or the appellate courts, respectively. A second instance decision may be appealed before the Supreme Court of Cassation on limited points of law, eg, where the decision deviates from compulsory precedents or general decisions on interpretation of the law of the Supreme Court of Cassation.

Territorial competence of courts is based on the permanent residence or seat of the defendant; if the plaintiff is a consumer, he or she may initiate the lawsuit before the court at his or her permanent or current residence.

Insurance disputes may also be litigated in arbitration proceedings (either arbitration institutions or ad hoc arbitration, on the grounds of an arbitration agreement) but the practice established in the last 10 years indicates that the insurers abstain from arbitration proceedings.

Revocation of a final and binding decision of either a state court or an arbitration tribunal may be sought only on limited grounds and within compulsory statutorily determined time frames.

2 When do insurance-related causes of action accrue?

The insured or a beneficiary under the general or life insurance policy may initiate a lawsuit against the insurer if the insured suffered damage or loss from the occurrence of an insured risk within the insurance coverage period. With respect to liability insurance policy, the injured persons are entitled to claim against the insurer directly as of the date of the insured event. The insured, under a liability policy, is entitled to be reimbursed by the insurer when its liability was ascertained in a trilateral agreement or by virtue of a court award and subject to the condition that the insured has paid the amount to the injured parties.

The general statutory limitation period on the insured's claim is three years and, as an exception, five years under life and accident insurance, motorists' liability insurance, liability insurance related to ownership and operation of aircraft and watercraft and general liability insurance.

Limitation periods run from the date of the damaging event and may be interrupted by the insured with the filing of a statement of claim against the insurer with the courts. While the judicial proceedings are pending, the limitation period does not run. The expiry of the limitation period is only considered by the court if the defendant raises an objection on these grounds.

Parties may not contractually modify limitation periods under Bulgarian law.

3 What preliminary procedural and strategic considerations should be evaluated in insurance litigation?

The insured should notify the insurer of the occurrence of the damaging event within the time limits therefor; failure to notify may be grounds for denial of coverage in certain cases, as explained in question 7.

Typically, insureds or beneficiaries under the policy would first address the insurer with a claim for voluntary settlement. Such notices however would not interrupt the limitation period.

When addressed with a claim (in or out of court), the insurer would consider the existence of liability under the policy (eg, its validity, coming into effect, termination and covered risks) and grounds to deny or limit coverage (exclusions, deductible clauses, underinsurance and overinsurance, etc). To evade clearly unmerited claims, the insured should also consider these issues prior to initiating a lawsuit.

Malevolent causation of a damaging event by the insured or a beneficiary under the insurance policy entitles the insurer to deny coverage under a property insurance policy. The insurer may deny coverage where the beneficiary under life or accident insurances intentionally causes the covered risk. However, when defending a direct claim by a third party under an obligatory general liability insurance (eg, from motorists), the insurer may not deny coverage because the damaging event was malevolently caused by the insured, as per article 226, paragraph 3 of the Insurance Code (IC); instead the insurer will subrogate the third party's rights against the insured.

Damaged third parties are entitled to initiate a lawsuit directly against the general liability insurer. Where the damaging event represents a crime, the judgment of the criminal court would have binding effect on the civil court hearing the insurance claim with regard to the commitment of the respective act, its illegal character and the guilt of the delinquent. Penal proceedings against the delinquent do not interrupt the limitation period running in favour of the insurer. Therefore, the damaged party may consider submitting a claim against the insurer while the penal proceedings are pending and request the civil court to stay the claim until the penal court solves the penal case. Thus the claimant would interrupt the limitation period which would not run while the civil procedure is stayed.

Where under liability insurance the damaged third party initiates a lawsuit against the insured, the latter shall inform the insurer immediately and shall request the inclusion of the insurer as a party supporting the insured in the proceedings. A settlement between the damaged third party and the insured does not have effect vis-à-vis the insurer, unless made with the participation or approval of the latter.

Under property and liability insurance policies, the insurer who paid damages to the insured, subrogates the latter's rights against the damaging party up to the amount of the damages paid. The insured retains the right to claim damages against the damaging party for the part not indemnified by the insurer, if any, and shall receive preferential payment, if the damaging party's property is not sufficient to satisfy the claims of both the insurer and the insured.

4 What remedies or damages may apply?

The insured is obliged to disclose the information he or she is aware of to the questions posed by the insurer in the questionnaire or proposal. In the case of misrepresentation or concealment of information by the insured, the remedies available to the insurer shall be:

- to require an amendment of the insurance contract within one month as of the date it become aware of or termination thereof and to keep the premium paid depending on the nature of the concealed information (if the insurer would have entered into the contract if it had known the information); or
- when a loss occurred before the amendment or termination of the contract, to reduce or deny the indemnity if the concealed information caused the occurrence of the insurance event.

In the second case if the concealed circumstance just increased the risk, the insurer will be entitled to reduce the compensation proportionally in line with the premium paid and the premium that would have been collected if the information regarding the risk had been disclosed to the insurer.

In the event of an unconscious breach of the duty to disclose information, the insurer is entitled to propose an amendment of the insurance contract within two weeks of the date it become aware of the information. If the insured does not accept the proposed amendments within two weeks, the insurer is entitled to terminate the policy and return the proportion of the premium collected for the remaining term of the agreement.

Significant increase or decrease of the insurance risk during the term of the contract would entitle each party to request the increase or decrease of the premium or termination of the contract.

When the insurer fails to pay the due compensation within the terms set forth by the IC or the policy, the general legal interest rate for default payment of monetary debts will apply. Punitive damages are not known in the 'civil law' system, which limits the function of civil liability to repairing or compensating damages.

Usually, if the claim is adjudicated in favour of the insured, the court or the arbitral tribunal shall also award statutory interest on the delayed payment from the date the indemnity became due by the insurer until the date of submission of the statement of claim before the court. The insurer shall also be liable to pay interest on the delayed payment until the final settlement, as well as litigation costs. In the case of compulsory motorists' liability insurance, there is an express provision (article 267, paragraph 4 of the IC) that interest and the litigation costs are not limited by the amount of the sum insured when they are awarded by the court against the insurer.

Interpretation of insurance contracts

5 What rules govern interpretation of insurance policies?

No specific provisions govern the interpretation of insurance policies. The general rules applicable to all types of contract will apply to insurance policies as well. Under the Obligations and Contract Act and the Commercial Act, the provisions should be interpreted according to their wording and the actual mutual will of the parties shall be sought. Individual clauses shall be interpreted in conjunction with the others and each one shall be construed in the sense which is manifested in the entire agreement, with a view to the aim of the agreement, the established customs and bona fides.

6 When is an insurance policy provision ambiguous and how are such ambiguities resolved?

The general terms and conditions applicable to insurance policy should clearly and in an unambiguous way define the coverage and exceptions, the premium payment and consequences of default and the rights and obligations of the parties, etc. When insurance policy provision is not clear and might be interpreted in different ways, the rules referred to in question 5 will apply.

There is no rule that the ambiguous word or phrase will be resolved against the party that drafted the contract, but there is a principle that rights under the agreement may not be exercised with the aim of damaging the counterparty.

Where the insured is a consumer under the Consumer Protection Act (ie, a natural person who enters into an agreement outside the scope of his or her professional activities), consumer protection regulations would also apply regarding unfair trade practices and contractual provisions establishing disparity between the parties.

Notice to insurance companies

7 What are the mechanics of providing notice?

Notices of the occurrence of an insured event or of circumstances that may give rise to a claim (under liability policy) would typically be provided in writing to the insurer within a term set forth in the policy. The documents evidencing the occurrence of the event and the amount of the damage might be provided at a later stage. It is a common practice under motor vehicle insurance policy for the insurers to require a telephone call first and in addition to a written notice.

Under travel assistance policies, the insurers typically provide for telephone notice.

Upon execution of the policy, the insured shall respond to the insurer's written questions fully and exhaustively in order to disclose all known material circumstances of importance to the character and the scope of the

risk. To this aim, the insured would fill in a questionnaire provided by the insurer which shall become an inseparable part of the insurance contract.

During the term of the insurance policy, the insured shall notify the insurer of all newly occurred circumstances immediately upon becoming aware of them if the insurer has inquired in writing about them upon the execution of the policy. Insurance policies may specify the term for the notice.

8 What are a policyholder's notice obligations for a claims-made policy?

There are no specific provisions under the IC. The claims-made policy will either set forth a short term for submission of a notice to the insurer or will require the notice to be filed 'as soon as possible'.

9 When is notice untimely?

Insureds under property insurance shall notify the insurers of the occurrence of a damaging event within seven days as of the date of becoming aware thereof, or within another contractually set time limit. However, this limit may not be shorter than three days and, for the risks of 'theft' or 'burglary', 24 hours as of the date the insured becomes aware of the event.

Under general liability policies, notice shall be provided within seven days as of the date on which:

- the insured became aware of:
 - circumstances which may affect the insured's liability; or
 - claims initiated against the insured; or
- the insured performed payment to the third party.

Failure to comply with these terms would be considered untimely notice.

10 What are the consequences of late notice?

The insurer may deny coverage on the grounds of late notification of the damaging event under property and general liability insurances only if:

- the insured intended thereby to prevent the insurer from ascertaining the circumstances related to the occurrence of the event; or
- late notification made the identification of the circumstances impossible. This exception may not be made by a general liability insurer who is defending a direct claim by the damaged third party.

Under motorists' general liability insurance, the insurer may not make an exception for reduction of the compensation due to a damaged third party on the grounds of:

- undisclosed circumstances existing upon execution of the contract; or
- newly occurred circumstances.

The insured's failure to notify the insurer of newly occurred circumstances, for which the insurer posed a question in the proposal form, shall have the consequences as per misrepresentation or concealment of information as explained in question 4. The IC requires the notice of newly occurred circumstances to be provided immediately upon the insured becoming aware of them.

Where the insured failed to notify a change of its address (stated in the insurance contract), all notices sent to the initially declared address by the insurer shall be deemed validly received by the insured and shall have the prescribed statutory or contractual effect.

Insurer's duty to defend

11 What is the scope of an insurer's duty to defend?

Pursuant to Bulgarian law, the insurer has the right but not the obligation to defend a claim brought against the insured and covered under a liability insurance policy. Usually, the general terms and conditions provide for the insurer's opportunity to take over and direct the insured's defence.

12 What are the consequences of an insurer's failure to defend?

The insurer has no duty to defend a claim under a liability insurance policy. However the insured is obliged to require the court to constitute its liability insurer as a third party assisting the insured in defending the claim. The insurer is then more likely to support the insured, in the defence of a claim that is likely to be covered.

Update and trends

The Financial Supervision Commission proposed a draft of a new Insurance Code at the end of 2014. The proposal is made with a view to the implementation of Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II). It proposes new regulations on capital, reserves requirements and investment rules applicable to insurers and reinsurers. As per the announced motives to the bill, it aims to harmonise the management system for insurers and reinsurers and regulate risk management, internal audit, internal control and actuarial function. Further, it is suggested that each insurer and reinsurer publish their annual report on solvency and financial condition. It is proposed that insurers with a smaller volume of activities shall be able to opt for the current, less strict regulation on financial condition, but in this case they would not be able to provide services on the common market on the grounds of the right of establishment and freedom to provide service.

New legal concepts, such as a termless insurance contract and explicit regulations on retroactive date and preliminary coverage are also proposed, as well as the introduction of a new fixed insurance value clause, which, if agreed upon by the parties to the insurance contract, would not allow application of underinsurance rules on reduction of the coverage. It is also proposed that the premium under the motorists' third-party liability insurance provide coverage for the territories of Bulgaria and all EU, EEA and green card system countries.

The legislative procedure is at a very early stage as the term for public discussions on the bill lasts until 31 January 2015. If introduced to the Parliament, it will have to be discussed and approved in two hearings and later promulgated by the State Gazette to come into force.

Standard commercial general liability policies

13 What constitutes bodily injury under a standard CGL policy?

Standard CGL policies protect business entities against liability claims for bodily injury or property damage arising from premises, business operations and products, and sometimes advertising and personal injury liability. Usually bodily injury under a standard CGL policy means death, disease, illness, physical or mental injury of or to any individual and death sustained by a person resulting from such injury, illness or disease.

14 What constitutes property damage under a standard CGL policy?

Property damage usually means loss of or physical damage to tangible property which is related to the loss of use or loss of value of the insured property. Insured property may include real estate (buildings, industrial premises, etc), movables, goods, production and raw materials, etc.

15 What constitutes an occurrence under a standard CGL policy?

An occurrence under a liability policy is an event causing liability. Usually, the occurrence is an accident or an event that was unexpected and unintended by the insured.

Liability policies might be written either on an occurrence basis (the cover is triggered when a bodily injury or property damage affects the third party during the term of the policy) or on a claims-made basis (the cover is triggered when a claim by a third party is brought against the insured or the insured became aware of a circumstance which may give rise to a claim and the insured notifies the insurer accordingly).

16 How is the number of covered occurrences determined?

Usually, a liability policy provides for a limit of indemnity per one insured event and a limit in aggregate for the whole term of validity of the policy. All claims arising out of one occurrence shall be covered up to the limit set for one insured event. Most frequently, an issue is whether a series of events constitutes a single occurrence or multiple occurrences and which limit shall apply. If the events have the same technical cause, they are more likely to be considered to be one event causing liability.

17 What event or events trigger insurance coverage?

As explained above, depending on the basis on which the liability policy is written, the event may be bodily injury or property damage to a third party occurring during the term of validity of the policy or a notice by the insured about a claim submitted by a third party, or of circumstances that may give rise of a claim.

18 How is insurance coverage allocated across multiple insurance policies?

The general rule set forth in the IC is that when two or more insurance contracts covering identical risk-insured events exist and the total amount of the separate insured sums exceeds the fair value of the insured property, each insurer shall not be liable to pay more than its pro rata share of any damages for such loss or damage calculated as the ratio between the insured amount under its policy and the grand total of the insured amounts under all policies. The insured is obliged to notify each of the

insurers involved of the existence of other insurance contracts by stating the name of other insurers and the insured amounts.

The same principle does not automatically apply to liability insurance, and the parties are free to negotiate other ways of settlement. For example, a liability insurer may stipulate in the policy that it shall not be liable for a claim covered by a preceding policy.

For the sake of completeness, it should also be noted that recent amendments to the legislation prohibited the execution of more than one compulsory motorists' liability policy.

First-party property insurance

19 What is the general scope of first-party property coverage?

First-party property coverage is a term used in English insurance law in relation to third-party liability insurance. Under Bulgarian law, each right of the insured with a monetary equivalent may be the subject of first-party property insurance. Typically, this would be moveable or immovable property insured against fire, storm, hail, water damage, landslide, earthquake and other natural disasters. Business interruption insurance that protects the insured against loss of income caused by the interruption of its business activity due to damage of insured property is also first-party insurance.

20 How is property valued under first-party insurance policies?

The insurer is entitled to examine the property prior to execution of the insurance policy in order to determine its value and the premium.

After the occurrence of a damaging event, the insurer or agents it appoints would investigate the damages and assess their monetary value. The insurer shall estimate the damages due on the grounds of the evaluation of the property as per the date of occurrence of the damage and over- or underinsurance rules, if applicable.

Under property insurance, the insurance compensation may not exceed the fair or restoration value of the property. The fair value is determined as the value of the reconstruction costs less the wear and tear depreciation. The restoration value is the price for recovering the property to the same state including all costs for delivery, construction and installation, etc, without applying depreciation for wear and tear. The principle set down by the IC is that the sum insured under a property insurance is determined on the basis of the fair value, except otherwise agreed in the policy.

In the event of overinsurance, the insurance sum is decreased to the amount of the fair or restoration value. In the event of underinsurance, the liability of the insurer is determined as per the ratio between the insurance sum under the policy and the actual fair, or restoration, value except for first-loss policies where the damages are entirely compensated if they do not exceed the insurance sum. Late payment of compensation shall be remedied with the payment of statutory interest accruable as of the date of the damaging event.

Directors' and officers' insurance

21 What is the scope of D&O coverage?

The IC does not explicitly regulate D&O insurance but the provisions regulating general liability insurance will apply for such policy. D&O policy is a regular part of large multinational companies' risk management; it is not, however, often used in the sector of small and medium-sized enterprises.

D&O policies offer liability cover for company managers to protect them from claims that may arise from the decisions and actions taken within the scope of their regular duties. The policy covers the personal liability of the company's directors and officers as individuals and the insured company when it has paid the claim of a third party on behalf of its managers. The protection covers the financial losses and the defence costs as a result of a legal action brought for actual or alleged wrongful acts in their capacity as directors and officers. The cover may be extended to defence costs arising out of criminal and regulatory investigations or trials as well.

The insurance may be written on an occurrence or claims-made basis. The parties may also agree on a specific retroactive date. The coverage

shall include the remedy adjudicated against the D&O up to the insurance sum plus the judicial expenses where the insurer participated in the proceedings. The insurer may also provide coverage with a view to an out-of-court settlement approved by the insurer between the insured and the damaged third party.

22 What issues are commonly litigated in the context of D&O policies?

These would relate mostly to the extent of the damages negligently caused to the company by the D&O in the course of management.

STOEVA, KUYUMDJIEVA & VITLIEMOV

Irina Stoeva
Vania Todorova

irina.stoeva@skvlaw.eu
vania.todorova@skvlaw.eu

17 San Stefano Street, Floor 3
Sofia 1504
Bulgaria

Tel: +359 2 954 2610
Fax: +359 2 954 26 55
www.skvlaw.eu

Getting the Deal Through

Acquisition Finance	Dispute Resolution	Life Sciences	Real Estate
Advertising & Marketing	Domains & Domain Names	Mediation	Restructuring & Insolvency
Air Transport	Dominance	Merger Control	Right of Publicity
Anti-Corruption Regulation	e-Commerce	Mergers & Acquisitions	Securities Finance
Anti-Money Laundering	Electricity Regulation	Mining	Securities Litigation
Arbitration	Enforcement of Foreign Judgments	Oil Regulation	Ship Finance
Asset Recovery	Environment	Outsourcing	Shipbuilding
Aviation Finance & Leasing	Foreign Investment Review	Patents	Shipping
Banking Regulation	Franchise	Pensions & Retirement Plans	State Aid
Cartel Regulation	Gas Regulation	Pharmaceutical Antitrust	Tax Controversy
Climate Regulation	Government Investigations	Private Antitrust Litigation	Tax on Inbound Investment
Construction	Insurance & Reinsurance	Private Client	Telecoms & Media
Copyright	Insurance Litigation	Private Equity	Trade & Customs
Corporate Governance	Intellectual Property & Antitrust	Product Liability	Trademarks
Corporate Immigration	Investment Treaty Arbitration	Product Recall	Transfer Pricing
Cybersecurity	Islamic Finance & Markets	Project Finance	Vertical Agreements
Data Protection & Privacy	Labour & Employment	Public-Private Partnerships	
Debt Capital Markets	Licensing	Public Procurement	

Also available digitally



Online

www.gettingthedealthrough.com



iPad app

Available on iTunes



Insurance Litigation
ISSN 2055-236X



THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012



Official Partner of the Latin American
Corporate Counsel Association



Strategic Research Sponsor of the
ABA Section of International Law