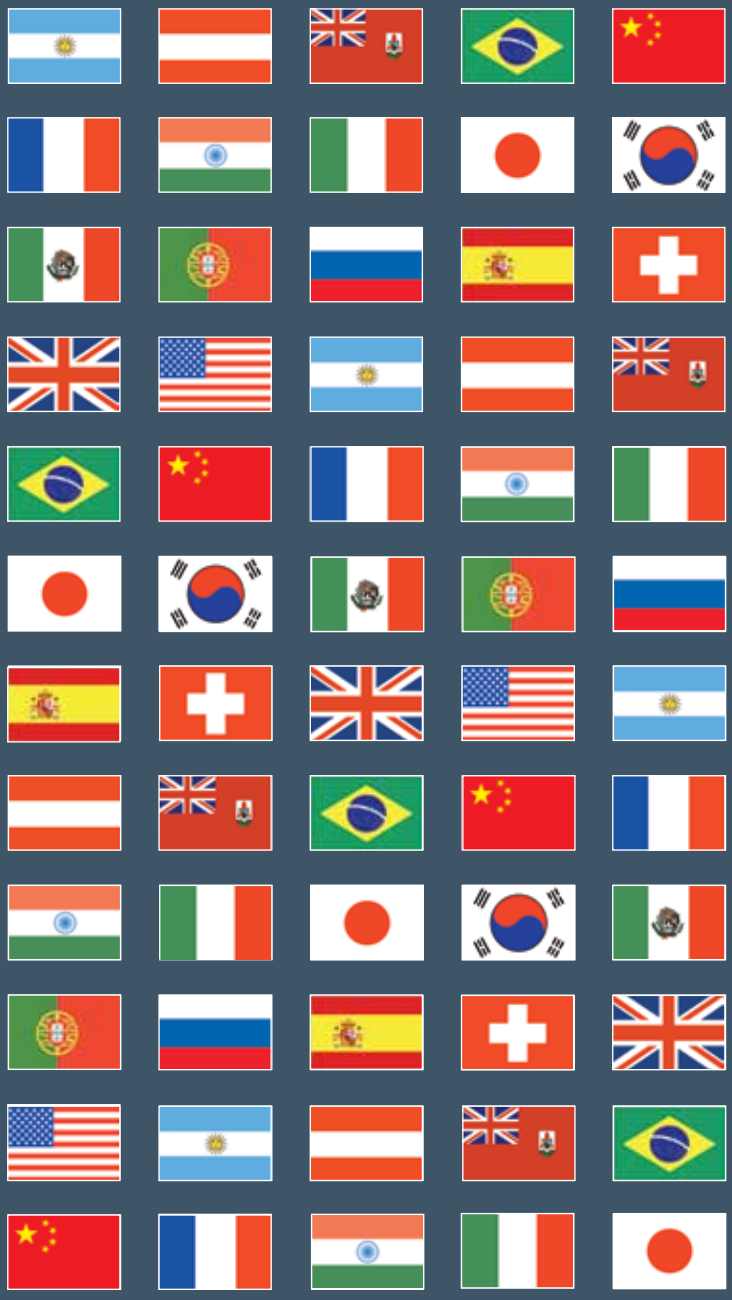
GETTING THE DEAL THROUGH

Insurance Litigation

in 17 jurisdictions worldwide

2014

Contributing editor: Barry R Ostrager



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Getting the Deal Through is delighted to publish the first edition of Insurance Litigation, a new volume in our series of annual reports, which provide international analysis in key areas of law and policy.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 17 jurisdictions featured.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually in print. Please ensure you are always referring to the latest print edition or to the online version at www.GettingTheDealThrough.com.

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Argentina

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Preliminary and jurisdictional considerations in insurance litigation

1 In what fora are insurance disputes litigated?

In Argentina there two types of jurisdiction: local and federal. There are 24 local jurisdictions (one for each province of Argentina and one for the city of Buenos Aires) and they deal with ordinary law disputes. In the case of Buenos Aires, both of those jurisdictions take place as well as the national; however the national deals with most of the cases related to ordinary law.

The federal jurisdiction has competence over disputes that involve certain matters and parties, such as a conflict in which the national state is a party. Due to the Argentina's federal organisation, the national Constitution provides that proceedings rulings for the local jurisdiction have to be dictated by each province. For that reason, as regards litigation, there are some differences between the provinces, though they are not substantial.

For insurance matters, the rule is that the local commercial courts are the competent authorities to settle disputes. Nevertheless, cases involving maritime, air and land transportation are within the federal jurisdiction; and therefore disputes have to be settled in the federal courts.

Generally, the different procedures and provincial constitutions do not establish special courts based on the amount involved in the dispute.

In some jurisdictions, the proceedings rulings provide for mandatory mediation prior to engaging in litigation.

2 When do insurance-related causes of action accrue?

In the chapter concerning third-party insurance, the Insurance Act provides that in case of multiple victims, compensation payable by the insured shall be distributed on a pro rata basis.

In the case of multiple actions (plurality of victims), the different proceedings will be accumulated before the judge who first acts.

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

The first step is to analyse if the incident giving rise to the claim has been accepted by the insurer. If that is not accepted, it must verify that the insurer has complied with the formal aspects of communication with the insurer (notice of damage, request for additional information, denial of coverage in due time (30 days from receiving notice or from the explanation of information received) and shape (reliable communication medium)).

Secondly, the court's opinion should be analysed as well as how it has ruled in a similar situation in order to estimate the probable decision of the case at hand. Based on this analysis, the strategy to follow could be defined (eg, wait for the final decision or try to make a deal with the claimant to end the case). According to the insurance law, the procedure and the Supreme Court case law, insurers may allege in the lawsuit claiming all those defences of the insurance contract or substantial law (that is to say, prescription) or procedural law (that is to say, different forum).

4 What remedies or damages may apply?

The Argentine legal system considers damage as an element of liability. Thus, it should:

- not be justified by the legal system;
- be true;
- be personal;
- be replaced at the moment of claim;
- affect a legitimate interest of the direct or indirect damaged party; and
- be susceptible to economic appreciation.

Generally, the damage can be material or moral. Material or asset damage shall be that which causes harm to the asset of the damaged party. Moral damage, thus, shall be that in the assets of the damaged party. On the other hand, the moral damage shall be that which affects or produces a spiritual or emotional damage to the victim. Other types of damages have also been acknowledged (for example, emerging damage, loss of profit, psychological damage), however, as a species within the type mentioned.

Interpretation of insurance contracts

5 What rules govern interpretation of insurance policies?

As a general rule, contracts should be entered into and construed on good faith (article 1198 of the Civil Code). And in insurance contracts, it is enforceable that the parties' good faith should be extreme or utmost good faith.

On insurance matters, Act No. 17.418 rules over the relationships among insurers and Act No. 20.091 rules the activity of the insurance company and creates the National Bureau of Insurance. This entity is empowered by such Act to rule over the insurance activity, providing for, among other issues, norms that rule such activity (creation of an insurance of minimum capitals, prohibited operations, penalties, etc), the way a policy should be written, and the elements it has to include.

Nevertheless, the courts can decide about the legality of the insurance contract clauses despite the authorisation of the state entity of control and declare them invalid if they are confusing, ambiguous or abusive.

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

An insurance contract shall be considered ambiguous when the wording of a policy is contradictory or when the terms used are not clear enough.

The legal system requires that the wording of the policy must be clear, that is, adequate, suitable, sufficient and unequivocal.

When taking into account an adherence contract, the case law agrees in considering that the contradictory or obscure clauses shall be construed against the insurer.

Notice to insurance companies

7 What are the mechanics of providing notice?

Argentine law does not rule that there is a specific way of advising the insurer of a fact, a fact that affects the risk insured or a fact by which its liability can be triggered.

According to the Insurance Law it would be enough to just provide sufficient announcements. However, the insured has to let the insurer know about the fact within at least 72 hours of when he or she was aware of the occurrence of the fact or the claim.

The National Bureau of Insurance has provided forms that the insurance companies have to provide to insurers with the purpose of joining information. Although this is not an enforceable requirement, this form is usually requested by the insurers.

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

It is important to highlight that in Argentina the validity of claims-made clauses have been judicially objected with contradictory legal precedents as regards the validity or not of this clause.

Despite that, the Superintendence of Insurances of the Nation has authorised this type of coverage by demanding, among other requirements, that the insurer clearly reports to the insured the coverage conditions under this mode (not only in the policy, but also in the proposal and forms of claim); the policy will provide an extended term after the enforcement of the contract for judgments made over facts occurred through the enforcement of the same.

9 When is notice untimely?

The insured party has to advise the insurer of every fact that causes damage to his or her property or from which his or her eventual liability would be triggered within the term of 72 hours of knowing it.

Nevertheless, the parties can agree on a longer term, but not a shorter one.

The same rule applies for contracts with claims-made clauses in the manner and to the extent thereby agreed.

10 What are the consequences of late notice?

The consequence of not providing for the occurrence of a fact is the loss of the right of the insured party.

Notwithstanding that, for civil liability insurance, such expiration cannot be alleged against the third party affected. This is why the insurer in case of existing liability will have to reply before the damaged party regardless of repeating against the insured.

Insurer's duty to defend

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

There are no limits for an insurer's duty to enforce its rights of defence in a lawsuit.

Nowadays, the courts agree to consider the insurance companies (in a claim triggered under the protection of an insurance contract for the risk of civil liability) a party and consequently this party can allege all those defences referred to its rights, including those related to such contract and the ones that are conferred by substantial law or procedural law to the rest of the parties.

Likewise, in such type of contract the law sets forth that the damaged third party or the insured party itself can request the insurance to be summoned in order to file written submissions in its own defence. The latter will have to respond on behalf of the insured party should the insured party be found responsible.

As a result of this, the insured party has to immediately communicate the notification of a process filled by a damaged third party, in order for the insurance to offer, through the appointment of lawyers, the defence in a trial. The insurance may accept or deny such defence, with the address of the process and the acceptance of the expenses by such defence.

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

In case of an insurer's failure to defend, the insurance company must compensate the insured or the third party for the damage they have suffered. Our legal process is mainly written and with peremptory terms.

Our procedure rules provide that if the defendant party fails to respond to the lawsuit in due time, the facts described in it will be considered acknowledged and the right to provide evidence will be lost.

We can mention, among other consequences, that if the insurer fails to file its defence it will not be able to produce any evidence to prove the insurance contract limits (insured amount, franchise, exclusions of coverage, etc).

Notwithstanding the defendant's failure to respond to the lawsuit, the claimant should provide concrete evidence so that the alleged damages could be verified by the court.

Standard commercial general liability policies

13 What constitutes bodily injury under a standard CGL policy?

Every damage or harm to the psychophysical integrity of a person constitutes bodily injury under a standard CGL policy.

14 What constitutes property damage under a standard CGL policy?

Every alteration that implies an effective reduction of assets constitutes property damage under a standard CGL policy.

15 What constitutes an occurrence under a standard CGL policy?

An occurrence under a standard CGL policy has to be understood as the fact expressly foreseen as the risk in the insurance contract.

16 How is the number of covered occurrences determined?

Insurance law establishes that the insured amount represents the maximum liability of the insurer, without defining how many events or occurrences are protected. Despite this, insurance contracts generally indicate that the insured amount represents the maximum limit per occurrence. This means every occurrence can cause one or more triggering events. Thus, it will be necessary to establish whether there have been one or more events originated from the same occurrence.

17 What event or events trigger insurance coverage?

The insurance coverage will be triggered with the production of damage. This implies that the occurrence of a risk set forth in the contract during the agreed enforcement (occurrence) or the claim made during the enforcement of the contract or in the extension period, for an event that occurred within the enforcement of the contract (claims-made) will trigger the coverage.

18 How is insurance coverage allocated across multiple insurance policies?

Insurance law provides for the possibility that a same insured guarantees the same risk but with different insurers. If that situation is immediately known by the different insurers in the event of damage,

each insurer will participate in the damage in a proportional way to the insured amount.

If the insured party does not warn the insurance companies, it will lose its right to be covered, unless it had been agreed in the contract.

On the other hand, though not legally stipulated, the co-insurance is accepted by the market and the Enforcement Authority.

The difference between the co-insurance and the multiple insurance policies is that in this case there is just one contract instead of many contracts with an insurance company.

Co-insurance contracts are issued by one insurer but subscribed to by all the insurers involved. All of them will undertake full responsibility up to the limit of the proportion each of them agreed to.

Usually one of the insurers undertakes the role of leader, which implies that it will be in charge of the wording of the contract and will act on behalf of the other co-insurers for the collection of premiums, reception of damage claims, appointments of insurance adjusters, etc.

Update and trends

The executive power is still discussing with all the parties in the market a project to amend the Insurance Law before sending it to Congress.

Furthermore, the Chamber of Senators has already voted on a reform of the Civil Code. This year the Lower Chamber will discuss that project as well. This bill implies a general reform of law order, which will combine civil and commercial law.

First-party property insurance

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

The purpose of this type of contract is to amend the damage suffered by the insured party to its property as a consequence of the production of an expressly foreseen risk in the insurance contract and during the enforcement agreed to.

That said, one of the limits of this type of insurance contract implies that the loss of the insured party will be amended according to the real value of the lost property. Therefore, under no circumstances could there be an enrichment of the insured party (indemnity principle).

Likewise, the loss of profit is excluded, except that it is contractually set forth.

Nevertheless, the courts have acknowledged the insured party's right to be compensated for the loss of profit derived from the delay incurred by the insurer in the payment of the compensation owed.

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

The property value under a first-party insurance policy is informed by the insured party when the coverage is requested. Thus, utmost good faith ought to be requested.

As a limit to such unilateral statements (besides the good faith requested for these contracts), the legislation provides that the insurer is bound to compensate only the real value of the damage suffered regardless of the right to collect all the premium; or, if the insured value is lower than the real value of the good, the insurer will only compensate the damage in proportion with the insured value.

Furthermore, the parties will be able to determine the value of the good by means of a valuation. Thus, the amount established and indicated in the contract will be taken as the value of the good at the moment of the damage (except that the insurer could prove that the established value at the moment of damage exceeds the current value of the good).

Directors' and officers' insurance

21 What is the scope of D&O coverage?

It is worth mentioning that these types of insurance are offered under the claims-made mode with the features already mentioned.

Two types of D&O coverage can be identified in the market.

Firstly, those that cover the civil liability of directors and managers of the corporation as a consequence of unintentional acts (those mistakes or omissions that are not done on purpose), made by those in the performance of their duties during the enforcement of the insurance contract and that have originated a claim during the applicability of the policy or the extended period.

Secondly, those policies by which the insurer will reinburse the corporation (policyholders) for the compensation paid to third parties in order to settle claims against directors and managers for their unintentional acts.

The direct action of the damaged party against the insurer is not provided for by law due to the principles of civil liability insurance stated before.

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

Recently the use of this type of coverage has increased.

This is mainly due to the increase of labour claims against corporations as well as their directors. We can also highlight the increase of money laundering laws as consequence of which more corporations have adopted D&O policies.

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