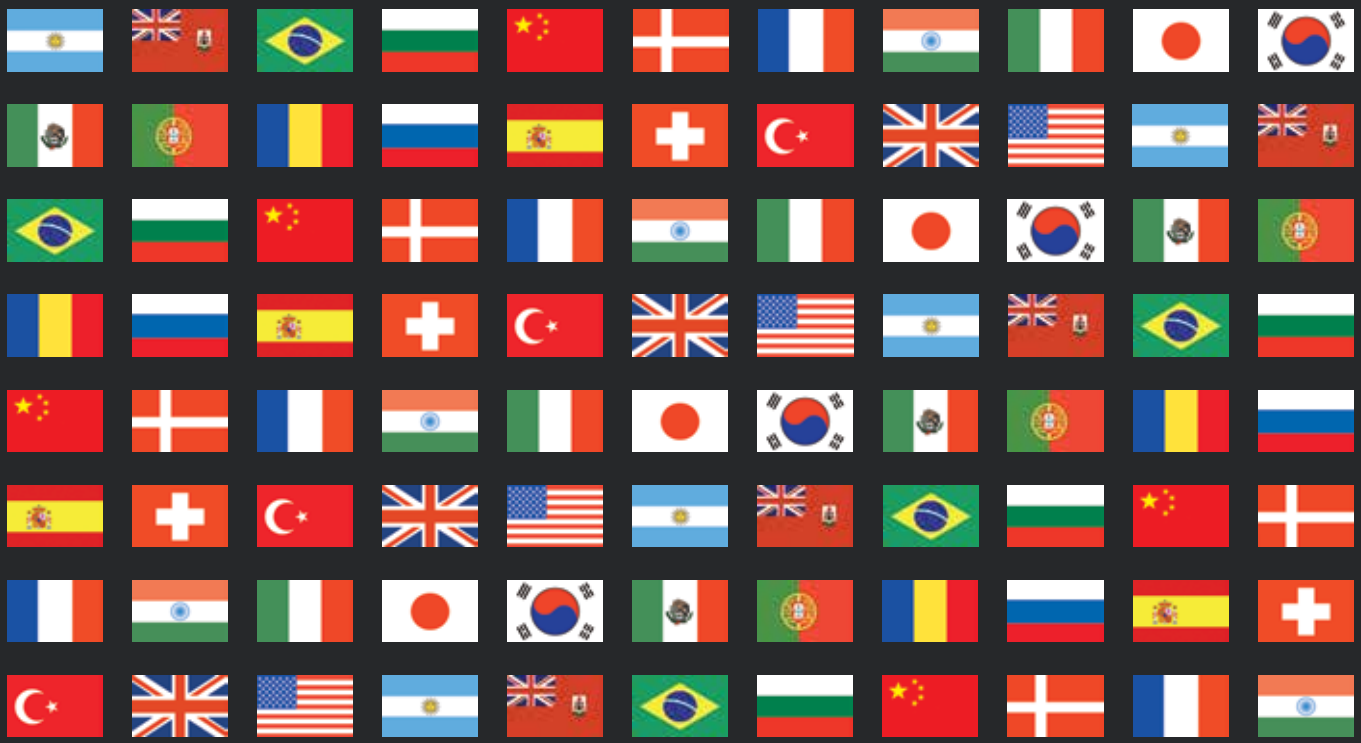
Insurance Litigation

In 20 jurisdictions worldwide

Contributing editor
Barry R Ostrager



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GETTING THE DEAL THROUGH

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Switzerland

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Preliminary and jurisdictional considerations in insurance litigation

1 In what fora are insurance disputes litigated?

The fora where insurance disputes are litigated in Switzerland depend mainly on the parties (individuals or legal entities), their domicile and the subject matter of the dispute.

Whilst Switzerland nowadays (as from 1 January 2011) has one unified (federal) civil procedure code (CPC), the organisation of the courts and to some extent the allocation of matters to these courts is a matter of the law of the cantons (member states), and there are 26 different cantons, each with its own specific court system. In other words, the issue of what court will hear an insurance dispute depends to some extent on the canton in question.

Generally speaking, there is a distinction between claims arising out of insurance contracts based on private law and claims based on public law, in particular social security insurance.

In general there are two civil court levels, a district court and a superior court on the cantonal level. However, in certain cantons (ie, in the cantons of Zurich, Berne, St Gallen and Argovia) there are commercial courts. In the canton of Zurich, it is often the Zurich Commercial Court that hears insurance disputes. In the Zurich Commercial Court, cases are heard by five sitting judges. Two of them are legally trained professional judges, the other three are part-time judges, chosen for their business expertise. In an insurance matter, they would normally come from the insurance industry, in a banking matter from the banking industry and so on. This business background is meant to make sure that the expertise necessary for a case is given (one could refer to them as 'expert judges'). However, it also means that an insured party is up against a panel in which the majority works in the insurance industry. In cases where the claimant has a choice, he or she may prefer to bring the action with the district court. It is a long-standing tradition of the Commercial Court to give a preliminary view on the case after the first exchange of written briefs in order to facilitate a settlement.

On the federal level, it is the Swiss Federal Supreme Court, the highest court in Switzerland, that hears appeals in insurance matters.

Issues with regard to insurance supervisory authorities are dealt with by centralised federal courts.

Reinsurance disputes are primarily dealt with by way of arbitration.

2 When do insurance-related causes of action accrue?

By and large, it seems fair to say that the Swiss private insurance market is characterised by a culture of negotiation and amicable settlement. In light of court costs (which are to be advanced by the claimant) and the rather long average duration of litigation, the insured and insurer often prefer to settle their case out of court.

Courts are often involved in cases where there are issues that raise general legal issues that are likely to have an impact on similar cases (in this context, it should be noted that Switzerland does not have a system of binding case law in contrast to common law jurisdictions) or in cases where the evidence is unclear.

In matters of social security insurance, there are more court cases because the court costs there are fairly low.

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

From the point of view of a potential claimant (insured) it is important to realise that he or she will have to embark upon a rather lengthy, time-consuming and costly proceeding. It is therefore crucial for a claimant to make sure that he or she can afford long and costly proceedings (ie, that there are enough means to finance the proceedings).

Another crucial issue – for both parties, insured claimant and insurer – to take any and all steps in order to obtain and secure evidence for the case. This can involve securing an expert early on, given that Switzerland is a relatively small country and, depending on the field, there may be very few potential experts available.

In the context of securing evidence well in time, one should bear in mind that the new Civil Procedure Code (CPC) provides for a possibility of taking evidence before bringing a full suit, in summary proceedings, in order to assess the chances of a suit. However, recent court decisions have made it more difficult to take evidence in these summary proceedings, compared to the rather open provision in the CPC. However, it should be well noted that there is no such thing as US-style discovery in Swiss courts. In recent times, potential claimants have successfully invoked the Swiss Data Protection Act in order to get access to the counterparty's documents; this has so far been primarily done by bank clients against their banks, but this route could be used in other industries as well.

In cases brought by an insured against an insurer, one can often see that the claimant did not sufficiently prepare for this suit and instituted proceedings ill-prepared. In Switzerland, courts take an active role in facilitating amicable settlements between the parties, normally on the basis of a preliminary, non-binding assessment of the case based on a first exchange of written briefs and documents filed along with the briefs. If the case is not well presented, the court's preliminary assessment is likely to be to the disadvantage of the claimant and the settlement eventually made will reflect this. It is not uncommon that courts put quite some pressure on the parties to reach a settlement.

4 What remedies or damages may apply?

The types of remedies and damages depend on the specific case. Generally speaking, in Switzerland only actual damages are compensated. Moreover, courts are quite strict and make it difficult for a claimant to meet his or her burden of proof with regard to damages. In this context, it should also be noted that in Switzerland, there are no jury trials, cases are heard by professional judges (who normally have full legal training; there are some lay judges sitting in smaller cases in small courts in rural parts of the country).

Interpretation of insurance contracts

5 What rules govern interpretation of insurance policies?

The rules that govern the interpretation of insurance policies are, by and large, the same rules that apply under Swiss law with regard to contract construction in general.

Primarily relevant are the common intentions of the parties (ie, what the parties really wanted (the 'actual intent' of the parties, called 'subjective construction')). The starting point is always the wording of the contract, but one always has to consider the context and, in particular, the purpose of the contract.

If (and only if) the consenting will of the parties cannot be established (any longer), the contract has to be interpreted according to the 'principle of faith' ('presumed will' of the parties; 'objective construction'). According to this principle, a contract is to be interpreted in an objective manner according to the court's findings on how a contracting party acting in good faith would and should have understood its obligations and rights deriving from the contract.

If the meaning of a contractual provision may not be determined by subjective construction or, if this fails, by objective construction, then, and only then, may rules regarding special cases be applied.

A special rule is in particular the rule of ambiguity. Under this rule, an unclear contractual provision is to be construed to the disadvantage of the party that had formulated the provision ('in dubio contra stipulatorem').

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

In principle, the rules on construction of an insurance contract also apply to the construction of an insurance policy provision. It is therefore a matter of construction how a policy is to be understood. The primary aim is to determine the common intentions of the parties. If the common intentions of the parties cannot be determined, the contract is to be construed in accordance with the principle of good faith. If this does not lead to a clear result, only then may the rule of ambiguity be applied. This rules means, in essence, that ambiguous wording is to be construed to the disadvantage of the party that had worded this provision. However, this rule may only be applied if and when all other principles of construction have failed or there are at least two different constructions that can seriously be invoked. The rule applies, therefore, if at all only subsidiarily. The rule may in no case be applied simply because the construction of a contractual provision is disputed.

It should also be noted that the rule of ambiguity only relates to determining the content and meaning of a contract, it is not about the application of a (per se clear) contractual provision on the facts.

Even if a contractual provision is objectively unclear, the rule of ambiguity may not be applied if the insurer (or his agent) explicitly made the insured aware of the content and scope of the relevant clause at the time the contract was entered into.

The rule of ambiguity may not be misunderstood to mean that it should generally lead to the construction that is the most favourable to the insured. However, if the above-mentioned conditions are met, the construction that is the most favourable for the insured (as the party that normally did not draft the contract) is to be applied.

Notice to insurance companies

7 What are the mechanics of providing notice?

In principle, the insured may make all communications with the insurer orally, or by e-mail, fax or post. There are no statutory provisions in this regard. However, form requirements may be stipulated in the contract. Of course, in order to have proof, one should generally make important communications by registered post.

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

There are no specific notice obligations for a policyholder with regard to a claims-made policy provided by statutory law. The respective obligations are determined by the insurance contract in question.

9 When is notice untimely?

In principle, the insured is obliged to notify the insurer as soon as he or she has knowledge of the occurrence of the insured event and of his or her claim based on the insurance. Notice must be made without delay. The court practice is quite strict in this regard.

Insurers often specify certain deadlines within which notice is to be made with regard to certain events, and they also specify in what form notification is to be made. In contrast, there is no particular form stipulated by statutory law for the notice. In principle, notice may therefore be made orally (for example over the phone), or by e-mail, fax or post.

It is sufficient if the notice informs the insurer that the insured event has occurred. Therefore, a brief description of the facts is sufficient. It is more important to notify quickly than to provide complete information to the insurer who may be expected to raise follow-up questions.

10 What are the consequences of late notice?

The consequences of late notice depend on whether there is fault on the part of the insured. If the insured infringed his or her duty to notify the insurer without fault, there are, in essence, no legal consequences to the insured's disadvantage.

If there is fault on the part of the insured with regard to giving timely notice, the insured is, in accordance with the Swiss Federal Act on Private Insurance Contracts, entitled to reduce the compensation. In practice, insurance contracts normally stipulate stricter obligations and consequences to the disadvantage of the insured. The most severe consequence is that, after expiry of a deadline, the claim to insurance is forfeited.

Insurer's duty to defend

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

The indemnity insurer is usually under a contractual obligation to defend against unjustified claims brought by the injured party. The contractual terms usually stipulate that the insurer is entitled to decide how the case is dealt with. In other words, the insurer decides whether the claims are to be considered as not justified so that they are to be rejected or whether they are to be considered as justified and hence to be satisfied. The insurer is also entitled to make payments to the insured party against the will of the insured. It is usually the insurer who negotiates with the injured party in lieu of the insured and enters into a settlement if possible. In case of a dispute, it is usually the insurer that conducts the proceedings in the name of the insured against the injured party. The indemnity insurer is in control of the proceedings, and it normally also chooses and instructs counsel.

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

The legal consequences if the insurer fails to successfully defend against the claims brought by the injured party depend on the reasons of such failure. In principle, the insurer has to cover the claims brought by the injured party. If the defence failed because the injured party acted in a grossly negligent manner, the insurer may take recourse against the insured or reduce the compensation. If the insurer defended against unjustified claims in a negligent manner, and if this causes damage to the insured party, the insurer might become liable for further damage than what was covered by the insurance in the first instance, depending on the circumstances of the case.

Standard commercial general liability policies

13 What constitutes bodily injury under a standard CGL policy?

Any type of bodily or psychiatric damage may qualify as bodily injury. Bodily injury is determined by medical examination. The economic (financial) effects of a proven bodily injury are to be compensated by the liable party. Accessory immaterial damages that do not reflect a financial value are being compensated by a compensation for personal sufferings. Such compensation for personal sufferings granted by Swiss courts is traditionally very low in comparison to similar compensations granted in other jurisdictions. In this context, it should be borne in mind that there are no jury trials in Switzerland.

14 What constitutes property damage under a standard CGL policy?

Damage to property is defined by the reduced value of the property as a consequence of the event insured against. Depending on the item of property (and the damage), the damage to be compensated may consist of the costs of repair, the costs of replacement or of compensation paid for the reduced market value of the damaged property.

15 What constitutes an occurrence under a standard CGL policy?

An occurrence under a standard CGL policy may be defined as bodily injury (death, injury or other damage to health) and damage to property (destruction, damage or loss).

16 How is the number of covered occurrences determined?

There is no generally applicable rule in this regard. The determination of the number of covered occurrences depends on the specific insurance contract and also on the industry branch the insured party is active in.

17 What event or events trigger insurance coverage?

Insurance coverage is given if the terms and conditions in accordance with the insurance contract are met and if there is no limitation with regard to the scope of coverage.

18 How is insurance coverage allocated across multiple insurance policies?

Generally speaking, under the respective contract, the insurer has to grant the unlimited coverage to the insured. The regulation between a number of policies and insurers respectively is dealt with in the framework of compensation payment in order to avoid overcompensation. For insurance coverage based on different legal grounds, there is a mandatory legal sequence to be respected. For the liability of a number of individuals or legal entities for the same damage based on different legal grounds (contract, statutory law or tort), the primary liable party is generally the party that has caused the damage by tort and lastly the party that is liable in the absence of a contractual obligation and without its own fault based on a statutory provision.

First-party property insurance

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

First-party property policies are typically named-peril policies. Named-peril policies insure against loss from specifically identified causes of loss. These policies are often issued to account for the particular business of the insured. With regard to insurance coverage for properties (real estate), one should bear in mind that most Swiss cantons provide for mandatory state property insurance, which covers elementary risks such as fire, floods and in some instances earthquakes.

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

Depending on the insurance contract, the actual cash value or the reinstatement value is covered.

Directors' and officers' insurance

21 What is the scope of D&O coverage?

D&O coverage is meant to protect members of the board of directors and management against claims brought by third parties. The D&O insurance normally covers the costs of the defence against unjustified claims and actions as well as possible compensation payments. Depending on the coverage, costs in order to rehabilitate good reputation are also covered. The type of insurance is typically 'claims-made', providing coverage for claims made during the policy period. Matters excluded from coverage are those that are uninsurable for public policy reasons like criminal or fraudulent acts, acts involving illegal profit or personal advantage.

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

Most litigation in the context of D&O relates to bankrupt companies. The claimants usually argue that the board members and management infringed their duties to the detriment of the company's creditors. The creditors often argue that the board members would have been obliged to file for bankruptcy much earlier and that not doing so and therefore postponing bankruptcy increased the damage.

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