Insurance & Reinsurance

In 23 jurisdictions worldwide

Contributing editors
William D Torchiana, Mark F Rosenberg and Marion Leydier

2015

GETTING THE DEAL THROUGH

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Contributing editors

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Regulation

1 Regulatory agencies

Identify the regulatory agencies responsible for regulating insurance and reinsurance companies.

Insurance is regulated in Canada at both the federal and provincial or territorial levels.

The federal government has the constitutional power to regulate the solvency and corporate governance of federally incorporated insurers and the solvency of branch offices of foreign insurers. This regulatory oversight is performed by the Superintendent of Financial Institutions (Superintendent) through the Office of the Superintendent of Financial Institutions (OSFI), pursuant to the provisions of the Insurance Companies Act (ICA), the regulations thereto and guidelines published by OSFI. The ICA also contains consumer protection provisions regulated by the Financial Consumer Agency of Canada.

Canada's 13 provinces and territories have exclusive constitutional jurisdiction to regulate market conduct with respect to the sale of insurance in their jurisdictions, including the types of insurance that may be sold and who may sell insurance. In addition, the provinces regulate the solvency and corporate governance of provincially incorporated insurers. The provinces and territories also regulate insurance agents, brokers and claims adjusters. Reinsurance intermediaries are not regulated in Canada. Each province and territory has its own insurance legislation, administered by an insurance commission or other regulatory body run by a commissioner or superintendent of insurance.

2 Formation and licensing

What are the requirements for formation and licensing of new insurance and reinsurance companies?

Incorporation of a federal insurer under the ICA is granted at the discretion of the federal Minister of Finance (Minister) upon the recommendation of the Superintendent. In determining whether to approve an application to incorporate an insurer, the Minister must take into account:

- the nature and sufficiency of the financial resources of the applicant;
- the soundness and feasibility of the applicant's plans for the future conduct and development of the insurer;
- the applicant's business record and experience;
- the character, competence and experience of the management; and
- the best interests of the financial system in Canada.

A government or government agency (whether Canadian or foreign) or an entity controlled by a foreign government (other than an entity that is a foreign financial institution or a subsidiary of a foreign financial institution) is not eligible to apply to incorporate an insurance company under the ICA.

A branch office of a foreign insurer may be registered under the ICA by applying to the Superintendent for an order permitting the foreign insurer to 'insure in Canada risks'.

Every applicant seeking to incorporate an insurance company or register a branch under the ICA must prepare a comprehensive submission that addresses the financial strength and business experience of the owners, and includes a detailed business plan that demonstrates the potential for a successful business operation and compliance with OSFI's minimum capital or asset requirements.

Insurance companies may also be incorporated under provincial law. The application requirements are similar to those under the ICA.

Regardless of its jurisdiction of incorporation or whether it operates as a branch of a foreign insurer, an insurer must be licensed in each province and territory in which it carries on business.

There is no special licensing category under the ICA or provincial or territorial legislation for reinsurers.

3 Other licences, authorisations and qualifications

What licences, authorisations or qualifications are required for insurance and reinsurance companies to conduct business?

Where the applicant for incorporation is a non-resident or a foreign company is applying to register a Canadian branch, the applicant or foreign company must provide evidence that Investment Canada has been notified under the Investment Canada Act (see question 13).

Property and casualty insurers must become members of the Property and Casualty Insurance Compensation Corporation (PACICC) and life insurers must become members of the Canadian Life and Health Compensation Corporation (Assuris). PACCIC and Assuris are industry-run guarantee funds.

Certain provinces and territories require that, in addition to obtaining an insurance licence, insurers be extra-provincially registered in the jurisdiction.

4 Officers and directors

What are the minimum qualification requirements for officers and directors of insurance and reinsurance companies?

All proposed directors (or the chief agent in the case of a foreign branch application) and senior officers must submit biographical information to OSFI and undergo to a security background check. OSFI will need to be satisfied that the proposed directors and officers possess the competence, skill and integrity commensurate with the proposed position of the individual within the company. The role and functions of a chief agent closely resemble those of a chief executive officer of a Canadian insurance company.

Persons disqualified from being directors of a company include:

- those under 18 years of age;
- those of unsound mind;
- those who have bankrupt status;
- employees of a Canadian or a foreign government; and
- insurance agents or brokers of the company.

5 Capital and surplus requirements

What are the capital and surplus requirements for insurance and reinsurance companies?

The capital of an insurance company incorporated under the ICA must, at all times, meet OSFI's minimum capital guidelines. A property and casualty insurer's minimum required capital is the sum of:

- capital required for unpaid claims and premium liabilities;
- catastrophe reserves;
- margin required for reinsurance ceded to unregistered reinsurers;
- capital required for interest rate risk;
- capital required for foreign exchange risk;

- capital required for equity risk;
- capital required for real estate risk;
- capital required for other market risk exposures;
- capital required for counterparty default risk for balance sheet assets;
- capital required for counterparty default risk for off-balance sheet exposures;
- capital required for collateral held for unregistered reinsurance and self-insured retention; and
- capital required for operational risk;

A life insurer's minimum required capital is the sum of the capital requirements for each of the following risk components:

- asset default risk;
- mortality, morbidity or lapse risks;
- changes in interest rate environment;
- segregated fund risk; and
- foreign exchange risk.

OSFI will start to progressively intervene where an insurer's capital ratio falls below 150 per cent. As a result, OSFI expects the board of an insurance company incorporated under the ICA to establish an internal capital target ratio in excess of 150 per cent. Many such companies have internal capital ratio targets in excess of 200 per cent.

Branches of foreign insurers registered under the ICA are subject to similar guidelines. Branches must vest in trust with the Superintendent assets sufficient to meet its internal capital target ratio.

Provincially incorporated insurance companies must comply with similar capital requirements.

6 Reserves

What are the requirements with respect to reserves maintained by insurance and reinsurance companies?

The liabilities shown in the annual return of a company incorporated under the ICA or of a branch of a foreign insurer registered under the ICA must contain a reserve for the value of the actuarial and other policy liabilities of the company or branch. Such a company or branch must have an appointed actuary who must value the actuarial and other policy liabilities of the company or branch in accordance with Canadian accepted actuarial practice, subject to such changes and additional directions that may be made by OSFI.

7 Product regulation

What are the regulatory requirements with respect to insurance products offered for sale? Are some products regulated by multiple agencies?

Insurance products and market conduct by insurers are exclusively regulated by provincial or territorial insurance regulators. Provincial and territorial insurance legislation contains general provisions with respect to insurance policies (other than life, accident and sickness and marine insurance policies) and specific provisions with respect to fire, automobile, life and accident and sickness policies, including statutory conditions that are deemed to be included in such policies. Those provinces and territories that permit private insurers to underwrite automobile insurance mandate the form of automobile policies. There are no other policy form requirements, and insurers are not required to file their policy forms with insurance regulators, nor to obtain approval of policy forms.

Insurers are not required to file rates or obtain approval for rates, with the exception of automobile insurance rates.

8 Regulatory examinations

What are the frequency, types and scope of financial, market conduct or other periodic examinations of insurance and reinsurance companies?

OSFI's supervision of an insurance or reinsurance company depends on the nature, size, complexity and risk profile of the company, and the potential consequences of its failure. OSFI designates a relationship manager for each company to conduct periodic assessments. OSFI's approach is based on the following principles:

- focus on material risk;
- forward-looking assessments and early intervention;
- sound, predictive judgement;
- understanding the drivers of risk;
- differentiation of inherent risks and management thereof;
- continuous and dynamic adjustment; and
- assessment of the whole institution.

Many insurers and reinsurers are reviewed annually by OSFI.

Canadian provinces and territories have exclusive jurisdiction to regulate market conduct with respect to the sale of insurance (see question 1), and the relevant provincial or territorial insurance regulators conduct separate assessments of an insurance company's market conduct in each province or territory in which it sells insurance. Reinsurance companies are not subject to such market conduct assessments.

9 Investments

What are the rules on the kinds and amounts of investments that insurance and reinsurance companies may make?

The ICA permits investments in accordance with written investment and lending policies, standards and procedures that a reasonable and prudent person would apply in respect of a portfolio of investments and loans to avoid undue risk of loss and obtain a reasonable return. This basic standard for investments is limited by express restrictions with respect to commercial and consumer lending, real estate investments, investments in equities and investments in real estate and equities. The ICA provides different restrictions for each of those types of investments for property and casualty insurance companies in Canada, registered branches of foreign property and casualty insurance companies in Canada, life insurance companies in Canada and registered branches of foreign life insurance companies in Canada.

10 Change of control

What are the regulatory requirements on a change of control of insurance and reinsurance companies? Are officers and directors of the acquirer subject to background investigations?

Both the acquisition of more than 10 per cent of any class of shares (a 'significant interest') and the acquisition of control of an insurance company incorporated under the ICA require the approval of the Minister. 'Control' for this purpose includes de jure and de facto control.

An applicant that proposes to acquire control must submit a detailed application to OSFI that includes:

- information concerning the applicant's home regulator and confirmation from the applicant's home regulator that it reports favourably on the applicant (if the applicant is a financial institution);
- the names of all persons owning more than 10 per cent of any class of shares of ownership interests in the applicant;
- a description of how the applicant will fund the acquisition;
- financial information concerning the applicant;
- information on any change the applicant proposes to make to the company's board of directors, senior management, risk management policies or procedures and business plan; and
- a support-principle acknowledgement letter signed by the applicant acknowledging the applicant's responsibility to support the operations and capital needs of the company.

In making a decision on whether to approve an application to acquire a significant interest, the Minister is required to consider, inter alia:

- the business record and experience of the applicant;
- the character and integrity of the applicant;
- whether the applicant has the financial strength to acquire control and to support the ongoing operations of the company;
- whether the transaction will be in the best interests of the Canadian financial services sector; and
- where the applicant is not a WTO member resident, whether the jurisdiction of residence of the applicant provides reciprocal treatment to Canadian financial institutions.

The applicant (if an individual) and any new individuals who will be appointed to the board of directors or as senior managers will be subject to background investigations by law enforcement and intelligence agencies.

The Competition Tribunal has authority under the Competition Act to block a purchase of shares or assets (a merger) that substantially prevents

or lessens, or is likely to prevent or lessen, competition. The Competition Act requires prior notification of substantial mergers to the Commissioner of Competition.

If the applicant proposing to acquire control of an insurance company is a foreign citizen or company, the acquisition may be reviewable under the Investment Canada Act (see question 13).

A change of control of a foreign insurer that has registered a branch under the ICA is not subject to any approvals under the ICA; however, the transaction may be notifiable under the Competition Act (see above) and may be reviewable under the Investment Canada Act (see question 13).

11 Financing of an acquisition

What are the requirements and restrictions regarding financing of the acquisition of an insurance or reinsurance company?

OSFI has not issued any explicit guidance with respect to the financing of an acquisition of control of an insurance company incorporated under the ICA. However, such companies are themselves subject to borrowing restrictions. While OSFI will permit a modest amount of debt in a holding company, OSFI will be concerned if the level of debt could impose an unreasonable burden on the insurance company to make distributions to the holding company to service this debt.

12 Minority interest

What are the regulatory requirements and restrictions on investors acquiring a minority interest in an insurance or reinsurance company?

Investments that are considered to be a 'significant interest' in an insurance or reinsurance company require the approval of the Minister (see question 10). Below that threshold, there are no regulatory requirements or restrictions.

13 Foreign ownership

What are the regulatory requirements and restrictions concerning the investment in an insurance or reinsurance company by foreign citizens, companies or governments?

An insurance company incorporated under the ICA is not permitted to register in its securities register or transfer or issue any share of the company to a foreign government or foreign government agency or an entity controlled by a foreign government. There are no other restrictions in the ICA on foreign citizens or companies investing in a Canadian insurance or reinsurance company. However, certain approvals may be required before making the investment (see question 10).

Subject to some exceptions, acquisitions of Canadian businesses above a certain size by a non-resident are reviewable under the Investment Canada Act. The Minister of Industry can block an acquisition if he or she is not satisfied that the acquisition is likely to be of net benefit to Canada. Whether or not an acquisition is reviewable, a non-resident is required to notify Investment Canada under the Investment Canada Act with respect to an investment to establish a new Canadian business.

14 Group supervision

What is the supervisory framework for groups of companies containing an insurer or reinsurer in a holding company system? What are the enterprise risk assessment and reporting requirements for an insurer or reinsurer and its holding company?

The supervision of Canadian insurance and reinsurance companies is principles-based (see question 8) and conducted on a consolidated basis, which involves an assessment of all of an insurance or reinsurance company's material entities (including all subsidiaries, branches and joint ventures), both in Canada and internationally. Canada has not adopted the EU's Solvency II framework for the supervision of groups of companies having a head office outside of Canada, but the Canadian model has a number of features similar to Solvency II, such as the three-pillar approach and the own risk and solvency assessment. A number of guidelines issued by OSFI are relevant to group supervision, including those issued in respect of regulatory capital and internal capital targets, own risk and solvency assessments, stress testing and enterprise risk management.

15 Reinsurance agreements

What are the regulatory requirements with respect to reinsurance agreements between insurance and reinsurance companies domiciled in your jurisdiction?

OSFI has issued a Guideline on Sound Reinsurance Practices and Procedures (Reinsurance Guideline) that requires insurers and reinsurers to ensure that the terms and conditions of reinsurance contracts provide clarity and certainty on reinsurance coverage. If a final, comprehensive contract cannot be executed prior to the effective date, the parties must have entered into, prior to such date, a binding written slip, cover note or letter of intent that sets out the principal terms and conditions of the reinsurance. The parties are required to enter into a final, comprehensive reinsurance contract within a relatively short time frame that has regard to the nature, complexity and materiality of the agreement.

The Reinsurance Guideline further requires that reinsurance contracts contain an insolvency clause clarifying that the reinsurer must continue to make full payments to an insolvent cedent without any reduction resulting solely from the cedent's insolvency. In addition, 'off-set' and 'cut-through' clauses and the structure of 'funds withheld' arrangements and other such types of terms and conditions must not be used to frustrate the scheme of priorities under the Winding-Up and Restructuring Act (WURA) (see question 19). Finally, the Reinsurance Guideline states that OSFI expects all reinsurance contracts to stipulate a choice of forum and a choice of law.

16 Ceded reinsurance and retention of risk

What requirements and restrictions govern the amount of ceded reinsurance and retention of risk by insurers?

The Reinsurance Guideline (see question 15) now requires a cedent to have a sound and comprehensive reinsurance risk management policy (RRMP). OSFI expects the RRMP to document the cedent's approach to managing risks through reinsurance including, inter alia, risk concentration limits and ceding limits. The Reinsurance Guideline states that a cedent generally should not, in the normal course of business, cede 100 per cent or substantially all of its risks in the main areas in which it conducts business. A cedent may, however, occasionally cede a portion, or even 100 per cent, of a specific line of business or a particular type of risk that is ancillary to its core business.

17 Collateral

What are the collateral requirements for reinsurers in a reinsurance transaction?

A reinsurance company is not required by law to post collateral in a reinsurance transaction. However, a company incorporated under the ICA or a branch of a foreign insurer registered under the ICA is not permitted to take credit for reinsurance ceded to an unregistered reinsurer unless that reinsurer posts collateral. Accordingly, most reinsurance contracts with unregistered reinsurers require that they post collateral. The amount of collateral required is negotiable; however, in order for the cedent to take full credit for the reinsurance, the amount must equal the actuarial value of the ceded liabilities (including reserves for outstanding claims and unearned premium, if any), plus the margin held by the cedent with respect to such ceded liabilities under OSFI's minimum capital guidelines (see question 5).

Where the cedent is an insurance company incorporated under the ICA or the branch of a foreign insurer registered under the ICA, such collateral must be deposited with a custodian in Canada pursuant to a reinsurance security agreement, and the unregistered reinsurer must have granted a security interest in favour of the cedent over the collateral. The cedent must also obtain an opinion from legal counsel that confirms that the security interest in the pledged assets is legally enforceable against all other creditors of the unregistered reinsurer, including in the event of insolvency, and that the security interest over the collateral constitutes a valid, first-ranking security interest.

Alternatively, an unregistered reinsurer may deposit sufficient assets with the ceding company (sometimes referred to as 'funds withheld'). If this option is used, the reinsurance contract must clearly provide that, in the event of the cedent's or reinsurer's insolvency, the funds withheld, less any surplus due back to the reinsurer, must form part of the cedent's general estate.

A letter of credit can only be used to collateralise a maximum of 30 per cent of the liabilities reinsured with an unregistered reinsurer. The letter of credit must adhere strictly to OSFI's requirements.

18 Credit for reinsurance

What are the regulatory requirements for cedents to obtain credit for reinsurance on their financial statements?

See question 17.

19 Insolvent and financially troubled companies

What laws govern insolvent or financially troubled insurance and reinsurance companies?

The Superintendent may, pursuant to the ICA, take control of an insurer incorporated under the ICA or the assets of a branch of a foreign insurer registered under the ICA where, inter alia, the company or the branch has failed to pay its liabilities or, in the opinion of the Superintendent, will not be able to pay its liabilities as they become due and payable, or the assets of the company or the branch are not, in the opinion of the Superintendent, sufficient to give adequate protection to its policyholders and creditors.

The WURA governs insolvent or financially troubled insurance and reinsurance companies, including branches of foreign insurers registered under the ICA and insurers incorporated under provincial or territorial laws. The WURA provides that, where the Superintendent has taken control of an insurer or the assets of the branch of a foreign insurer pursuant to the ICA, a court may make a winding-up order in respect of the insurer or branch.

20 Claim priority in insolvency

What is the priority of claims (insurance and otherwise) against an insurance or reinsurance company in an insolvency proceeding?

The WURA governs insolvency proceedings of insurance and reinsurance companies in Canada. The WURA provides that all costs, charges and expenses properly incurred in the winding-up of a company, including the remuneration of the liquidator, are payable out of the assets of the company, in priority to all other claims. In general, the company must then satisfy certain obligations for unpaid salary and wages to employees in the three months before the commencement of the winding-up, then its obligations to policyholders and to its secured and unsecured creditors, in that order. To the extent any assets remain, they are distributed among the members or shareholders according to their rights and interests in the company. The WURA expressly preserves the law of set-off, at law or equity, with respect to all claims on the estate of a company and to all proceedings for the recovery of debts due or accruing due to a company at the commencement of the winding-up of the company, in the same manner and to the same extent as if the business of the company was not being wound up.

21 Intermediaries

What are the licensing requirements for intermediaries representing insurance and reinsurance companies?

Insurance agents, brokers and claims adjusters must be licensed in each province or territory in which they sell insurance or adjust claims. Managing general agents (MGAs), managing general underwriters (MGUs) and third-party administrators (TPAs) are required to be licensed if their activities cause them to fall within the definition of an insurance agent or broker under the relevant provincial or territorial insurance legislation. Generally, an 'agent' is defined as a person who solicits insurance on behalf of an insurer or transmits an application for, or a policy of, insurance to or from such insurer, or acts in the negotiation of such insurance. As a result of the breadth of this definition, an MGA, MGU or TPA may find that it must obtain provincial or territorial agent licences. When it comes into force, the new Saskatchewan Insurance Act will require MGAs to be licensed.

Currently, reinsurance intermediaries do not need to be licensed, as long as none of their activities would cause them to fall within the definition of an insurance agent or broker within the relevant provincial or territorial insurance legislation.

Insurance claims and coverage

22 Third-party actions

Can a third party bring a direct action against an insurer for coverage?

Insurance statutes in all provinces and territories, except Quebec, provide that a third party may bring an action against a liability insurer (other than an automobile insurer) if the insured under the liability policy is found liable for injury or damage to the person or property of the third party, and fails to satisfy a judgment awarded against the third party in respect of his or her liability. In the case of automobile insurance, insurance statutes in all provinces and territories, except Quebec, provide that a third party has a right of action to recover directly from the automobile insurer.

In Quebec, an injured third party may bring an action directly against the insured or the liability insurer, or against both, under the Civil Code. In Quebec, auto insurance is dealt with on a first-party, no-fault basis.

23 Late notice of claim

Can an insurer deny coverage based on late notice of claim without demonstrating prejudice?

Insurance statutes in all provinces and territories, except Quebec, provide for relief from forfeiture in the court's discretion, where there has been imperfect compliance with respect to the notification of loss requirements in the policy. Unless the insurer has been prejudiced by late notice, relief from forfeiture will usually be granted to the insured by the court. However, relief from forfeiture on the grounds of lack of prejudice is not available for failure to bring an action against an insurer within an applicable limitation period. In Quebec, the Civil Code provides that if a property and casualty insurer sustains injury due to late notice of a claim, the insurer may invoke any clause of the policy that provides for forfeiture of the right to indemnity.

24 Wrongful denial of claim

Is an insurer subject to extracontractual exposure for wrongful denial of a claim?

Punitive damages have been awarded against insurers for wrongful denial of claims where the court has found that the insurer acted in bad faith and engaged in conduct that was high-handed, malicious, arbitrary or highly reprehensible. Aggravated damages have been awarded where wrongful denial of a claim caused foreseeable mental distress to the insured.

25 Defence of claim

What triggers a liability insurer's duty to defend a claim?

Generally speaking, a liability insurer's duty to defend is triggered where the pleadings allege acts or omissions that fall within the policy coverage. Allegations in the pleadings that are not supported by the factual allegations made therein or allegations of negligence that are derivative of the harm caused by intentional conduct do not trigger a duty to defend. A liability insurer is only required to defend those allegations that potentially fall within the scope of the policy, and the insured is responsible for the defence of allegations that clearly fall outside the scope of the policy.

26 Indemnity policies

For indemnity policies, what triggers the insurer's payment obligations?

An insurer's payment obligations under an indemnity policy are triggered by proof that an insured event has occurred that is within the scope of coverage afforded by the policy, and that the insured has suffered a financial loss as a result. While a claim may include both covered and uncovered claims, only covered claims are indemnifiable.

27 Incontestability

Is there a period beyond which a life insurer cannot contest coverage based on misrepresentation in the application?

Insurance statutes in all provinces and territories provide that a life insurer cannot contest coverage based upon non-disclosure or misrepresentation where the policy has been in effect for two years during the lifetime of the person whose life is insured, unless there was fraud. The right to void

coverage within this two-year period is limited to non-disclosure or misrepresentation of facts within the applicant's knowledge that are material to the insurance.

28 Punitive damages

Are punitive damages insurable?

This issue has not been extensively considered in Canada. However, in one Ontario case, the court held that insuring punitive damages is contrary to public policy.

29 Excess insurer obligations

What is the obligation of an excess insurer to 'drop down and defend', and pay a claim, if the primary insurer is insolvent or its coverage is otherwise unavailable without full exhaustion of primary limits?

There is jurisprudence in some provinces to the effect that the fact that the primary insurer is insolvent will not, in and of itself, require the excess insurer to 'drop down and defend'. In these cases, the courts held that an obligation on the part of the excess insurer to drop down and defend must be found in the terms of the excess policy, which can in certain cases be broader than the terms of the primary policy.

30 Self-insurance default

What is an insurer's obligation if the policy provides that the insured has a self-insured retention or deductible and is insolvent and unable to pay it?

There appears to be no Canadian jurisprudence on an insurer's obligation if the policy provides that the insured has a self-insured retention or deductible and the insured is insolvent and unable to pay the self-insured retention or deductible. As a result, the court would consider the facts of the case, including the policy wording, and any relevant English and United States jurisprudence. Third-party liability insurance policies in Canada usually include a condition that bankruptcy or insolvency of the insured or of the insured's estate will not relieve the insurer from its obligations under the policy.

31 Claim priority

What is the order of priority for payment when there are multiple claims under the same policy?

With the exception of automobile policies, the general rule adopted by Canadian courts is that, where there are multiple claimants under the same policy, payments are made on a first-come, first-served basis. Owing to specific statutory provisions in provincial and territorial insurance legislation, where there are multiple claimants under automobile policies, payments are made on a pro rata basis.

32 Allocation of payment

How are payments allocated among multiple policies triggered by the same claim?

There is no established Canadian rule with respect to how indemnity payments should be allocated among multiple policies triggered by the same claim. In deciding how to allocate such payments, the court will consider a number of factors, including the policy wording and the coverage trigger theory or theories adopted by the court in that case. There is some Canadian jurisprudence supporting a pro rata allocation based upon policy periods. There has been no judicial consideration of the 'all sums' approach adopted in some United States jurisdictions, which allocates responsibility for the full amount of the claim to every insurer who was at risk during the continuous period during which the injury is considered to have occurred, although this approach has been referred to in several cases.

33 Disgorgement or restitution

Are disgorgement or restitution claims insurable losses?

Generally speaking, third-party liability policies issued in Canada only cover the insured's liability to third parties for compensatory damages. Money payable by way of disgorgement or restitution is not normally considered to be damages and, therefore, is not normally covered under such policies.

34 Definition of occurrence

How do courts determine whether a single event resulting in multiple injuries or claims constitutes more than one occurrence under an insurance policy?

Most third-party liability policies issued in Canada define an 'occurrence' as an accident, including continuous or repeated exposure to substantially the same harmful conditions, or in words of similar effect. Where policies contain such a definition, Canadian courts have concluded that all injuries that flow from one cause or event are considered to result from one occurrence. However, where separate injuries result from separate acts, even though the acts may be of the same nature, each act constitutes a separate occurrence.

35 Rescission based on misstatements

Under what circumstances can misstatements in the application be the basis for rescission?

In the case of property and casualty insurance, under the common law, a material misrepresentation by the policyholder in the application will render the policy void or voidable. The onus is on the insurer to show that the risk would have been material to a reasonable insurer, and that the insurer would have charged a higher premium or would have refused to underwrite the risk if the misrepresented facts had been correctly or truthfully disclosed to the insurer.

In the case of life insurance and accident and sickness insurance, under provincial insurance legislation, an applicant for insurance and a person to be insured must each disclose to the insurer in the application, on a medical examination, if any, and in any written statements or answers furnished as evidence of insurability, every fact within the person's knowledge that is material to the insurance. A failure to disclose, or a misrepresentation of, such a fact renders the contract voidable by the insurer. A misstatement of the age of a person insured does not entitle an insurer to void the policy. In addition, where a policy has been in effect for two years, a failure to disclose or a misrepresentation of a fact required to be disclosed does not, in the absence of fraud, render the policy voidable.

Reinsurance

36 Reinsurance disputes

Are formal reinsurance disputes common, or do insurers and reinsurers tend to prefer business solutions for their disputes without formal proceedings?

Formal reinsurance disputes are not common in Canada. Most such disputes are dealt with by arbitration as opposed to litigation in court. While there is some Canadian jurisprudence with respect to substantive issues involving reinsurance, arbitrators are primarily guided by market practice, supplemented by consideration of English and United States reinsurance jurisprudence.

37 Common dispute issues

What are the most common issues that arise in reinsurance disputes?

Owing to the small number of reinsurance disputes and the fact that most are resolved by means of private arbitration, it is not possible to identify the most common issues that arise in such disputes. Examples of the issues involved in such disputes include underwriting and claims-related issues, failure to give timely notice of claims, and loss allocation and aggregation issues.

38 Arbitration awards

Do reinsurance arbitration awards typically include the reasoning for the decision?

Canadian reinsurance arbitration awards are usually brief and rarely include any reasoning for the decision.

39 Power of arbitrators

What powers do reinsurance arbitrators have over non-parties to the arbitration agreement?

Provincial and territorial arbitration legislation generally provides that arbitrators may, in certain circumstances, issue a notice to a non-party witness to produce documents and to attend and give evidence at the arbitration. Generally, parties or arbitrators may also subpoena witnesses or request the court to subpoena witnesses.

40 Appeal of arbitration awards

Can parties to reinsurance arbitrations seek to vacate, modify or confirm arbitration awards through the judicial system? What level of deference does the judiciary give to arbitral awards?

Parties to reinsurance arbitrations can seek to vacate or enforce arbitration awards through the judicial system. The grounds upon which a court may set aside an arbitration award are quite limited. They include situations where:

- the award was beyond the scope of the arbitration agreement;
- the applicant was not treated equally and fairly, was not given an opportunity to present a case or respond to another party's case, or was not given proper notice of the arbitration or the appointment of an arbitrator;
- an arbitrator committed a corrupt or fraudulent act or there was a reasonable apprehension of bias; and
- the award was obtained by fraud.

The arbitration statutes confer upon the arbitration tribunal the right, either on its own initiative or at a party's request, to modify an award, to correct typographical errors, errors of calculation and similar errors, or to amend an award so as to correct an injustice caused by an oversight on the part of the arbitral tribunal. These statutes do not allow a party to apply to the court to modify an arbitration award.

If the arbitration involves a non-Canadian party, the provisions of the UNCITRAL Model Law of International Commercial Arbitration apply.

In addition, where there are no non-Canadian parties, if the arbitration agreement does not deal with appeals on the question of law, a party may appeal an award to a court on a question of law and, if the arbitration agreement so provides, a party may appeal to the court on a question of fact or a question of mixed fact and law. There is no ability to appeal an arbitration award where one of the parties is a non-Canadian.

The courts give a high degree of deference to arbitral awards.

Reinsurance principles and practices

41 Obligation to follow cedent

Does a reinsurer have an obligation to follow its cedent's underwriting fortunes and claims payments or settlements in the absence of an express contractual provision? Where such an obligation exists, what is the scope of the obligation, and what defences are available to a reinsurer?

The limited Canadian jurisprudence on follow-the-fortunes and follow-the-settlements obligations indicates that the courts will imply such terms upon satisfactory evidence that they are consistent with the intent of the parties and with market practice. Arbitrators will be primarily guided by the intent of the parties and market practice, supplemented by consideration of the limited Canadian jurisprudence and the much larger body of English and United States jurisprudence on these concepts. The limited Canadian jurisprudence that exists indicates that these concepts will not require a reinsurer to pay losses that are outside the contractual scope of the reinsurance contract.

42 Good faith

Is a duty of utmost good faith implied in reinsurance agreements? If so, please describe that duty in comparison to the duty of good faith applicable to other commercial agreements.

It is a well-established principle of Canadian insurance law that an insurer owes a duty of good faith to its insured, and this same principle has been applied in the reinsurance context. The duty of good faith requires the cedent to disclose all material facts to the reinsurer. On the other hand, Canadian courts will not generally imply a duty of good faith in other commercial agreements. Where Canadian courts have implied such a duty in commercial contracts, they have done so to ensure that the actions of one party do not nullify the bargain made between the parties after the contract has been entered into. This duty does not require disclosure by one party to a commercial agreement of any material facts to the other party before a commercial agreement has been entered into.

43 Facultative reinsurance and treaty reinsurance

Is there a different set of laws for facultative reinsurance and treaty reinsurance?

There is no different set of laws for facultative and treaty reinsurance.

44 Third-party action

Can a policyholder or non-signatory to a reinsurance agreement bring a direct action against a reinsurer for coverage?

Canadian courts have consistently held that a policyholder or non-signatory to a reinsurance agreement cannot bring a direct action against a reinsurer for coverage. There is no Canadian jurisprudence on whether the beneficiary of a 'cut-through' clause could bring a direct action against a reinsurer. In any event, OSFI's Reinsurance Guideline prohibits the use of a cut-through clause in a reinsurance contract if it would frustrate the scheme of priorities under the WURA (see question 15).

45 Insolvent insurer

What is the obligation of a reinsurer to pay a policyholder's claim where the insurer is insolvent and cannot pay?

Canadian reinsurance contracts have for many years contained insolvency clauses that require the reinsurer to make full payments to an insolvent cedent without reduction solely from the cedent's insolvency. Insurers regulated by OSFI are now required to include such clauses in their reinsurance contracts (see question 15).

46 Notice and information

What type of notice and information must a cedent typically provide its reinsurer with respect to an underlying claim? If the cedent fails to provide timely or sufficient notice, what remedies are available to a reinsurer and how does the language of a reinsurance contract affect the availability of such remedies?

The type of notice and information that a cedent must give its reinsurer with respect to an underlying claim depends upon the terms of the reinsurance contract. Most proportional treaties deal with claims in a bulk fashion by means of quarterly statements. Few reinsurance treaties nowadays require bordereaux reporting. Market practice with respect to proportional treaties is not to provide detailed information about underlying claims. Market practice with respect to excess of loss claims and facultative claims (both proportional and excess of loss) is to provide the reinsurer with copies of adjusters' reports and pleadings in the case of liability claims. To some extent, the amount of information provided may depend upon the complexity or novelty of the claim.

There is no Canadian jurisprudence on the remedies available to a reinsurer where the cedent fails to provide timely or sufficient notice of an underlying claim. However, arbitrators generally apply the same approach as the courts in connection with late notice of claim by an insured, that is, that the cedent will not forfeit its right to recover unless the reinsurer has been prejudiced by the delay, although the language of the reinsurance contract may influence the arbitrators' decision in this respect. It is unclear how a Canadian court or arbitration panel might rule where the delay in giving notice of loss exceeds an applicable statutory limitation period.

47 Allocation of underlying claim payments or settlements

Where an underlying loss or claim provides for payment under multiple underlying reinsured policies, how does the reinsured allocate its claims or settlement payments among those policies? Do the reinsured's allocations to the underlying policies have to be mirrored in its allocations to the applicable reinsurance agreements?

This issue is discussed in question 32. As there is no Canadian jurisprudence on this allocation issue, the policy wordings would need to be considered, and supplemented by market practice (if any) and by any relevant English and United States reinsurance jurisprudence.

There is also no Canadian jurisprudence on how a loss or claim that provides for payment under multiple policies should be ceded to multiple reinsurance contracts or whether the reinsured's allocations to the underlying policies have to be mirrored in its allocations to the applicable reinsurance agreements.

48 Review

What type of review does the governing law afford reinsurers with respect to a cedent's claims handling, and settlement and allocation decisions?

Almost all Canadian reinsurance contracts contain arbitration clauses that require that disputes with respect to a cedent's claims handling, settlement and allocation decisions be referred to arbitration. As discussed in question 40, the courts give a high degree of deference to arbitral awards, from which the reinsurer may have limited or no rights of appeal (depending upon the wording of the arbitration clause), and may have limited grounds to ask a court to set aside the award.

Where a reinsurance contract does not contain an arbitration clause, the reinsurer would be able to litigate in court issues involving a cedent's claims handling, and settlement and allocation decisions.

In both venues, arbitration and court, the decider will be guided principally by the reinsurance contract wording, supplemented by market practice and any relevant Canadian, English and United States reinsurance jurisprudence.

49 Reimbursement of commutation payments

What type of obligation does a reinsurer have to reimburse a cedent for commutation payments made to the cedent's policyholders? Must a reinsurer indemnify its cedent for 'incurred but not reported' claims?

There is no Canadian jurisprudence on either of these issues. As a result, an arbitration panel or court would consider the facts of the case, including the reinsurance contract wording, market practice, and any relevant English and United States reinsurance jurisprudence.

50 Extracontractual obligations (ECOs)

What is the obligation of a reinsurer to reimburse a cedent for ECOs?

The obligation of a reinsurer to reimburse a cedent for ECOs is normally expressly provided for in or excluded from reinsurance agreements. There is no consistency in these provisions – while most reinsurance agreements exclude ECO coverage, some include ECO coverage (usually where the reinsurer has been consulted about, or has expressly agreed to, the cedent's litigation strategy).

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