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China: Trends & Developments

Zhan Hao, Wan Jia, Wang Xuelel and Cui Wei
AnJie Broad Law Firm



Trends and Developments

Contributed by:

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AnJie Broad Law Firm

AnJie Broad Law Firm has an insurance practice team that provides a wide range of service areas, including insurance M&A, establishment and compliance operation of insurance institutions and finance work. It provides its clients with accurate policy advice and first-class dispute resolution services across numerous policy types and market sectors. Insurance dispute resolution is a core practice area and a team priority. The team of over 50 lawyers continually acts on the toughest arbitration cases on the forefront of insurance dispute resolution. Disputed insurance matters

handled by AnJie Broad's insurance team include property insurance claims disputes, life insurance claims disputes, insurer's subrogation disputes, reinsurance contract disputes, insurance-fund product disputes and insurance institution investment disputes. The firm can offer both local insights and global reach. It has established an extensive co-operative network with first-class law firms in the US, the UK, Germany, France, Canada, Australia, Japan, South Korea, and other states and regions. This allows AnJie Broad to continue to deliver top-tier global insurance-related legal services.

Authors



Zhan Hao is the managing partner of AnJie Broad Law Firm. He was listed as a Band 1 PRC Insurance Lawyer by Chambers & Partners from 2009 to 2022. Besides being a

professor at the Central University of Finance and Economics Law school and Renmin University of China Law school, Dr Zhan is a legal expert at the Insurance Asset Management Association of China and Insurance Association of China. He has obtained his PhD, Master of Law and Bachelor of Law degree in China and has finished his post-doctorate research in the economy. His areas of expertise include insurance and reinsurance, and antitrust/competition.

CHINA TRENDS AND DEVELOPMENTS

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Wan Jia focuses her practice on insurance disputes, complex commercial litigation and arbitration. She has successfully represented AnJie Broad Law Firm clients in the insurance

sector in a variety of insurance disputes, including insurance claims disputes, insurer's subrogation disputes, insurance fund utilisation, etc. Besides representing clients in domestic litigation matters before PRC courts, Ms Wan has handled domestic and international arbitration matters before numerous leading arbitral institutions. She has been admitted as a lawyer both in the State of New York in the USA and the PRC. Ms Wan has handled many influential and complex cases. Her areas of expertise include property insurance, liability insurance and insurance subrogation litigation.



Wang Xuelei was promoted to the position of partner at AnJie Broad Law Firm in 2015. He is skilled in insurance dispute resolution involving areas such as personal insurance, property

insurance, liability insurance, and export credit insurance. Mr Wang has been working in the insurance law sector for over 12 years and has handled many complex insurance disputes. He has represented clients in cases before the Supreme People's Court, the High People's Courts of multiple provinces and many other Intermediate People's Courts. Mr Wang is also an arbitrator of the Handan Arbitration Commission and the Ningbo Arbitration Commission. His areas of expertise include personal insurance, property insurance, liability insurance and export credit insurance.



Cui Wei is a partner at AnJie Broad Law Firm, skilled in commercial and financial dispute resolution. His practice areas involve insurance, corporate, and financial

investment. He has been practising law in dispute resolution for over ten years. Mr Cui has extensive experience in representing domestic and foreign clients in complex litigation and arbitration cases. He has represented cases before the PRC Supreme People's Court, the High People's Courts of multiple provinces and many other Intermediate People's Courts, as well as major arbitration institutions. Mr Cui is qualified to practise in the PRC and the State of New York in the USA.

AnJie Broad Law Firm

19/F, Tower D1
Liangmaqiao Diplomatic Office Building No 19
Dongfangdonglu
Chaoyang District
Beijing 100600
China

Tel: +86 10 8567 5988
Fax: +86 10 8567 5999
Web: www.anjielaw.com



Introduction

The insurance industry is an important pillar of the financial system and social security system. In recent years, China's insurance industry has achieved rapid development. As of April 2023, there are 347 members of the Insurance Association of China (IAC), among which are 13 insurance group (holding) companies, 86 property insurance companies, 93 life insurance companies, 14 reinsurance companies, 18 insurance asset management companies and 69 insurance intermediaries. In fact, other than the members of IAC, there are still more asset management companies and insurance intermediaries acting in the market. According to data released by the former China Banking and Insurance Regulatory Commission and the State Financial Regulatory Administration, the insurance premium income from January to May 2023 totalled CNY2.6 trillion, an increase of 10% year-on-year-growth. With the continuous development of the insurance industry, the volume of insurance litigation also grows with every passing day. As of July 2023, there were nearly three million litigation cases in relation to insurance policies from the China Judgments Online Database, mainly involving disputes over property insurance policies and life insurance

policies, as well as some subrogation cases and a small number of insurance premium disputes cases. The trends and developments of insurance litigation present distinctive characteristics as described below. Meanwhile, although litigation resolutions and arbitration resolutions are still the mainstream ways to resolve insurance disputes, the surge of insurance disputes cases has also created a demand for building a diversified disputes settlement system.

Characteristics of Trends and Developments of Insurance Litigation in China

Disputes may arise in all aspects of formation and performance of insurance policies: for example, the determination of the validity and application of the exclusion clause, whether the insurer performs the obligation to make an explicit explanation of the meaning of the exclusion clause, whether the incident is covered by the insurance policy, whether the calculation of the loss is accurate. These are the very typical disputed issues in insurance litigation.

Insurance litigation cases regarding new types of insurance policies continue to emerge as well. Apart from disputes arising out of traditional insurance policies, such as motor vehicle

liability insurance, work injury insurance, pension insurance and life insurance, cases related to cyber insurance, D&O liability insurance and green agriculture insurance are emerging. Compared with insurance litigation regarding traditional insurance policies, the insurance litigation regarding new types of insurance policies may involve multiple legal relationships and complicated facts, which presents difficulties and challenges for law practitioners and adjudicators. Some new types of insurance litigation are set out in detail below.

The increase of securities class actions has led to a rapid growth of the number of claims and litigations under D&O liability insurance policies

With the official implementation of the new Securities Law of the People's Republic of China in March 2020, PRC supervisory departments have continued to make breakthroughs in clarifying the scope of liability and compensation for those responsible directors and officers and have further strengthened the recourse against actual controllers of listed companies. As of January 2023, a total of 337 A-share listed companies issued announcement information about purchases of D&O liability insurance, the number of which increased by 36% year-on-year. Under the influence of stricter regulation, the risk of litigation involving listed companies related to misrepresentation and fraudulent statements has risen, the required standards for directors and officers performing their fiduciary duties have been higher, and corresponding disputes over D&O liability insurance policies have increased. Compared with other liability insurance litigation, D&O liability insurance litigation presents characteristics such as fewer referable precedents, complex legal relationships and difficulties in the application of laws.

Situations will be more complex when foreign litigation procedures are involved. As many Chinese companies choose to be listed in stock markets outside mainland China, such as the Hong Kong Stock Exchange, the New York Stock Exchange or the NASDAQ, class actions and investigations brought against insureds in those jurisdictions will make claims under the D&O insurance policy even more challenging, such as whether the penalties imposed by the foreign regulator are covered under the D&O policy, how to apply the foreign law to make the allocation of loss when covered and uncovered insureds are both sued, how to determine the reasonableness of the settlement amount entered in the proceedings in another jurisdiction when the D&O policy dispute is heard by a PRC court or arbitration tribunal, etc.

Insurance litigation in the Internet Plus era

With the rapid development of the social economy and internet service, online sales of insurance products expand rapidly, creating new opportunities for the development of the insurance industry. According to the Interim Measures for the Supervision of the Cyber Insurance Business issued by the China Banking and Insurance Regulatory Commission (CBIRC, the former China Insurance Regulatory Commission), insurance companies can operate cyber insurance business in several areas, such as personal accident injury insurance, term-life insurance and whole-life insurance, household property insurance, liability insurance, etc. In 2016, nearly 80% of Chinese insurance companies have started their cyber insurance business through different business models such as constructing their own websites or co-operating with third-party platforms. The development of cyber insurance without a well-established regulatory system has triggered chaos. In 2018, the CBIRC and its branches received 10,531 consumer complaints

about cyber insurance, which correspondingly resulted in a surge of litigation cases related to cyber insurance policies. Formation of cyber insurance policies is different from that of traditional policies, so disputes usually relate to the formation process.

According to Article 3 of the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Insurance Law of the People's Republic of China (II) (amended in 2020), if the policyholder or the policyholder's agent does not sign or seal the insurance policy in person, but the insurer or the insurer's agent signs or seals it on behalf of the policyholder, the policy should not take effect for the policyholder; however, if the policyholder has already paid the insurance premium, it should be regarded as retroactive recognition of the act of signing or stamping on behalf of the policyholder. Thus, it weighs a lot to the formation and inception of cyber insurance policies whether the electronic signature is personally signed by the policyholder and whether the electronic signature is valid. The effectiveness of the cyber insurance policy also relates to whether the policyholder pays the premium in full and on time through electronic payment.

According to Article 17 of the Insurance Law of the People's Republic of China (the "PRC Insurance Law"), an insurer should highlight clauses which exclude the liability of the insurer on the insurance application form, insurance policy document or any other insurance certificate, bringing them to the attention of the policyholder in an insurance policy, and in writing or verbally explain to the policyholder the contents of such clauses; where there is no highlighting or explicit explanation, such clauses would be invalid. Due to the convenient and efficient characteristics of purchasing cyber

insurance, the policyholder frequently asserts that insurers failed to perform their obligation under Article 17 of the PRC Insurance Law. Thus, in cyber insurance litigation, the burden of proof is placed upon the insurers to prove that they fulfil the obligation to inform the policyholder of the contents of the insurance policy truthfully through the internet sales platform.

Insurance litigation under the influence of the green economy

The demand for green insurance in the green financial market is increasing, and agricultural insurance plays an essential role in the growth of green insurance in China. China is currently one of the major countries in terms of agricultural insurance premium income, with premium income of CNY119.2 billion in 2022. Faced with the direct or indirect risks brought by global environmental pollution, climate change and natural disasters, the corresponding disputes over agricultural insurance policies have increased. The main features are as follows.

First, agricultural insurance policies litigation usually comes in the form of a series of cases, ie, different plaintiffs in the same area bring separate litigation cases against the same insurer for similar facts and reasons.

Second, agricultural insurance products are generally policy-oriented and subsidies from the local government are granted for public interest considerations. The PRC Agricultural Insurance Regulations clearly stipulate that the local financial department is the administrative agency of agricultural insurance, and the subsidies are determined by the local financial department. Therefore, when the PRC courts hear the relevant cases, in addition to applying the PRC Insurance Law, the Civil Code of the People's Republic of China (the "Civil Code")

and other laws, the PRC courts also need to take into account regulations issued by local financial departments.

Third, parties to agricultural insurance policies are prone to disputing the validity of the terms of the insurance policy and the manner of determining the loss resulting from the incidents. In practice, the two main disputed focal issues are whether the loss has really occurred and whether the insurance claim is fraudulent.

Lastly, given that the insureds of agriculture insurance policies generally have low incomes and are in a relatively vulnerable position, the PRC courts tend to protect their interests by taking into account the principle of equity.

Increasing number of litigation cases arising out of litigation property preservation liability insurance

Litigation property preservation refers to the protection measures taken by the court to prevent a party (generally the defendant) from transferring, concealing or selling the property before the judgment is issued, so as to ensure the smooth execution of the judgment after it takes effect in the future.

In accordance with the Civil Procedure Law of the People's Republic of China, when receiving an application for taking preservation measures, the people's court may require the applicant/plaintiff to provide a guarantee. In recent years, a litigation property preservation liability insurance policy (LPPL) is considered as a qualified and legitimate method of providing a guarantee.

LPPL insurance generally covers the losses suffered by the defendant as a result of the wrongful or improper application for property preservation. When the applicant/plaintiff loses

the case, the defendant will sue the applicant/plaintiff and the insurer to reimburse the losses caused by property preservation measures.

With the wide application of LPPL insurance in civil litigation cases, more and more disputes have arisen out of such insurance policies. The following criteria will be considered in LPPL disputes:

- whether the applicant had subjective fault;
- whether the preservation measures were adopted in an improper manner;
- whether the defendant suffered any loss; and
- whether there was a direct causation between the improper preservation measures and the defendant's loss.

New Laws, Regulations and Trends The formation of the State Financial Regulatory Administration

On 18 May 2023, the State Financial Regulatory Administration was formed on the basis of the China Banking and Insurance Regulatory Commission (CBIRC) and is responsible for the supervision of the financial industry, including the insurance industry.

Before this, the CBIRC had been in operation for more than five years. With the formation of the State Financial Regulatory Administration, the CBIRC will no longer exist.

Changes of hierarchical jurisdiction

In China, there are four levels of courts: the primary courts, the intermediate courts, the high courts, and the Supreme People's Court. In accordance with the judicial interpretations published by the Supreme Court on 17 September 2021, if the amount in dispute for a civil case is less than CNY500 million (not inclusively), the primary court will have first-

instance jurisdiction; if the amount in dispute for a civil case is between CNY500 million (inclusively) and CNY5 billion (not inclusively), an intermediate court will have first-instance jurisdiction; if the amount in dispute for a civil case is more than CNY5 billion (inclusively), the high court will have first-instance jurisdiction. It is rare for the Supreme People's Court to hear a case at the first instance.

Changes of territorial jurisdiction

In accordance with PRC laws, a lawsuit brought on an insurance dispute will fall under the jurisdiction of the people's court where the domicile of the defendant or the insured object is located.

However, the territorial jurisdiction is subject to some exceptions. China has established some professional courts, such as the financial court, to handle litigations in some specific sectors. For instance, since 26 March 2021, the Beijing Financial Court will hear insurance disputes over which the Beijing Intermediate People's Court has first-instance jurisdiction. The Beijing Financial Court will also try the appeals for insurance disputes from the district courts of the first instance.

Impacts of the Civil Code's effectiveness

On 1 January 2021, the Civil Code came into force. The provisions of the Civil Code have numerous and significant impacts on the PRC Insurance Law and its judicial interpretations.

In accordance with the Civil Code, the insurer shall have a specific explanation obligation not only with regard to clauses which exempt or diminish the insurer from liability as prescribed by the PRC Insurance Law, but also for those clauses in which the applicants, beneficiaries or insureds have major interests.

Another noteworthy point concerns the amendment of the statute of limitations. Article 188 of the Civil Code provides that the limitation period for a person to request the people's court to protect his civil rights is three years, unless otherwise provided by law. However, before the Civil Code officially stipulated that the statute of limitation is three years, a two-year statute of limitation had long been implemented in China in accordance with PRC General Principles of Civil Law since their promulgation in 1987.

In considering the effectiveness of the Civil Code, the PRC courts have been divided as to whether a two-year or three-year statute of limitation should apply to disputes involving property insurance policies because the current effective PRC Insurance Law still stipulates that the period of limitation for the insured or beneficiary of non-life insurance to claim for insurance benefits is two years. Up to now, most of the courts would hold that a three-year statute of limitation in accordance with Article 188 of the Civil Code should be applied in property insurance claims as most courts consider that the two-year statute of limitation prescribed by PRC Insurance Law was inherited from the abolished PRC General Principles of Civil Law, instead of the special provisions of the PRC Insurance Law.

New approach to insurance disputes resolution: diversified dispute resolution mechanism

Against the background of increasingly complex insurance policy types and the upsurge of disputes, in addition to the traditional dispute resolution measures of litigation and arbitration, the establishment of diversified dispute resolution mechanisms has become a new trend.

On 22 May 2020, the Supreme Court of the People's Republic of China, the Ministry of

Public Security, the Ministry of Justice, and the CBIRC jointly issued the Notice on Promoting the Reform of “Integrated Online Data Processing” for Road Traffic Accident Damage Disputes (Law [2020] No 142), which standardised and improved the relevant mediation mechanism. The issuing of a series of relevant legal documents then followed, reflecting the importance of establishment and improvement of the diversified dispute resolution mechanisms.

The definition of the diversified dispute resolution mechanism is that when a dispute arises between an insured and an insurer, and the two parties cannot reach a settlement by themselves, they adopt a mechanism of resolving the dispute through mediation in the form of non-litigation by insurance industry associations, arbitration institutions, courts and other third parties.

According to the different participants, there are three main forms of diversified dispute resolution mechanisms in the insurance industry: the first model involves the CBIRC and the insurance industry association. In this scenario, with guidance from the CBIRC, the insurance industry association would lead the parties in settling the disputes. The second model involves the administrative organs as the main body to lead the two parties in settling the disputes. The third model involves the arbitration institution as the main body to lead the parties in settling the disputes through mediation or settlement instead of arbitration procedures.

In recent years, valuable experience has been accumulated in the establishment of the diversified dispute resolution mechanism. However, there are certain shortcomings, as follows. First, the legal and regulatory system has not been well established. Although the Supreme Court of the People’s Republic of China and the CBIRC have issued a series of legal documents, in practice, the legal status of the parties involved in mediation and the unified implementation of rules and regulations are still subject to further detailed laws and regulations. Second, the publicity and popularisation of the diversified dispute resolution mechanism needs to be strengthened. Third, the multiple dispute resolution mechanism requires enhanced financial supports.

Outlook and Conclusions

China has shown great potential in the development of the insurance industry, achieving a rapid expansion of the insurance market. Correspondingly, the number of insurance litigation cases has also increased significantly due to the development of the market. With the gradual maturity of the insurance industry, the improvement of relevant laws and regulations, and the development of diversified dispute resolution mechanisms, insurance litigation related to traditional insurance policies, as well as new-type insurance policies, are expected to be more properly resolved in the near future.

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