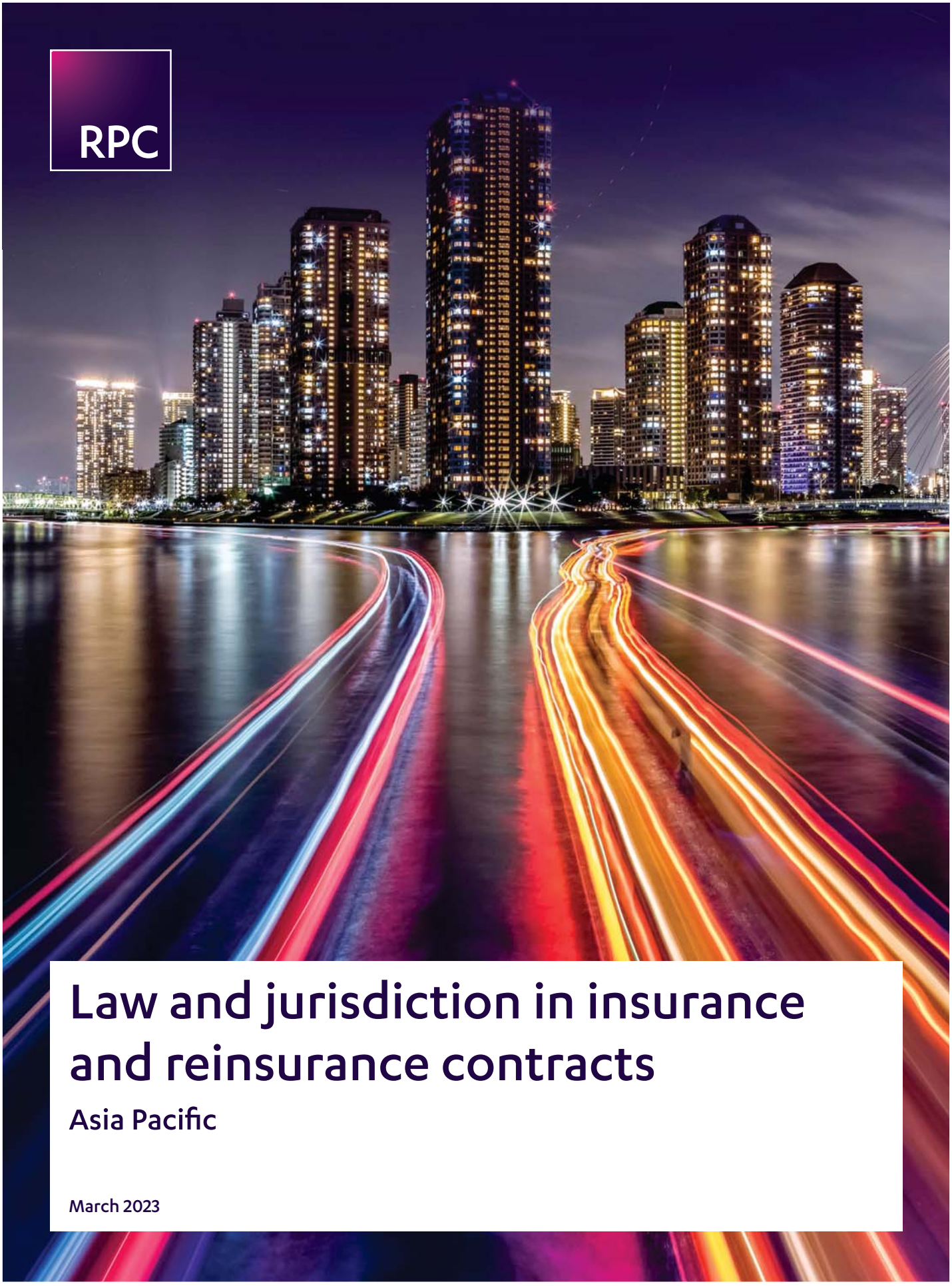

RPC

Law and jurisdiction in insurance and reinsurance contracts

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Introduction

While not always given priority during placement negotiations, governing law clauses, jurisdiction clauses and arbitration clauses are often the most important provisions in any insurance or reinsurance contract. This is because the governing law will determine the meaning and effect of all of the other terms of a policy. While underwriters and brokers may consider they have a good understanding of the terms of cover being bound, this understanding may often be founded on principles they are familiar with (such as English law). However this may be misconceived, where a different selection of governing law dictates the actual effect of the terms of cover, which may be very different from the underwriter's intentions.

There is, therefore, often a stark tension between the 'international understanding' of policy wordings on the one hand (where, for example, underwriters may negotiate terms of cover based upon a 'common law' understanding of policy terms) and local application on the other (where terms of cover may be ascribed very different meanings depending upon the relevant governing law provided for and the approach of local courts).

Significant uncertainty can arise, both as to the meaning of terms and the outcome of a given dispute, due to the potential for local courts to approach the application of contractual terms in a highly incongruous manner. This can be particularly the case in jurisdictions with less mature legal systems. An absence of developed legal principles relevant to specific issues, a lack of specialist judges and a range of other factors may lead to greater levels of uncertainty of outcome.

This situtation is typically much more pronounced at a reinsurance level. While there is significant case authority as to the meaning of reinsurance provisions and concepts as a matter of English law, many countries have only very nascent law in the reinsurance sphere. Since the commencement of the last soft market, this situation has become more pronounced, with underwriters being persuaded to move away from the certainty that came with historic preferences for, and selection of, English governing law in reinsurance contracts.

Suggestions that the same governing law should be provided for in both direct and reinsurance policies, often that of the risk location, can ignore the reality of how incorporated terms will be construed and the protection that a recognised governing law, such as English law, can provide to reinsurers. Historically, it was common to find different law and jurisdiction clauses across the different contracts in the insurance and (re)insurance contractual chain, and this can often be a preferred solution for reinsurers."

Issues of governing law and the applicable court jurisdiction are of course separate, though frequently the distinction is misunderstood or ignored. Two choices are to be made, one in relation to the choice of law clause, the other a jurisdiction clause stating the forum in which any dispute will be determined, either by national courts or, alternatively, in arbitration.

One of the difficulties when selecting governing law is that regulations in certain countries mandate that local law must apply to insurance contracts covering in-country exposures. Likewise, in many countries, courts are very reluctant to give up jurisdiction over disputes. Where insurers have concerns over the determination of disputes by local courts in a particular jurisdiction, the ability to provide for arbitration (importantly for liability as well as quantum matters) under the auspices of internationally recognised institutions and arbitral rules, can provide considerable comfort.

As a general premise, many courts and regulators are inclined to support of the enforcement arbitration clauses. It may be that local courts will require that local law be applied and even, at times, for the arbitration to be heard in that country. However, they may be less likely to interfere with the choice of the tribunal and this can serve to significantly mitigate jurisdictional risks.

A more problematic situation arises where the contract fails to specify a choice of law clause, such that conflict of law rules may be considered (and all I can say is that if you get to that stage you need a lawyer!)

Of course, laws can vary widely across jurisdictions, including the applicable limitation period. For example, absent any contractual specification, a claim may be subject to a two year time bar before the Thai courts, a 30 year limitation period in Indonesia, or in the case of Nepal, no prescription period at all!

Another crucial consideration should of course be the scope for commercial settlement. Many legal systems have compulsory schemes of mediation, as a potential mechanism to seek to resolve a dispute before it proceeds to litigation or arbitration. The recognition of concepts such as "confidentiality" and "without prejudice" varies across different jurisdictions but it is of significant importance when undertaking mediation or communicating settlement offers .

Within the confines of a comparative booklet of this size, it is not possible to provide a definitive statement of all law and procedure on these issues across 18 jurisdictions in Asia Pacific (as well as our 'starting point' of England and Wales). However, working with our friends and colleagues in leading regional legal practices, we have endeavoured to provide an accessible reference point to assist insurers with some immediate considerations, prior to seeking more substantive advice. We hope that this is useful and informative for both underwriting and claims professionals alike.

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Indonesia

Governing Law

Are direct insurance policies in Indonesia required to be subject to local law? If so, what are the provisions that govern this?

The governing law for direct insurance policies issued by Indonesian insurers is generally Indonesian law, although this is not mandated by Indonesian law or regulation.

Financial Services Authority (*Otoritas Jasa Keuangan* or **OJK**) Regulation No. 23/POJK.05/2015 (**OJK Reg 23/2015**) regarding Insurance products and the marketing of insurance products sets out the requirements for insurance products in Indonesia, including mandatory policy provisions. While it does not stipulate that policies be subject to Indonesian law, it does require that insurance policies marketed in Indonesia be in the Indonesian language or in a bilingual format.

Nevertheless, it is generally accepted that insurance policies issued by Indonesian insurers should be subject to Indonesian law as there must be a reasonable nexus between the chosen law, the parties' nationalities, the place where the policy is executed, and/or the place of the policy's performance. The choice of a foreign law to govern an insurance policy may raise the issue of the enforceability of the policy before the Indonesian courts because of a weak legal nexus.

Is the position the same, or does it differ, for reinsurance contracts?

The same applies for reinsurance policies issued by Indonesian reinsurers. However, where an international reinsurer is concerned, the reinsurance policy is more likely to be subject to the laws and regulations of the country where the reinsurer is based or some other governing law.

Are "floating governing law" clauses permitted in insurance and reinsurance policies in Indonesia?

There is no specific restriction on "floating governing law" clauses. However, as explained above, the governing law for insurance policies issued by Indonesian insurers and reinsurance policies issued by Indonesian reinsurers is as a matter of practice generally Indonesian law. If an Indonesian insurer has an insurance policy that stipulates a "floating governing law", that policy will most likely be interpreted and enforced under Indonesian law, as a result of being the most reasonable nexus.

Arbitration

Can direct insurance policies in Indonesia provide for arbitration (as opposed to court jurisdiction) as the sole dispute resolution mechanism for coverage disputes? If so, what specific legislation or rules apply to the arbitration of insurance disputes in Indonesia?

Insurance policies in Indonesia cannot provide for arbitration as the sole dispute resolution mechanism for coverage disputes. However, policies must provide for an alternative form of dispute resolution mechanism outside of the courts (see OJK Reg 23/2015).

The explanatory guidance to OJK Reg 23/2015 further provides that the dispute resolution provisions in an insurance policy cannot limit dispute settlement to just one mechanism.

OJK Regulation No. 61/POJK.07/2020 ("OJK Reg 61/2020") provides that any financial sector dispute (including insurance and reinsurance disputes) resolved outside the court's jurisdiction shall be settled through the OJK-approved Alternative Institutions for Financial Services Sector Dispute Settlement (*Lembaga Alternatif Penyelesaian Sengketa Sektor Jasa Keuangan* or "LAPS SJK").

However, as a rule of thumb, use of LAPS SJK is voluntary and the parties may opt for a different institution if they prefer.

LAPS SJK, which received an operation permit from the OJK in December 2020, provides dispute resolution services through mediation and arbitration.

Can the parties choose which (local or international) arbitral rules (including any institutional rules) apply, or is their ability to do so restricted by local law or regulation?

If the parties opt for arbitration by LAPS SJK, the LAPS SJK Rules will apply. However, under the LAPS SJK Arbitration Rules, parties also have the freedom to choose other arbitral rules, provided these other rules are not contrary to the prevailing laws and regulations or LAPS SJK policy. This means the parties are able to choose local or international arbitration rules.

Is there a compulsory default appointing body or authority for the appointment of arbitrators (in the event the parties cannot agree) or can the parties choose the default appointing body (by agreement or pursuant to the institutional rules of their choice)?

Indonesia (continued)

Where the parties agree to refer any dispute arising from an insurance contract to LAPS SJK for arbitration, either in an arbitration agreement or subsequently , Article 12 of LAPS SJK Reg. 2 stipulates that the parties may agree on an odd number of arbiters. If the Arbitration Agreement does not specify the number of arbitrators, it is assumed that three will be chosen. Alternatively, per Article 13 of LAPS SJK Reg. 2, a sole arbitrator may be chosen by the parties from the LAPS SJK List of Arbitrators within ten days from the registration of the petition for arbitration.

LAPS SJK will have the authority to appoint arbitrators, both sole arbitrator and tribunals, if the parties cannot agree.

The specific default appointing body pursuant to the LAPS SJK Arbitration Rules is the Administrator of LAPS SJK (appointed by a general meeting of members in accordance with LAPS SJK's articles of association).

If the parties have provided for arbitration in their policy, can the Insured nevertheless opt to pursue its claim before the local courts?

No. Article 3 of Law No. 30 of 1999 regarding Arbitration and Alternative Dispute Resolution, dated 12 August 1999 ("Arbitration Law"), provides that the district courts do not have the authority to adjudicate disputes between parties that are bound by an arbitration agreement. If one of the parties refers the dispute to a district court, the district court must refuse to hear such dispute.

Does local law or regulation require that the forum of any arbitration is in Indonesia or can the arbitral forum be overseas?

There is no local law or regulation that requires the forum of the arbitration to be in Indonesia. The LAPS SJK Arbitration Rules stipulate Jakarta as a default location for arbitration. The LAPS SJK Arbitration Rules, however, do not prohibit the parties from choosing an overseas forum for the arbitration with the approval of the arbitrator(s). If the parties decide to conduct the arbitration online, the place of arbitration is assumed to be the LAPS SJK secretariat in Jakarta unless specified otherwise.

Is the position the same on these issues as far as reinsurance contracts are concerned?

The above responses apply equally to reinsurance contracts. There is no requirement that reinsurance contracts provide an option for the parties to resolve the dispute either through the courts or, alternatively, outside of the court's jurisdiction.

Mediation

Can insurance and/or reinsurance policies in Indonesia provide for mediation of disputes? Can such mediation be compulsory?

Yes, insurance and reinsurance policies can provide for mediation of disputes, but it is not mandatory.

If mediation is stated as the first step in the dispute resolution mechanism of the insurance policy, the parties must first attempt mediation for any dispute. However, because this is contractual in nature, the parties can agree to waive the mediation clause and refer the dispute directly to arbitration or court if they wish.

Would mediation have to be undertaken under the auspices of a local mediation body or the local courts and pursuant to local mediation rules, or can the parties agree to use an international mediation centre, mediator and rules of their choice?

As mentioned above, pursuant to OJK Reg 23/2015, an insurance policy must provide an alternative dispute resolution option, including mediation. The OJK established LAPS SJK as an alternative dispute resolution institution for the financial services sector, complete with a mediation centre.

As discussed above, OJK Reg. 61/2020 regulates that any financial services sector dispute settled outside the court jurisdiction shall be through LAPS SJK. While OJK Reg. 61/2020 does not explicitly prohibit the use of an international mediation centre, the foregoing provision presumably compels any mediation for insurance disputes to be referred to LAPS SJK.

Are mediations conducted on the basis that they are confidential and "without prejudice"? If so, how is this achieved?

Yes. In a mandatory mediation process through the courts the principle of confidentiality is explicitly guaranteed. Article 5 paragraph (1) of Supreme Court Regulation No. 1 of 2016 regarding In-Court Mediation (SC Reg 1/2016) regulates that the mediation process is a closed and confidential process, except as agreed otherwise by the parties.

Article 35 of SC Reg 1/2016 explicitly provides that if the parties in dispute cannot reach an amicable settlement, any statement or information disclosed during the mediation process cannot be used as evidence in a litigation. Also, the mediator shall destroy their notes taken during the mediation process and cannot be a witness in any litigation process.

The confidentiality principle is adopted in the LAPS SJK Mediation Rules (Rules of LAPS SJK No. Per-01/LAPS-SJK/I/2021 regarding Mediation Rules and Proceedings, dated 4 January 2021). Article 4 provides that mediation is confidential in nature. This confidentiality can apply in certain circumstances, including:

As agreed by the relevant parties in dispute;

- As required to achieve an amicable settlement;
- Due to a court order and/or the order of another government authority;
- Academic research, keeping the identities of the relevant parties and mediator confidential.

The LAPS SJK Mediation Rules clearly regulate the use of any material disclosed during the mediation process, especially if the parties fail to reach an amicable settlement. No material or information disclosed in mediation can be used by the parties if they continue the dispute to LAPS SJK Arbitration.

The LAPS SJK Mediation Rules are silent on whether material and information disclosed during mediation can be used in court proceedings, in case the relevant parties refer the dispute to a district court. Ethically speaking, such disclosure should not occur. But to avoid this possibility, the dispute settlement clause in an insurance policy/agreement should articulate that any material and/or information disclosed in any mediation process is confidential and without prejudice.

Limitation

What limitation/time bar provisions apply to claims under insurance and reinsurance policies in Indonesia? Are there any specific issues or challenges these give rise to?

The time limit to make a claim may be stipulated in the insurance/reinsurance policy. Otherwise, the general statute of limitation under the Indonesian Civil Code applies, which is 30 years.

General

Are there any other compulsory dispute resolution rules relevant to insurance and/or reinsurance coverage disputes in Indonesia? If so, what are these?

There are no compulsory dispute resolution regulations or rules other than the Arbitration Law, OJK Reg 61/2020, and the LAPS SJK Rules (if the parties so choose) relevant to insurance disputes.

Are these any anticipated/upcoming changes to law and regulation in Indonesia which would impact the litigation, arbitration or mediation of insurance disputes in Indonesia?

Given how recently OJK Reg. 61/2020 was enacted and LAPS SJK was established, we do not anticipate any additional changes that would impact the litigation, arbitration or mediation of insurance disputes happening soon. However, in general, changes to the Indonesian Civil Code are regularly discussed by the Government of Indonesia and the House of Representatives so it is always possible these will affect dispute resolution in the insurance sector.

Indonesia
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