

# Key components of insurance and reinsurance

Law and practice in Latin jurisdictions  
A practical guide

CLYDE & CO



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# Introduction

We have produced this Guide to provide a quick reference tool to the legal framework for the handling of insurance and reinsurance claims in each of the main “Latin” jurisdictions. This guide, written by our London based Latin team, is primarily aimed at those working in the international markets but who have an interest in or exposure to claims and losses in Latin America.

## Why the “Latin” jurisdictions?

“Latin” is of itself an undefined term, capable of diverse meanings. “Latin America” for instance has been defined as being all those parts of the Americas that were once part of the Spanish and Portuguese Empires, or separately as those countries in the western hemisphere south of the United States of America.

For the insurance and reinsurance market such distinctions are of academic interest only, but clearly the market in most South American countries is in the midst of a sustained period of growth. This period of growth has many of the hallmarks of a permanent tilt in the market’s geographic centre, or centres, of gravity. Even if this puts the position too strongly, what cannot be disputed is the large number of claims facing the market from the region.

We have not limited our review, however, to South America. Because of the cultural, historical and economic ties that remain between the region and Spain we have

included a chapter on the Spanish position, which is, of course, a significant market in its own right. Further, its legal system remains the foundation for many South American jurisdictions. We have not included a guide for Portugal because the Brazilian legal system, whilst based on the Portuguese system and rules, has developed sufficiently independently for a review of the position in Portugal not to be necessary.

We have also included, as an introduction, a review of English law. This is not out of “Anglo-Saxon” bias but rather a reflection that the London marine, and in turn non-marine, markets developed underlying principles of insurance law at an early stage. Many of these principles have been adopted in other jurisdictions albeit on a codified civil law rather than common law basis. It is helpful, we hope, to have a review of English law for comparison, not least because this guide is designed for those with an understanding of both international practice and broad common law concepts.

## Why a guide?

The most difficult decision in drafting a guide such as this is what to exclude. Such a guide will always be incomplete. Were it a complete review of the applicable laws and regulations we would have failed in our aim of providing a quick reference tool. Thus, rather than aim for completeness we have sought to distinguish the useful from the merely potentially applicable; the regular concerns from the rarities. Inevitably there will be issues that arise which are not covered here and we would welcome your suggestions for additional areas of review.

Also inevitably, this guide is not a substitute for full legal advice and there will be instances where the general position as expressed herein will not apply, or at least will not be applied. We are obliged, therefore, to disclaim any liability for actions taken based on this guide.

The contact details for our team are at the back of this guide.

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A photograph of the Tower Bridge in London at dusk. The bridge's two massive stone towers are illuminated from below, casting a warm glow. The bridge's blue-painted steel structure, including the suspension cables and walkways, is visible. In the background, the Gherkin (30 St Mary Axe) is lit up, and other city buildings are visible under a cloudy, twilight sky. The River Thames is in the foreground.

# England & Wales

## 1. Introduction and basic principles

England & Wales is a common law system meaning that prior decisions of the courts establish binding law alongside statutes.

English insurance law is derived from the Marine Insurance Act 1906 (which despite its name also applies to non marine insurances), and a detailed body of case law which has interpreted and applied the Act and its underlying principles.

## 2. Broker relationships and role

An insurance broker acts as an agent for the insured and is usually instructed to arrange and obtain cover for his client. Generally, the insured will be fixed with the consequences of the broker's actions or inaction, and if the insured's position is prejudiced by the broker, it may have a cause of action against the broker.

However, in certain circumstances the broker may also perform functions on behalf of the insurer, such as in respect of binding authorities or open cover type arrangements.

A broker's role often continues after the cover has been placed and may include paying the premium to insurers and representing the insured in claims negotiations and collection.

## 3. Governing law of policies

The identification of the system of law which governs an insurance policy coming before the English courts (or arbitrators) depends on a number of factors too detailed to review in full for the purposes of this guide.

For commercial insurance policies any law may be agreed as the applicable law of the contract, whether or not it is the law of an EU member state.

In the absence of an express choice the position is more complicated. Policies entered into on or after 17 December 2009 covering "large risks", will usually be governed by the law of the country where the insurer has its habitual residence. A large risk is defined as one that relates to a policyholder that meets at least two of the following criteria: (1) a balance-sheet total of EUR 6.2 million; (2) a net turnover of EUR 12.8 million; or (3) 250 or more employees.

This rule does not apply to policies entered into before 17 December 2009, nor to reinsurance contracts. Again assuming there is no express choice, for both of these categories the law of the country most closely connected to the dispute will be applied. This can be difficult to determine, and will depend on the nature and placement of the risk, as well as the location of the parties and the policy provisions used.



## 4. Jurisdiction and claim resolution

### (a) Jurisdiction of English courts over insurance disputes

For commercial insurances an express choice of jurisdiction will be upheld. An arbitration clause in the policy is also effective.

Again, the rules are far from straightforward where there is no express choice. Essentially, for EU risks, an insured can sue in its own domicile or that of the insurer whereas an insurer may only sue in the policyholder's home jurisdiction. For non-EU risks the English courts will seek to establish which jurisdiction is most relevant to the dispute.

The basic domicile rule is expanded so that an insurance company is deemed to be domiciled in a member state if it has a branch, agency or other establishment in one of the member states, and if the dispute arises out of such a branch, agency or other establishment.

### (b) Arbitration framework

For commercial policies arbitration clauses will be upheld. The English courts support arbitration as a matter of policy, and only intervene in arbitration where the tribunal is unable to act effectively.

Pursuant to the Arbitration Act 1996, a party may challenge an award on the basis that the arbitrators lacked substantive jurisdiction or there was a serious irregularity affecting the arbitrators, the proceedings or the award; and, provided the parties have not agreed to waive the right, a party is entitled, if the court gives permission, to appeal on a question of English law.

The UK is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards which means that foreign arbitration awards are recognised and may be enforced by the English courts.

### (c) The Financial Ombudsman Service (FOS)

Consumer policyholder complaints against insurance companies are dealt with by the FOS.

### (d) Alternative Dispute Resolution (ADR)

ADR is an alternative to litigation and arbitration and has gained acceptance in England in recent years. Indeed, English courts often require parties to resort to ADR, usually mediation but also potentially other avenues such as Early Neutral Evaluation, before permitting the case to go forwards.



Mediation is, so far, the most commonly used method of ADR, in which the parties work towards a negotiated settlement of a dispute with the assistance of a trained neutral third party (“the Mediator”) on a confidential and without prejudice basis.

**(e) Regulation of the UK insurance industry**

The Financial Services Authority (FSA) is responsible for both approving the establishment of insurance and reinsurance companies and brokers, and for monitoring and controlling their activities in the UK, pursuant to the Financial Services and Markets Act 2000.

Authorisation from the FSA is required to carry out ‘regulated activities’ in the course of a business. The key insurance related regulated activities are the ‘effecting’ (i.e. entering into) and ‘carrying out’ (i.e. performing) of contracts of insurance.

For regulatory purposes, insurance business is divided into ten classes of long-term (life and related) business and eighteen classes of general (property, liability, guarantee etc) business. Separate authorisations from the FSA must be obtained

for each class of business being underwritten.

Insurance regulation in the UK is currently under review with a new structure expected to be in place in late 2013.

**5. Disclosure obligations and remedies for breach**

An insurance contract is a contract of utmost good faith. Accordingly, before the contract is made, there is a positive duty on an insured to disclose all matters material to the risk, irrespective of whether the insurer has specifically asked about those matters. The relevant information includes material facts which the insured actually knows of and those which he ought to know in the ordinary course of business.

The Consumer Insurance (Disclosure and Representations) Act was enacted on 8 March 2012 following recommendations by the English and Scottish Law Commissions. It alters the duty of disclosure as it applies to consumers by abolishing the consumer’s duty to volunteer material facts and replacing it with a duty to take reasonable care to answer the insurer’s questions fully and accurately, and to ensure the information is not misleading.

However, breach of the pre-contract duty of utmost good faith outside the scope of the Consumer Act (and thus for reinsurances and commercial insurances) entitles an insurer to avoid the policy regardless of whether the failure to give full disclosure of the material facts was innocent, negligent or deliberate. Avoidance essentially means that the contract is rescinded with effect from inception. The insurer must repay any premiums received (subject to the terms of the policy and probably not where the insured is guilty of fraud), and the insured must repay all previously paid claims.

## **6. Warranties and conditions precedent**

### **Warranties**

As a matter of English insurance law a warranty has a specific meaning and effect. It is a promise by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts. A warranty can be either express or implied but it must be exactly complied with, whether it is material to the risk or not. A common example of a warranty is where an insured “warrants” that its property is protected by a security guard for 24 hours a day.

If a breach of warranty occurs at the time the policy is concluded, the policy is discharged as it comes into being and will not have come into existence at all unless the breach is waived by the insurer. If a breach occurs during the insurance period, the insurer’s liability will be discharged from the date of the breach unless waived by the insurer. Duties to be performed before the breach remain to be performed (such as payment of the premium).

### **Conditions precedent**

The contract may include other terms which are described as ‘conditions precedent’. Conditions precedent can be as to (a) the validity of the contract; (b) to the attachment of risks; or (c) they can be as to the liability of the insurers to make payment under the policy.

The effect of a breach of a condition precedent is that the insurance contract never comes into existence and the insured is entitled to a return of the premium. Common examples are: the provision of further information by the insured; the inspection of the insured subject matter; payment of the premium; and satisfactory disclosure of all material facts.

The effect of a breach of a condition precedent in relation to the attachment of a specific risk is that the relevant

property will not be covered by the policy until the specified conditions have been met; for example satisfactory testing of a piece of mechanical equipment.

Conditions precedent to the insurer's liability are usually concerned with the claims process. A common example is a condition stipulating that a claim must be made within a specific period of time after the date of loss. Failure to comply with this will mean the insurer is not liable to pay the claim, but may still have liability for future claims.

## **7. Claim management issues**

### **(a) Notification of claims**

English law does not set down a period within which a claim has to be notified to a policy. However, policies usually include notification provisions provided that, before an insured is entitled to make a claim under an insurance policy, it must comply with an obligation to notify the insurer of any actual or potential loss. The insured may also be obliged to notify the insurer within a specified time period of an event that is likely to give rise to a claim under the contract, on the basis that a delay in notification of such circumstances may disadvantage the insurer by depriving them of the opportunity to investigate the loss.

The effect of an insured's failure to comply with the terms of the notification clause will depend on whether the obligation to notify is a condition precedent to the insurer's liability. If it is, the insurer is entitled to repudiate the claim. If it is not, the claim must be paid, but the insurer may be entitled to set off from the claim damages for any loss suffered as a result of the insured's breach.

### **(b) Reservation of rights**

Insurers commonly reserve their rights before the claim review and loss adjustment process has been completed to avoid the risk of waiving their right to contest policy coverage. For example, when insurers are faced with a claim under a policy which may have been induced by misrepresentation or non-disclosure, insurers should reserve their rights as to the validity of the policy. If there are concerns that a claim may not be covered, the reservation of rights should be in respect of liability for the claim. Reservation of rights are usually communicated through a letter to the broker/insured. The terms of such a reservation should be as clear as possible but there is no requirement that any specific form of words should be used.

**(c) Without prejudice, privilege and confidentiality**

English law recognises various forms of privilege which entitle a party to withhold evidence from production to opponents or the court.

- (i) Written or oral communications which are part of a genuine good faith attempt to settle a dispute between the parties are generally not admissible in evidence and will be privileged from disclosure as being “without prejudice”. Such communications are usually marked “without prejudice” but this does not guarantee that privilege applies.
- (ii) Legal advice privilege applies where communications between a client and lawyer are confidential and came into existence for the purpose of giving or seeking advice in a relevant legal context.
- (iii) Litigation privilege (which also applies to arbitration) attaches to communications between a client and his/her lawyer, or between a client or lawyer on the one hand and a third party on the other, which are made when litigation or arbitration is in

reasonable contemplation or has been commenced. The dominant purpose of the communication must be to obtain information or advice in connection with, or to conduct or aid the conduct of, such litigation or arbitration.

**(d) Limitation/time bar**

Legal proceedings must be commenced within the relevant limitation period. If a claimant brings proceedings outside of the limitation period, the defendant can plead the defence of limitation. The limitation period in cases of contractual disputes is 6 years from the date on which the cause of action accrued (Limitation Act 1980, section 5).

Under contracts of property insurance, the cause of action accrues on the occurrence of the insured loss. Under contracts of liability insurance, a cause of action does not accrue until liability is ascertained by agreement, judgment or award.

In reinsurance contracts, the courts usually adopt the same approach they take to liability insurance; time begins to run from the date that the reinsured’s liability is ascertained, although there is some academic debate in that regard.



Sometimes a policy may contain a contractual limitation clause either barring a claim after the deadline or excluding liability for loss unless the insured has begun proceedings before the deadline; such clauses are enforceable.

**(e) Penalties for late payment of claims**

*Damages*

An insured who has not been paid a valid claim is entitled to sue the insurer for the money owed, plus interest, but cannot currently bring an action against an insurer to recover damages for consequential loss caused by the insurer's unreasonable delay in payment.

**(f) Rights of third parties**

The Third Parties (Rights Against Insurers) Act 1930 enables a third party who has a claim against an insured to bring a direct action against the insured's insurers in the event of the insured's insolvency. It is not possible for the parties to contract out of this provision. There is new enactment of this legislation in The Third Parties (Rights Against Insurers Act) 2010. This enactment is intended to improve upon the 1930 Act, which has proved to be expensive and time-consuming.

The 2010 act is not yet in force and no commencement date has yet been set. However, even under the provisions of the new act, the rights of third parties only apply in circumstances where the insured is insolvent.

Neither the 1930 act nor the pending 2010 act apply to reinsurance contracts.

**8. Reinsurance considerations**

**(a) Cut through position**

In cases of an insurer's insolvency, the insured cannot rely on the Third Parties (Rights Against Insurers) Act 1930 to claim against the reinsurer directly because reinsurance is excluded from the scope of the act and the insured has no privity of contract with reinsurers. Reinsurance contracts may however contain "cut-through" clauses which may give the insured a direct cause of action against reinsurers in the event of the insurer's insolvency. Such clauses are open to challenge by the liquidator of the insolvent insurer.

**(b) Claims control/cooperation**

Claims control clauses and claims cooperation clauses are both recognised under English law. These clauses are usually (but

not always) a condition precedent to insurers' liability to pay a claim (see the discussion above at paragraph 6). Claims **control** clauses allow reinsurers to control the handling and settlement of claims made against the insured. Claims **cooperation** clauses impose a contractual duty on the insured/reinsured to cooperate in the claims process, so are an effective way for a reinsurer to protect its interests. These are particularly useful protections for a reinsurer who may be considered, in practical commercial terms, the direct insurer of the insured e.g. where there is a "fronting". The terms of such clauses are generally enforced.

**(c) Follow the settlements/fortunes**

A "follow the settlements" clause has a recognised meaning under English law. It seeks to restrict the reinsurer's right to reopen the question of the insurer's liability to the insured. Where such a clause operates, the insurer is entitled to recover a settlement with its insured provided he can prove that he acted prudently and in a businesslike manner in reaching the settlement, and that the settlement is covered by the reinsurance as a matter of law.

Absent a follow the settlements clause, a reinsurer can put the burden on the insurer to prove that the loss was covered by the underlying policy.

**(d) Incorporation of terms/back to back**

Reinsurance contracts often seek to incorporate the provisions of standard market wordings and the terms of the underlying contract of insurance thus ensuring the reinsurance contract is "back to back" with the insurance policy.

Many reinsurance contracts will contain a "full reinsurance clause". Inclusion of a full reinsurance clause is strong evidence of the parties' intention to place the reinsurance "back-to-back" with the underlying insurance on facultative, but not treaty, insurance. In such instances the English courts will seek to construe the policy provisions of the reinsurance in a manner which is the same as the law applicable to the underlying policy even if English law would give those words a different meaning. Equally the reinsurance policy may expressly incorporate the terms of the underlying policy.

However, the courts' approach to incorporation clauses has been

different in relation to governing law, jurisdiction and arbitration. The inclusion of an incorporation clause will not ensure the governing law or dispute resolution procedure under the reinsurance contract is the same as that of the underlying insurance contract. Thus, if the parties to the reinsurance contract wish to choose a particular governing law or dispute resolution procedure (for example that of the underlying insurance policy), they should specify this expressly.

## 9. Subrogation

### (a) Method

An automatic right of subrogation arises in all contracts of non-marine insurance once the insurer has indemnified the insured. The insurer thereby obtains the right to recover against any third party responsible for the loss in the name of the insured.

The principle of subrogation may be excluded or amended by the terms of the policy. The right may be waived by the insurers, and an insurer will not usually be permitted to exercise it against a co-insured, or a party who has contributed to the premium.

Subrogated claims are pursued by the insurer but in the name of the insured, and any recovery is first used to discharge the insured's uninsured losses (to include the deductible) and thereafter to diminish the insured loss from top down.

### (b) Time limits and defences

The right of subrogation only arises once the insurer has fully indemnified the insured. The insurer obtains the same rights as the insured, which are subject to the defences which the third party could have raised against the insured. Thus, for limitation purposes, time will already be running from the date that the insured's cause of action against the third party arose.

An aerial view of a cable car (funicular) in Rio de Janeiro, Brazil. The cable car is suspended from thick cables and is moving down a steep, forested hillside. Below the hillside, a large bay is filled with numerous small boats. In the background, the city of Rio de Janeiro is visible, with its dense urban landscape and iconic mountains like Sugarloaf Mountain under a hazy, golden sky. The word "Brazil" is written in orange text on a black rectangular background in the upper left corner.

**Brazil**



## 1. Introduction and basic principles

In Brazil insurance and reinsurance contracts are governed by the Brazilian Civil Code (“BCC”) and Complementary Law 126/2007, respectively, but there also exists an extensive volume of secondary legislation issued by the Brazilian insurance regulatory authorities (i.e. CNSP and the SUSEP), which applies to both insurance and reinsurance contracts.

Insurance contracts may also be governed by the Consumer Code (Law n. 8.078/90) in circumstances where the insured is defined as a “consumer” under the Consumer Code. In such case, an insurance policy is deemed to be an “adhesion” contract.

The application of the Consumer Code results in the application of rules which are more favourable to the insured (such as longer limitation periods, stricter rules on unfair clauses and the burden of proof lying with the insurer).

Even where the Consumer Code does not apply some practitioners take the view that all insurance contracts (including those covering large risks) are adhesion contracts, resulting in greater protection from the courts.

“Adhesion” contracts are standard form insurance contracts on pre-approved terms. Their terms are not negotiated with the insured; the insurer provides a range of pre-drafted clauses, exceptions and endorsements and the insured chooses which of these to include in the policy.



## 2. Broker relationships and role

Under Brazilian law the broker is an independent intermediary who is authorised to act in facilitating the entry into insurance, reinsurance and retrocession contracts.

The activity of insurance brokers is regulated by Law 4.594/64, while a reinsurance broker is specifically regulated by Resolution CNSP No 173/2007. Article 2 of Resolution CNSP 173/2007 defines the activity of the reinsurance broker as a “legal entity incorporated and domiciled in the country, in accordance with the applicable legislation in force, and who is authorised to intermediate reinsurance and retrocession operations”.

In turn, Article 5 lists the conditions that must be met by the reinsurance brokers, including “the reinsurance broker must have the exclusive purpose of acting as intermediary in the placement of reinsurance and retrocession contracts”.

Despite the provisions above, some courts have ruled, especially in the context of the Consumer Code, that the broker is an agent of the insurer.

Insurance and reinsurance brokers owe certain duties to both parties, for example to act in good faith and with due diligence, and are liable to indemnify either party for any prejudice caused by negligent or wilful acts.

### 3. Governing law of policies

The general rule is that Brazilian law and jurisdiction are both mandatory in insurance policies covering risks within the Brazilian territory.

The exception applies where an arbitration agreement is entered into by the parties (Art. 2 of the Arbitration Act – Law. 9.307/96). In the case of insurance contracts, Brazilian law must remain the substantive law applied to the contract by the arbitrator(s).

However, in the case of reinsurance contracts, the governing law and jurisdiction provisions may be freely agreed by the parties (Art. 38 of CNSP 168/2007) (which prevails over Art. 9 of Law Decree 4.659/42).

We note that the issue regarding reinsurance contracts is not free from debate, as some Brazilian practitioners insist that Brazilian law is mandatory in

any and every circumstance where the risk is located in Brazil. This is on the basis that the contract was entered into in Brazil (*lex loci celebrationis*) (Art. 9 of Law Decree 4.659/42), and that the application of a foreign law would infringe public policy (Art. 17 of Law Decree 4.659/42).

However, there are strong arguments to the contrary, as described above. In addition, Complementary Law 126/2007 has not imposed such limitation, nor have the regulatory authorities, as they could have done pursuant to Art. 12 (I) of the same law.

Finally, any arbitration agreement inserted into an insurance or reinsurance contract must be drafted and entered into in accordance with Article 44, II, “c”, II of Annex I to Circular Susep n. 256/2004. In particular, the insured must give his express written consent to the arbitration (e.g. signing the proposal or the arbitration clause itself).

## 4. Jurisdiction and claim resolution

### (a) Arbitration framework

Brazil recognises arbitration as a valid means of dispute resolution, and an award will be enforced as if it were a final judgment. The Brazilian arbitration framework is outlined under the Arbitration Act (Law n. 9307/96), which is partly based on the UNICTRAL Model Law.

Brazil became a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 2002, and in recent years, courts have shown growing support for arbitration proceedings. This is especially true of

the Superior Court of Justice, where foreign awards must be recognised before they can be enforced.

**(b) Regulatory/superintendent/ombudsman**

The Brazilian Private Insurance National System is composed of the following parties (Art.8 of Law Decree 73/66): the National Council of Private Insurance (CNSP);

- The Superintendence of Private Insurance (SUSEP)
- The Reinsurance Companies
- The Insurance Companies
- The Insurance Brokers

The CNSP is responsible for issuing the general public policy and rules applicable to the Private Insurance National System, regulating insurance companies operating in Brazil, and issuing general guidelines on policy wordings (Art. 32 of Law Decree 73/66).

In turn, SUSEP is responsible for executing the public policy established by the CNSP, to enforce regulations and rules and supervise the organisation and functioning of the companies acting in the Brazilian insurance market (Art 36 of Law Decree 73/66).

SUSEP's supervisory authority covers insurance, reinsurance, open private pension funds and capitalization markets. Its remit does not extend to health insurance (ANS- National Agency of Supplementary Health) or closed private pension funds (PREVIC- National Superintendence of Complementary Pensions).

**5. Disclosure obligations and remedies for breach**

Art. 766 of the BCC imposes a general duty on an insured to disclose all relevant facts to an insurer before policy inception. Brazilian courts have interpreted this provision on the basis that the insured will only lose the right to an indemnity if the insured's act or omission was in bad faith (i.e. the insured intended to cause harm or was reckless). There is controversy as to whether a negligent or innocent misrepresentation/non-disclosure might give insurers the right to refuse an indemnity.

Art.37 Susep Circular 256/2004 gives guidance on the contractual wording which can be included in policies to govern the position when the matter omitted or misrepresented affected the underwriter's decision to accept the risk or calculate premium, as follows:

- If fraudulent: an insurer can avoid the contract provided the insured's misrepresentation or non-disclosure was in bad faith, in which case the premium is retained
- If negligent or innocent and discovered before a loss happens: affirm cover and charge additional premium or – terminate the contract and retain the premium (pro rata)
- If negligent or innocent but only discovered after a loss happens: affirm cover, pay the indemnity, charge additional premium or deduct additional premium from indemnity; or terminate the contract after payment of the indemnity, retaining the premium

(pro rata) and charge additional premium (pro rata)

- If negligent or innocent but only discovered after a loss happens (and the maximum limit of indemnity payable): terminate the contract after payment of indemnity, deducting additional premium from indemnity

## 6. Warranties and conditions precedent

Brazilian law does not classify contractual terms into warranties and conditions and the remedies for breach are substantially different than under English law. Words are to be given their ordinary meaning, but a technical meaning may also be taken into account. Civil Code provisions will be implied into a policy and where terms reflect the Civil Code provisions the policy will be given the same interpretation.

The most commonly available remedy for a breach of contract is compensation by way of damage, provided the insurer can prove it has suffered damages and that there is a causal link between the breach and the loss. In some cases, there may be a premium adjustment.

In order for an insurer to rescind/ terminate a contract for breach of a warranty or other provision:

- The policy and Civil Code must expressly provide for rescission/ termination
- the insured must be notified of the breach (in the case of unpaid premium)
- The breach must be material to the risk or fundamental in nature

- The insurer must show that there is a causal link between the breach and the loss

## 7. Claim management issues

### (a) Notification of claims

Art. 771 of the BCC imposes an obligation on an insured to provide notice of a claim as soon as possible and if this is not complied with a claim will not be covered. The Brazilian courts have interpreted this on the basis that the insured will only lose the right to an indemnity if the failure to notify has prejudiced the insurer's position.

### (b) Reservation of rights

Although commonly included in correspondence and documents with insureds, the concept of reservation of rights is not widely developed in Brazil given that a waiver, or forfeiture, of rights in law is not based on mere conduct (implied), but instead must be express. Further, Brazil does not recognise the doctrine of estoppel (as understood under English law), although courts do recognise the principle of “venire contra factum proprium” (whereby a party cannot act in contradictory behaviour to the detriment of the other party) and “supressio” (whereby a party is prevented from enforcing a right as a result of its failure to exercise it in a timely fashion).

In light of this principle and despite being largely untested, it is best practice to reserve rights when appropriate.



**(c) Without prejudice, privilege and confidentiality**

The concept of “without prejudice” negotiations does not exist under Brazilian law, and details of a settlement negotiation can be brought to the attention of a third party or a court.

Parties may enter into confidentiality agreements in order to replicate, as much as possible, a confidential negotiating environment equivalent to that available under “without prejudice” rules. Such confidentiality agreements are legal, but the remedies available for a breach are limited unless a party can demonstrate that it suffered prejudice as a result of the breach.

As to privilege, the general rule under Brazilian law is that a document is subject to disclosure if: (i) a party in possession of the document has a legal obligation to disclose it; (ii) the document was referred to in submissions and deemed necessary as evidence to be used in court proceedings; or (iii) the document is of common ownership between the parties (Art. 368 of the Civil Procedure Code). An exception to the general rule is where a party may refuse to disclose a document on the basis that he has a duty of confidentiality either because of his condition or profession (Art. 363 of the Civil Procedure Code) and which generally includes documents written by in-house lawyers. It clearly includes legal advices and correspondence with external law firms.

**(d) Limitation**

The time period for bringing a claim under an insurance policy is 1 year for claims brought by the insured against the insurer (art. 206, II, b, of the Brazilian Civil Code). Based on Súmula 229 STJ, time starts to run from the date of the insured’s knowledge of the loss, ceases to run when notice is given to the insurer, and will begin again from where it stopped when the insurer formally denies coverage. A minority of practitioners argue that time starts to run from the date when insurers deny coverage, and some courts have held that this is the case.

Some practitioners argue that time starts to run from the date when insurers deny coverage, and some courts have held that this is the case.

The limitation period is uncertain for claims brought by a reinsured against a reinsurer. Some argue that the 1 year period applies by way of analogy to insurance cases, whilst others consider that the 3 year time bar for contractual claims applies.

**(e) Penalties for late payment of claims**

Under SUSEP rules, an insurer has 30 days to pay a claim/deny coverage. Time begins to run from the date on which the insurer has been provided with the basic information to adjust the loss (Art. 33 SUSEP Circular 256/2004). To the extent that insurers fail to make payment of the indemnity as a result of undue delay in the adjustment of the claim, the insurer may be liable for both monetary correction (i.e. indexation)

and delay interest (usually 1% per month)(Art. 772 of the BCC). These can substantially increase the value of a claim.

Claims for defective loss adjustment are becoming more common and have sometimes been upheld by courts (e.g. loss of profits and cost of servicing debt).

**(f) Rights of third parties**

Recent decisions by the Superior Court of Justice allow a third party to bring a claim against the insured and its insurer, whereby the latter will be jointly liable for the payment of any indemnity. One such decision (REsp 925130) involved a motor third party liability policy which was triggered by a road accident. It is unclear how such a decision could be applied in cases involving property claims, complex risks, containing multiple co-insurers, deductibles and self insured retentions.

**8. Reinsurance considerations**

The Brazilian reinsurance market, which was under a “de facto” monopoly until 2007, is now open to foreign entities. However, to operate in Brazil, reinsurers must obtain a licence with the local regulator (SUSEP).

Reinsurance and retrocession activities are governed by Complementary Law No. 126/07, which is further regulated by Resolution CNSP No. 168/07, as well as other specific regulations issued by SUSEP, but in general terms, laws relating to insurance contracts are applied to reinsurance contracts.

**(a) Cut through position**

Brazilian law provides for cut-through rights in the case of insolvency or bankruptcy of the insurer (Art. 14 Complimentary Law 126/07 and Art.34 of Resolution CNSP 168/2007) where the reinsurance is facultative in other types of contract, where there is an express provision in the policy. It is untested whether cut-through rights can be expanded to apply to other factual situations either by contract or by virtue of a court order.

**(b) Claims control/cooperation**

Both claims control and cooperation provisions are valid under Brazilian law (Art.39 of CNSP Regulation 168/2007) and reinsurers can direct insurers during the investigation and adjustment of the loss. However, some lawyers question the validity of control provisions on the basis that the adjustment is a duty of the insurer. Also, some practitioners argue that claims control clauses are only applicable to reinsurance contracts entered into by Local Reinsurers where that reinsurer holds the majority share of the risk (Art. 39 of CNSP 168/2007, as amended by Resolution CNSP 225/2010). Regardless of their validity, there is limited remedy for a breach of these provisions given that the reinsurer will have to prove that the breach caused him damage and that there was a causal link between the breach and the loss.

**(c) Follow the settlements/fortunes**

Although untested in courts, follow the settlements/fortunes provisions

are valid under Brazilian law. To recover a claim/indemnity, the burden is on the insurer to show that the claim falls within the risks covered under both the insurance and reinsurance policy and that it acted in good faith and with due diligence in adjusting and settling the claim.

Follow the settlement provisions do not extend coverage beyond the scope of the reinsurance contract and “ex gratia” payments are not binding on reinsurers.

**(d) Incorporation of terms/back to back**

This remain a largely untested area, but reinsurance contracts often follow the terms of the underlying contract of insurance so as to ensure that the reinsurance contract is “back to back” with the insurance policy. However, there is no rule mandating that the reinsurance conditions must match those of its counterpart insurance policy. Many reinsurance contracts are a translation of English and American wordings and will contain a “full reinsurance clause” and include reference to an “all terms and conditions as original” provision and a “follow the settlements” provision. This does not mean, necessarily, that cover is back-to-back, although it often will be. As to incorporation of terms by reference, underwriters are well advised not to assume that a term is or is not incorporated, and to include the full wording of clauses, as opposed to merely making reference to them (e.g. LMA and LEG wordings).

## 9. Subrogation

**(a) Method**

Upon payment of an indemnity, an insurer is subrogated to the insured’s rights of recovery, up to the sum of the indemnification paid and may assume the rights and actions that the insured would have against the third party that caused the damage (Article 786 of the BCC).

These rights are guaranteed by the Civil Code, and are exercised in the name of the insurer and require proof that the insurer has both paid a claim and was required to do so under the policy.

**(b) Time limits and defences**

Following the enactment of the 2002 Brazilian Civil Code, based on Article 206, § 3, V, the view predominantly accepted is that the limitation period applicable to a subrogation claim is 3 years. The Civil Code does not make it clear, however, from which date the limitation period for a subrogation claim by the insurer begins to run.

As a result, there are conflicting decisions by the Brazilian courts on this point. Some consider that the limitation period starts running from the date of the loss; others argue that it runs from the date on which the insured becomes aware of the loss; whilst others argue that it flows from the date on which the indemnity is paid by the insurer.

There are exceptions to the general limitation period described above (e.g. maritime and aviation) and differing contractual provisions and/or specific legislation should be taken into account.



# Mexico

## 1. Introduction and basic principles

Mexican insurance law is derived from a combination of the Civil Code and the Insurance Contract Law of 1935.

In the Mexican insurance market there are two types of insurance contracts, “Adhesion” and “Non Adhesion”. When considering a claim it may be important to clarify the nature of the policy and that the applicable rules have been met. Both Adhesion and No Adhesion policies are governed by the Insurance Contracts Act and certain provisions of the Commercial Code.

“Adhesion” contracts are standard form insurance contracts on pre-approved terms. Their terms are not negotiated with the insured; the insurer provides a range of pre-drafted clauses, exceptions and endorsements and the insured chooses which of these to include in the policy. “Non Adhesion” contracts are those insurance contracts in which the insured and the insurer negotiate each of the terms and conditions.

Both types of policy form must be registered with the regulator (see below) however, the process to register “Adhesion” contracts is more complex, as, together with the wording of the contract, the insurer must provide a combined legal and actuarial analysis showing that the policy complies with all applicable laws and regulations.



## 2. Broker relationships and role

Insurance brokers are regulated by the Ley General de Instituciones y Sociedades Mutualistas (General Law of Insurance Institutions and Mutual Companies) According to this law, insurance brokers are considered to be individuals or companies who assist the insured **and** the insurer in entering into the insurance contract. This dual-focus is an unusual concept and does raise specific issues; for instance, insurance brokers cannot intervene in the process of entering into an insurance contract in a manner which could be said to be one of coercion or with lack of neutrality.

Brokers may also advise the contracting parties as to how to renew, modify or cancel the insurance policy, and in the handling of claims. Again, the broker is to act in a neutral fashion as between the insurer and insured.

The negotiation of “Non Adhesion” insurance contracts is undertaken exclusively by insurance brokers. An insured and insurance company cannot do so without a broker.

Insurance brokers must be authorised by the CNSF.

Insurance brokers cannot provide false information or misrepresent the characteristics of the risk to any of the parties, either before inception or during the handling of a claim.

### **3. Governing law of policies**

It is mandatory that insurance policies for risks located in Mexico are governed by Mexican law other than for marine risks, where the parties may agree a foreign law.

### **4. Jurisdiction and claim resolution**

It is mandatory that insurances for risks located in Mexico are subject to Mexican jurisdiction (court or arbitral). This also applies to Mexican marine risks

#### **(a) Arbitration framework**

Mexico amended the Commercial Code and the Federal Civil Procedure Code in 1993. The amendments laid down new arbitration rules very similar to the UNCITRAL model law.

Commercial disputes may be settled by arbitration pursuant to the rules of the Commercial Code. Parties may freely decide which claims shall be submitted to arbitration as well as the language, applicable law and detail of the arbitration proceedings.

Arbitration agreements must be in writing and can be enforced at any time. Final awards are legally enforceable. Mexico is a signatory and has ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

However, despite this legal framework, arbitration is not common in Mexico and the enforcement of awards is in particular often difficult and time-consuming.

#### **(b) Regulatory/superintendent/ombudsman**

Insurance is regulated in Mexico by the Secretaría de Hacienda y Crédito Público hereafter referred to as the Treasury through the Comisión Nacional de Seguros y Fianzas (National Commission of Insurance and Bonds), hereafter described as “CNSF”.

The Comisión Nacional para la Protección y Defensa de los Usuarios de Servicios Financieros (Commission for the Protection and Defence of Users of Financial



Services) hereafter described as CONDUSEF, is the insurance ombudsman in Mexico for consumer policies. Its remit does not extend to commercial insurance policies.

The CONDUSEF also offers other services for policyholders such as mediation, conciliation and arbitration with insurers.

Arbitration before the CONDUSEF is not compulsory and therefore in practice, a very small quantity of insurance claims are resolved via this government body.

## **5. Disclosure obligations and remedies for breach**

An insured is obliged to declare in writing the information requested in the proposal form or questionnaire supplied by the insurer. This should cover all of the important facts relevant to assess the risk as they are known or should be known at the time of the inception of the contract. The insured is not, however, obliged to disclose information other than that requested/referenced in the proposal form/questionnaire.

Any omission or misrepresentation concerning the risk will allow the insurer to nullify the insurance contract even in those cases where the omission or misrepresentation is not relevant to a loss.

The insurer must notify the insured of the nullification of the contract within 30 calendar days of the date when

it becomes aware of the omission or misrepresentation.

## **6. Warranties and conditions precedent**

Whilst there is some academic debate, warranties and conditions precedent to liability are not clearly recognised under Mexican law and they have no established legal meaning.

In practice, a breach of “warranty” or “condition precedent” would be treated in the same way as a breach of an ordinary condition and give rise to damages only. For the clause to have a nullifying effect, it needs to be clearly drafted but even then there can be no certainty that such a clause would be construed as intended by a Mexican court or arbitral tribunal.

## **7. Claim management issues**

### **(a) Notification of claims**

The insured must notify the insurer of any loss as soon as possible and unless agreed otherwise in the policy has a maximum of 5 days to notify the loss.

In the case of late notice, the insurer can reduce the indemnity from the sum which would have been paid if prompt notice had been given.

The insurer will only be released from liability due to late notice if the insured omits to notify the loss with the intention of preventing the insurer from investigating the circumstances of the loss.

**(b) Reservation of rights**

Reservation of rights is not a recognised concept under Mexican law. The insurer is obliged to request from the insured all information which is necessary to confirm or deny cover within 30 days after the notification of the loss.

After this 30 day period, interest starts to accrue until the date when the claim is paid.

**(c) Without prejudice, privilege and confidentiality**

The without prejudice concept does not exist under Mexican law. All negotiations are undertaken openly and so may later be referred to in evidence. However, the parties may agree to enter into confidential discussions.

The concept of privilege does not exist; rather, a party need only disclose in litigation/arbitration those documents that support its case or that the other party specifically requests. As there is no standard disclosure of any document that is relevant to a case the concept of privilege is not as important as it is under English law.

Communications between lawyer and client are considered confidential and confidentiality agreements are generally respected by parties.

**(d) Limitation**

Any legal action to make a claim under an insurance policy must be brought within 5 years for life insurance and 2 years for all other insurances.

In both cases the period will begin to run from the date of the loss. For liability policies, the period starts from the date the claim is made against the insured.

However, if the insured can show that it had not previously been aware of the loss, this limitation period shall not commence until the day on which they became so aware.

With respect to beneficiaries other than the insured, the limitation period shall not commence until the day on which they become aware that they were beneficiaries.

Any agreement to modify the limitation period is null and void. However, the limitation period will be interrupted by:

- The appointment of experts by an insurer to assess the loss
- Where an action claiming payment of Policy premiums is initiated by the insurers
- The submission of a claim to CONDUSEF for mediation

**(e) Penalties for late payment of claims**

Under Article 71 of the Mexican Insurance Contract Law (*Ley Sobre El Contrato De Seguro*), claim monies are due to the insured from the insurer within 30 calendar days from the date on which the insurer receives the documents and information that allow it to determine the grounds of the claim. As mentioned above, the insurer must confirm or deny cover within 30 days after the notification of the incident. After 30 days, legal interest starts to accrue until the date when indemnification is paid.

**(f) Rights of third parties**

Third parties' rights are only expressly recognised under Mexican insurance law in respect of civil liability insurance.

The damage caused to a third party entitles him to automatically claim cover under the civil liability insurance of the defaulting party by way of a direct action against the insurer. The insurer may have a right of recovery against the insured if there are policy issues.

**8. Reinsurance considerations**

The provisions in respect of insurance policies for example the Insurance Contract Law of 1935, (the terms of which we have discussed above) do not directly apply to reinsurance.

Consequently, reinsurance contracts are governed by general rules of contracts under the Civil Code. However, there is debate as to whether the regulations of the Insurance Contract Law of 1935 are also applicable to cover any aspect not addressed in the reinsurance contract.

The administration and regulation of reinsurance contracts is governed by the directives issued by the Treasury and by the Commission of Insurance and Finance.

**(a) Cut through position**

Mexican law is silent in respect of the position on cut through. However, insurance and reinsurance contracts are strictly independent of each other and therefore it is very unlikely that a Mexican court would allow an insured to bring an action against a reinsurer unless the reinsurer has agreed in writing that he agrees to be directly bound by the rights and obligations contained in the insurance policy.

**(b) Claims control/cooperation**

The breach of a claims control or cooperation clause merely entitles the reinsurer to recover from the reinsured any damage it may have suffered directly as a result of such breach. This is the case even if the clause itself states that a breach releases the insurer from liability. In practice, it is difficult to demonstrate that damage has been caused by the breach of such a contractual condition.

**(c) Follow the settlements/fortunes**

Mexican insurance law does not expressly regulate follow the settlements or fortunes provisions. Therefore, Mexican courts would apply principles set out in the Insurance Contracts Act and the Commercial Code.

Accordingly, if a clearly worded follow the fortunes/settlements clause is contained in a reinsurance contract and which is breached by the insurer, the reinsurer may have grounds to reject cover.

A follow the fortunes/settlement obligation will not be implied into a reinsurance contract. Accordingly, an insurer has to legally prove to reinsurers that the loss is covered under the insurance and reinsurance contracts.

**(d) Incorporation of terms/back to back**

As mentioned above, insurance and reinsurance contracts are strictly independent from each other. There is no rule of law that incorporates the terms of an insurance contract or imposes back to back wordings in Mexican insurance law.

However, as a matter of practice, it is common that the cover contained in the reinsurance contract reflects the terms of the insurance policy, and we would expect a court or arbitral tribunal to seek to achieve consistency where possible.

**9. Subrogation**

**(a) Method**

Once an insurer has paid a loss, it is automatically subrogated into the insured's position to recover against any third party responsible for that loss. Such a recovery is undertaken in the name of the insurer directly, and recovery is paid in proportion to the amount of its share of the loss.

The insured is obliged to cooperate with the recovery. If the recovery from the third party is not possible due to the actions or omissions of the insured, or is prejudiced by the insured, the insurer can recover the indemnity from the insured.

**(b) Time limits and defences**

Following the enactment of the 2002 The limitation period for subrogation actions will depend on the position between the insured and the relevant third party. There is no special rule.







Chile



## 1. Introduction and basic principles

Insurance and Reinsurance contracts are governed by the Chilean Commercial Code, together with other specific laws and regulations including the Law on Insurance Companies DFL 251 of 1931 (as amended). As in other civil law systems, prior decisions of the courts are not binding but can be persuasive when interpreting or applying the Commercial Code.

The Insurance Companies Act sets down the law specific to insurance companies but mostly concerns regulatory and corporate requirements. There are other insurance-related statutes but they do not have a direct bearing on the claim handling process. A full review of insurance and reinsurance law in Chile has recently been undertaken resulting in the following modifications:

- (i) Supreme Decree N°1055, new regulation governing insurance agents and the claims adjustment proceeding, which entered into force last June 1, 2013; and
- (ii) Law N°20.667 publicized in the Official Gazette last May 9, 2013. This law modified Section VIII of Book II of the Commercial Code, which will enter into force on December 1, 2013.

Under Chilean Law, the Chilean Securities and Insurance Supervisor (Superintendencia de Valores y Seguros - SVS) is an autonomous corporate body affiliated with the Chilean Government through the Ministry of Finance. It is responsible for the supervision of all activities and entities involved

in Chilean securities and insurance markets. The SVS enforces compliance with all laws, regulations, by-laws, and other provisions governing the operation of these markets.



## 2. Broker relationships and role

Insurance brokers are generally responsible for procuring and placing appropriate cover on behalf of insureds. Should they fail to do so, the broker can be liable to the insured for the failure. However, a broker can also owe duties to an insurer in respect of the management of a claim. For example, correspondence from a broker to an insured may be sufficient to interrupt limitation so as to preclude an insurer from relying on limitation.

### 3. Governing law of policies

For commercial insurances, Chilean law does not, for business insurances and reinsurances, require Chilean law to be applied. Therefore, the parties are free to select a governing law of their choice. If there is no express choice of law, Chilean law will be applied. However, policies shall not contain clauses which violate Chilean law and are at the ultimate discretion of the SVS in respect of certain minimum requirements.

### 4. Jurisdiction and claim resolution

It is mandatory that all Chilean insurances, and reinsurances of Chilean insurance business, are subject to Chilean jurisdiction (Article 29 of the Law of Insurance Companies). This can be court or arbitral jurisdiction. If there is no express choice of arbitration then the Chilean courts will have jurisdiction.

However, the new law N°20.667 that enters into force next December 1, 2013, incorporated an important change related to dispute resolution in article 543. This article states that ALL disputes between an insured or beneficiary and insurer in relation to a commercial insurance contract, shall be resolved by an arbitrator designated by mutual agreement of the parties. If the parties cannot reach an agreement as to the arbitrator, the person of the arbitrator shall be designated by the courts. It is forbidden to designate the person of the arbitrator in the insurance contract.

The new law also provides that in disputes related to reinsurance, the parties may agree that such is resolved according to international commercial arbitration rules referenced in Chilean law.

Finally, the new article 543 of law N°20.667 prescribes that the insurance companies shall send to the SVS authorized copies of the final resolutions or sentences on insurance matters governed by this law in which they have been a party to, in order to keep them for public consultation.

#### (a) Arbitration framework

Chilean law recognises and upholds arbitration provisions and awards and is a signatory to the New York Convention on the Enforcement of Foreign Arbitral Awards. The Santiago Chamber of Commerce is the most important arbitration institution, although recently there has been the establishment of a new institution in association with the American Association of Arbitration (AAA) and which follows the AAA international rules and guidelines.

#### (b) Regulatory/superintendent/ombudsman

Insurance is regulated in Mexico by As stated, in Chile, insurance and reinsurance business is monitored by the SVS, a regulatory authority, whose authority extends to the monitoring of the loss adjustment process (as discussed below).

The Chilean Insurance Association (AACH), also established a separate non-mandatory ombudsman in 2008.

The ombudsman is authorised to handle all claims except, amongst other factors:

- i. those referred to or being handled by the SVS, a court or arbitrator
- ii. non-life claims where the amount claimed is greater than UF 500 (USD 23,405) and life and healthcare claims of more than UF 250 (USD 11,703)
- iii. claims centring on the company's right to issue the insurance or refusal to do so

A decision of the ombudsman is binding on the insurer but not on the insured. Accordingly, the Ombudsman is not relevant to most international insurance claims.

## 5. Disclosure obligations and remedies for breach

Chilean insurance law is founded on the duty of utmost good faith. As a consequence, the insured is obliged to declare all relevant information such as is required by the insurer to properly assess the risk and not to make false or misleading statements. If proper disclosure is not given, or a false statement is made, the insurer can elect to declare the policy as null and void or to accept it on substantially different

conditions. In such circumstances the premium must be returned to the insured. This is similar to the avoidance regime under English law.

Criminal sanctions may also apply for fraudulent or deliberate mis-statements.

## 6. Warranties and conditions precedent

Chilean law does not have a special categorisation of "conditions precedent". Thus a breach of a policy condition will depend on its terms and the relevant factual matrix. A breach of a policy condition does not always allow an insurer to avoid or terminate the policy, but a clearly drafted provision may be construed so as to prevent a claim being pursued once breached (thus having the effect of a condition precedent).

A breach of a warranty in a policy will, when applying the law strictly, may render the policy unenforceable against insurers.

## 7. Claim management issues

### (a) Notification of claims

According to the Chilean Commercial Code (Article 556) the insured must notify the insurer of any loss within 3 days of their becoming aware of the loss; however, the parties may agree a different term in the policy. For liability claims the knowledge is ordinarily (subject to specific policy terms) that a claim that is being made against the insured. However, within

the modifications incorporated by the law N° 20.667 to Title VIII of Book II, is the new article 524, which establishes the duty to notify the insurer as soon as possible after taking acknowledgment of the occurrence of any facts that constitute or may constitute a claim covered by the insurance. Therefore, the three day period will after 31 December 2013 be a maximum period.

A delay in notification allows an insurer to deny the claim.

**(b) Reservation of rights**

Chilean law recognises a reservation of rights whilst insurers consider whether a claim is covered by the policy. However this may only be permitted for a reasonable period of time, the duration of which depends on the nature of each case.

Therefore, should potential coverage issues arise it is important that they are considered, raised and resolved promptly.

**(c) Without prejudice, privilege and confidentiality**

Without prejudice communications are not automatically protected from disclosure in Chile. Therefore, the use of the phrase “WP” or “Without Prejudice” on communications will not of itself protect those communications. However, it is possible to engage in confidential communication between parties if it

is agreed that the communications are on that basis and are not to be put before a court or tribunal.

Privilege generally attaches to communications between a lawyer and client.

As in most civil jurisdictions, the disclosure obligations of parties to arbitration or litigation are more limited than in English proceedings, with disclosure only required in respect of documents a party wishes to rely on and those documents specifically requested by the opposing party.

**(d) Time periods and limitation**

Currently, for claims based on breach of contract, proceedings must be commenced within 5 years of a breach of the contract. When founded in tort the period is 4 years from the damage

Accordingly, an insured has 5 years to bring a claim against insurers under a policy. For property damage claims this time period runs from the date of the incident/damage which gives rise to the claim.

The doctrine and jurisprudence is divided in respect of liability claims as to whether the limitation period commences from the date of the incident or when the damage is made known to the insured party.

However, from December 1, 2013, new article 541 of the Commercial Code, incorporated by Law N°20.667 will apply. This article regulates the statute of limitation for insurance related actions, and establishes that actions arising from an insurance contract shall be subject to a reduced period of 4 years, commencing on the date in which the specific obligation became enforceable. The statute of limitations cannot be diminished by any forms of preclusion, expiration or lapsing. In civil liability insurance, the statute of limitation may not be inferior to the term of the action to which the affected third party has the right to exercise against the insured.

As a general rule, the statute of limitation period that runs against the insured will be interrupted by the notification of the claim or occurrence, and the new term will run from the moment in which the insurer communicates its decision on the matter.

Insurers need to be aware of strict and short time limits, in respect of the loss adjustment process which is prescribed by the Chilean Adjustment Regulations<sup>1</sup>. If the adjustment of the claim is not made

directly by the insurance company, then a Chilean registered adjuster shall be appointed by the insurer. The appointed adjuster must act impartially, and the adjustment process is subject to prescribed reporting and response periods, outlined as follows:

- The adjuster must be appointed by the insurer within 3 days of the notification of the loss to the insurer
- The adjuster can issue interim reports discussing policy coverage issues. If so, both the insurer and the insured have 5 days to respond and make observations
- The adjuster has to issue the final report as soon as possible, but not later than 45 calendar days since the date of notification of the claim (although the period may be exceptionally extended for equal terms when the circumstances require<sup>2</sup>). The relevant exceptions to this general rule are maritime claims (180 days) and individual insurance contracts covering the risk of loss or damage to assets or patrimony which annual premium exceeds 100 UF<sup>3</sup> (90 days)

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<sup>1</sup> The basis for the extension shall be informed, indicating the specific pending adjustment tasks. In no case an extension shall be based in new information or data that could have been reasonably foreseen before, unless the reasons justifying the lack of such request is stated. Also, no extension applies to claims in which there is no activity from the adjuster.

<sup>2</sup> However the Superintendence of Securities and Insurance may cancel the extension for qualified causes, setting a term for the delivery of the final adjustment report.

<sup>3</sup> Equivalent to approximately USD 4,500 (applying the rate of Exchange of August 2, 2013: USD 515,94 CLP)

- The insurer and insured each have just 10 days to respond to the final report, following which the adjuster has another 6 days to reply to those responses.

Whilst not binding, the adjuster's final report is persuasive before a Chilean court or arbitral tribunal.

**(e) Penalties for late payment of claims**

There is no specific regime for punitive awards for late payment of a claim. However, the Chilean regime sets down a prescriptive timetable for responding to claims. If it is ultimately determined that a claim is payable, Chilean courts and tribunals can award interest on insurance recoveries, and interest will probably be applied from the date when the insurer should have paid the claim. Thus, there is effectively an interest penalty for late payment.

**(f) Rights of third parties**

Currently, third parties may not bring a claim directly against an insurer in Chile apart from exceptional cases such as personal accident for motorized vehicles and some environmental and maritime related actions, but it is not admissible for other policies.

In relation to Civil Liability Insurance, article 570 of the Commerce Code, incorporated by Law 20.667, sets down the obligation of the insurer to pay the indemnity directly to the affected third party, provided it is established by a firm judicial sentence or by an authorized settlement (judicial or extrajudicial). The latter in no case represents the exercise of a direct action against the insurer.

**8. Reinsurance considerations**

Leaving aside regulatory issues, all insurance law in Chile also applies to reinsurance by analogy, except in certain cases where consumers may be affected.

However, there are practical considerations to be considered, for example:

- (a) The inter-relationship between the mandatory claim management requirements imposed on a Chilean insurer and its obligations under the reinsurance. In particular, the mandatory loss adjustment regime applies only as between the insured and the direct insurer. A reinsurer cannot intervene directly in that process but rather only in cooperation with the insurer



- (b) The effect of a claim control/cooperation provision in the reinsurance. As stated, Chilean law does not recognise “conditions precedent” as having a specific meaning. Therefore, prejudice following the breach of such a provision is likely to have to be established in order for an insurer to avoid liability for a claim unless very clear wording is used setting out the consequences of a breach.

## 9. Subrogation

As in most civil jurisdictions, subrogation rights are recognised in Chilean law, and are exercisable against a third party once a claim payment has been made.

The rights are exercised in the name of the insurer (rather than the English/US practice of adopting the name of the insured as a ‘fictional’ claimant) and require proof that the insurer has both paid a claim and was required to do so under the policy.

As rights of subrogation are exercised in the name of the insurer, reinsurers also have the right to bring proceedings in their own name once they have paid a claim. This can obviously create practical complications if there is a multitude of reinsurers exercising subrogation rights against a third party arising out

of the same loss. It is often more straight forward, therefore, for such rights to be exercised in the name of the direct insurer with reinsurers exercising control or cooperation over the claim as may be appropriate.

Absent agreement, any recovery by way of subrogation is shared proportionally between insurers/reinsurers in accordance with their share of the loss; in contrast to the English ‘top-down’ approach.

When pursuing a claim in subrogation, an insurer adopts the rights of the insured vis-à-vis the third party. Accordingly, the limitation period that applies between the insured and the third party is relevant. This will usually be the limitation period outlined above at paragraph 7(d), unless subject to a specific contractual variation.

# Colombia



## 1. Introduction and basic principles

Colombia is a civil law jurisdiction which derives most of its law from statute. Case law is relevant as an auxiliary source of law. Insurance law is derived from the Civil and Commercial Codes and certain specific Insurance Acts.



## 2. Broker relationships and role

The broker's principal is generally the insured, to whom the broker owes duties arising out of the placement of a risk. The precise duties will depend on the remit and detail of their instruction.

Brokers are generally heavily involved in claims and insureds rely on them for advice on their dealings with reinsurers.

## 3. Governing law of policies

Under Colombian law, all policies involving Colombian parties or risks located in Colombian territory, are mandatorily subject to Colombian law. Colombian courts will therefore disregard the application of foreign law to an insurance contract between a Colombian insured and Colombian insurer regardless of any other policy provision to the contrary.

With respect to reinsurance, the parties are free to choose the governing law of the reinsurance policy. In practice though, many reinsurance policies are written subject to Colombian law due to market pressure.

## 4. Jurisdiction and claim resolution

There is no clear rule of law that insurances must be subject to Colombian jurisdiction, however, the Civil Code stipulates that contracts governed by Colombian law cannot contain a jurisdiction clause in favour of another country. Thus, there is a de facto restriction. Certainly, the Colombian courts will recognise jurisdiction over a policy involving Colombian parties or risks located in Colombian territory. Policy provisions in favour of Colombian arbitration will be upheld.

The court system in Colombia can be extremely slow and alternatives to litigation established in the Colombian Political Constitution of 1991 and the Statutory Law on the Administration of Justice of 1996, and Law 446 of 1998 provides for conciliation and arbitration schemes which are regulated by decree 1818/1008.

As an alternative to litigation, mediation is encouraged and in many cases a conciliation hearing is compulsory before proceedings may be issued followed by another compulsory conciliation hearing one at a very early stage of the proceedings. There are no penalties for the parties if they fail to mediate a dispute, and these stages are often regarded as a formality to be undertaken.

#### **(a) Arbitration framework**

In Colombia, there are two potential procedures that can be used to regulate arbitrations – the legal procedure and the institutional procedure (akin to whether the Arbitration Act 1996 or, for example, the ICC rules govern an arbitration in England). The arbitrators' fees for the institutional procedure are generally lower than those for the legal procedure. However, there are some instances where the legal procedure is imposed by an arbitral institution, for example, in cases where one of the parties is a state entity.

The largest arbitral institution in Colombia is the Chamber of Commerce of Bogotá. There is a growing awareness of the advantages of arbitration in Colombia and it is not uncommon to find arbitration agreements in both insurance and reinsurance contracts.

#### **(b) Regulatory/superintendent/ombudsman**

In the resolution of insurance disputes it is not yet common for insureds to refer cases to any regulatory bodies or ombudsmen as is the practice in some other Latin jurisdictions. However, the insured is entitled to file a complaint/queja, before the Defensor del Asegurado (Insured's Defender), an ombudsman created by law. The Defender is normally an external insurance lawyer who will produce an opinion on the merits of the claim. The opinion is not binding and the parties are free to pursue the claim in court.

Additionally, claims handlers often consult the regulator, the Financial Superintendence, to clarify legal ambiguities or to ascertain its construction of a particular legal provision. The regulator should respond in writing and although this opinion is not binding, it is persuasive in court and often quoted in judgments and arbitration awards.

In the case of claims involving state owned entities, there are two regulators that closely govern the conduct of state entities:

- Procuraduría: ensures public servants do not act outside their authority and supervises their conduct
- Contraloría: protects the public purse and ensures public servants and state entities do not waste state resources/money

These two regulators act independently from each other. They will frequently supervise the resolution of insurance disputes with state entities at the request of the insured or the judge hearing a case (who is a public servant himself).

## 5. Disclosure obligations and remedies for breach

Art. 1058 of the Commercial Code provides that an insured has a duty to disclose to the insurer any facts or circumstances that are relevant to the risk.

Colombian law distinguishes between innocent and fraudulent non-disclosure and misrepresentation. In the case of a fraudulent non-disclosure or misrepresentation, provided the insurer can show that they would have entered into the policy on different terms or would not have written it at all, the insurer can seek the avoidance

of the policy ab initio or from the beginning. Thus the policy is nullified. However, in the case of an innocent misrepresentation, the insurer is not entitled to seek avoidance of the policy but rather to claim in court a reduction of the indemnity that corresponds to a pro-rated allowance as to the extra premium that would have been charged.

## 6. Warranties and conditions precedent

The concept of “condition precedent to liability” does not exist under Colombian law. There is an alternative concept, a “suspensive condition” which is defined in Art. 1536 of the Civil Code as a condition that has to be fulfilled in order to give rise to an enforceable obligation. As long as the condition is not fulfilled, the enforceable obligation does not arise. Art. 1541 of the Civil Code clarifies that such suspensive conditions are to be interpreted literally. Therefore a clearly drafted condition precedent should at law be upheld (although see the discussion as to late notice of claims below).

An alternative is to argue that a condition precedent is a warranty, or guarantee, under Colombian law. Art. 1061 of the Commercial Code defines a warranty as a promise by which the insured agrees to either do something or not do something, or comply with a certain obligation, or whereby it affirms or denies the existence of certain facts. Warranties under Colombian

law are to be interpreted literally and the remedy for breach of warranty is avoidance. Again, therefore, a clearly drafted warranty should at law be upheld. It needs to be made clear, for example, whether any warranted representation should be in respect of the contemporaneous position as at the date of the representation or a statement of the ongoing position.

## **7. Claim management issues**

### **(a) Notification of claims**

Article 1075 of the Commercial Code provides that insurers should be notified of a claim within three days of the date the insured had knowledge or should have had knowledge of the damage, or for liability claims the date of the claim presented against it. Policies often stipulate other deadlines; a longer deadline is acceptable, however a shorter one is not valid under Colombian law.

Late notification of claims under Colombian law only entitles an insurer to damages for any prejudice suffered even if the notification provision is framed as a condition precedent to liability.

Once an insured has presented to insurers sufficient evidence to prove its claim and has made a formal request for reimbursement under the policy, insurers have 1 month in

which to either approve or deny the claim. If an insurer does not respond within this time period the claim will be deemed approved. In the case of claims under property policies and provided that the insured is a company and the insured amount exceeds 15 times the minimum official wages, the term can be extended by agreement of the parties for up to 60 working days.

### **(b) Reservation of rights**

Reservations of rights under Colombian law have no effect. An insurer/reinsurer is expected to provide guidance to its insured in respect of a claim and the courts will generally not find favour with an insurer/reinsurer that does not do so.

Insurers can make it clear to insureds that by providing any such guidance they are not prejudicing their position under the insurance/reinsurance policy or confirming cover. Such a communication needs to be carefully drafted.

Consequently, Art.1.077 of the Commercial Code provides that an insurer has 30 days from the date of notice of a claim to confirm or deny cover or to request further information so as to allow a coverage determination.



**(c) Without prejudice, privilege and confidentiality**

The without prejudice concept does not exist under Colombian law. All negotiations are undertaken openly and so may be referred to in evidence. However, the parties may agree to enter into confidential discussions.

The concept of privilege also does not exist; rather a party need only disclose in litigation/arbitration those documents that support its case or that the other party specifically requests. As there is no standard disclosure of any document that is relevant to a case, the concept of privilege is not as important.

Communications between lawyer and client are considered confidential and confidentiality agreements are generally respected by parties.

**(d) Limitation**

The limitation period for an insured to bring a claim against insurers is two years, as per Art. 1081 of the Commercial Code. This begins to run from the date of notification or from the date the insured should have become aware of the claim.

An extraordinary 5 year period applies in circumstances where the

insured was not aware of its right to bring a claim. The Supreme Court has recently held that the direct action of a third party against the insurer under liability policies is subject to this 5 year period, known as the extraordinary time bar period and also found at Art. 1081 of the Commercial Code.

The limitation period for the insurer to commence proceedings to avoid a policy is two years from the insurer becoming aware of the misrepresentation or non-disclosure.

Under Colombian law, a limitation period cannot be amended by the parties, either in the policy terms or after a loss, as a matter of public policy.

**(e) Penalties for late payment of claims**

Interest is payable on late payments of claims. A punitive rate of interest is charged and it is not uncommon for it to be above 20% per annum. It only becomes payable once the insured has fully proven its claim and upon expiry of the 1 month period that the insurer has to either approve or deny the claim.

**(f) Rights of third parties**

The general position is that third parties cannot claim against insurers directly. However in the

case of liability policies it is possible, although not very common, for third parties to claim directly against insurers (see above for the applicable time limit).

## 8. Reinsurance considerations

With some exceptions, the laws of insurance are generally applicable to reinsurance.

The more significant aspects of the reinsurance law in Colombia are:

### (a) Cut through position

The concept of cut through is not particularly developed or a recognised concept in Colombian law. However, the Commercial Code includes specific articles which deal with reinsurers' liability, stating that an insured cannot claim directly against a reinsurer.

### (b) Claims control/cooperation

Both claims control and claims cooperation clauses are recognised in the Colombian insurance market. Claims control provisions are more common than claims cooperation. Claims cooperation clauses can present more difficulties because insurers do not always agree with the views of reinsurers and without a control clause reinsureds are not obliged to follow reinsurers' instructions.

A clearly drafted provision should be given effect as a "suspensory provision" (akin to a condition precedent) under Article 1536 of the Civil Code, but in practice reinsurers are likely to be required to show clear prejudice in order to rely on a breach of such a clause so as to be released from liability for a claim.

### (c) Follow the settlements/fortunes

There is no distinction under Colombian law between a follow the fortunes and a follow the settlements clause. As a matter of law, and even in the absence of a clause of this nature in the contract of reinsurance, reinsurers are bound to follow the fortunes/settlements of the insurer, unless they can show malice or bad faith on the part of the insurer.

### (d) Incorporation of terms/back to back

There is no specific legal rule that a reinsurance policy is deemed to be consistent with the terms of the underlying policy. However, policies are often back to back with the relevant standard wordings translated from English to Spanish and incorporated into the local policy and a court or arbitral tribunal will usually assume this. This can present difficulties if the translation is not of a good standard. For

example, Colombian law has special definitions for “year” in the context of employment which can create difficulties when interpreting the phrase “first year of service” in a policy.

If the reinsurance terms are the same as for the underlying then Colombian law will impose the follow the fortunes/settlements doctrine.

## 9. Subrogation

### (a) Method

Subrogation claims are recognised under Colombian law, and upon payment of a loss an insurer is automatically subrogated to the rights of the insured vis-à-vis a third party. Subrogation is brought in the name of the insurer/reinsurer and not the insured. A recovery is applied in proportion to the share of liability for the loss.

It is important to ensure full cooperation from the insured if a subrogation action is contemplated and we would always recommend this is provided for in any settlement agreement. As the court system in Colombia can be slow it is important to make sure the cooperation clauses agreed with the insured in the settlement agreement last for the duration of the subrogation claim.

### (b) Time limits and defences

The limitation period for subrogation actions will depend on the position between the insured and the relevant third party. For claims under contract the period is generally 10 years.



# Argentina

## 1. Introduction and basic principles

All contracts, including those of insurance, are governed by the Argentine Civil Code. As in other civil law systems, prior decisions of the courts are not binding but can be persuasive when interpreting or applying the Commercial Code.

The Insurance Law 17,418 of 6 September 1967 sets down the law specific to insurance companies but mostly concerns regulatory and corporate requirements. There are other insurance related statutes, but they do not have a direct bearing on the claim handling process.

by the Argentine Superintendence of Insurance (Superintendencia de Seguros de la Nacion) (“SSN”) to perform insurance broking activities. Broking activity is regulated by Law No. 22400.

Generally, a broker is appointed by, and acts on behalf of, the insured during the placing and subsequent administration of a policy. The acts of a broker will bind the insured.

## 3. Governing law of policies

Under Law 12,988, individuals or assets located in Argentina must be insured by an Argentine insurance company under an insurance policy issued in Argentina.

Pursuant to Article 16, Insurance Law and SSN Resolution 35,615, all insurance and reinsurance contracts written in Argentina must be governed by Argentine law and be subject to Argentine jurisdiction. Argentine courts will have jurisdiction over any insurance case where the insurer or policyholder is domiciled in Argentina. This strict rule can create complications for the insurance of goods or cargo in transit.

## 4. Jurisdiction and claim resolution

### (a) Arbitration framework

Arbitration is relatively undeveloped in Argentina, although commercial arbitration is gradually becoming more established as a way of resolving disputes, particularly where foreign companies are involved. Generally, courts will uphold agreements to arbitrate, provided substantive and formal requirements have been met.

## 2. Broker relationships and role

Insurance brokers must be licensed



Under Argentine Law, an agreement to arbitrate contained in an insurance contract is not enforceable (Article 1198, Civil Code). However, the courts will enforce an arbitration agreement if it has been concluded between insurers and insured after a dispute has arisen.

In terms of reinsurance contracts, however, arbitration agreements are allowed, although the arbitral process must be conducted in Argentina and must apply Argentine law.

**(b) Mediation**

Mediation is obligatory before a civil case goes to court. If the case involves only compensation for material damage caused, it is common to reach a settlement as the sum can be easily quantified; if personal injuries are involved, it is much more difficult. If no agreement is reached by parties, minutes of proceeding are issued and presented to the court.

Mediators are not responsible for fixing quantum in cases of dispute but merely try to facilitate an agreement between the parties.

**(c) Regulatory/superintendent/ombudsman**

In Argentina, insurance and reinsurance business is monitored by

the SSN, an independent regulatory authority within the Ministry of Finance. All Argentinian risks may only be insured with insurers authorised by the SSN. The remit of the Superintendency also extends to registering all loss adjusters.

**5. Disclosure obligations and remedies for breach**

Under Argentine law, insurance contracts must be executed, construed and performed in good faith (Article 1198, Civil Code). Both parties are required to demonstrate transparent and honest conduct and a readiness to fulfil their respective obligations. The insurer must provide a clear policy and accept risks that are covered. The insured must inform the insurer of the true state of the risk and pay the premium. Consequently, the insured is obliged to declare all relevant information required by the insurer to assess the risk and not to make false or misleading statements.

However, if the insurer provides an application form with a questionnaire, the insured will have complied fully with his duty of disclosure by accurately completing the questionnaire at the time of taking out the insurance policy.

Section 5 of the Insurance Act No. 17,418 sets out the effect of material non-disclosure and/or misrepresentation.



If proper disclosure is not given, or a misrepresentation is made, even if innocent, the insurer can elect to avoid the policy within 3 months of discovering the “material” non-disclosure or misrepresentation. A fact is “material” if an objective insurer would have been induced not to accept the risk, or to change the terms of cover, had the real state of the risk been known.

If bad faith or fraud on the part of the insured can be shown, the insurer is entitled to retain the premium.

## **6. Warranties and conditions precedent**

Argentine law does not have a special categorisation of “conditions precedent” or “warranties”. Instead it uses the concept of ‘cargas y obligaciones’ (duties and obligations), whereby the remedy for a breach derives from statute. For instance, article 46 of Insurance Law 17,418 imposes a duty on an insured to notify a loss within 3 days of becoming aware of it. If the insured does not comply, the right to an indemnity under Article 47 is lost.

Where the law does not establish the effect of a breach of duty, an insured’s right to an indemnity will only be lost where it can be shown that the loss has arisen from, or been aggravated by, the insured’s negligence.

Ultimately the effect of a breach of a policy condition will depend on its terms, the factual matrix and any relevant legal provisions. Insurers must, however, act promptly should they become aware of any default by the insured whether in respect of a specific clause or a generally negligent or prejudicial act.

## **7. Claim management issues**

### **(a) Notification of claims**

Under Article 46 of Law 17,418, the insured must notify the insurer of any loss within 3 days of becoming aware of the loss. However, the parties may agree to extend the time limit specified in the policy. For liability claims, the knowledge will be (subject to specific policy terms) that a claim is being made against the insured. Accordingly, an insured is not generally required to give notice of circumstances which may give rise to a claim.

A delay in notification allows an insurer to deny coverage of the claim where that late notice has prejudiced their position.

### **(b) Reservation of rights**

Argentine Law does not recognise the concept of reservations of rights whilst insurers consider whether a claim is covered by the policy.

An Argentine insurer has 30 days from notification to accept or decline cover for a claim. If the insurer needs more information before it can make a decision, this must be requested within 30 days from notification. This request postpones the 30 day period until such time as the insured has provided all the information the insurer has requested. The information requested by insurers must be relevant. On receipt of such “complementary information”, the insurers may have further requests to make, again extending the time limit by 30 days. In other words, the insurer indirectly “reserves its rights” to reject the claim by requesting relevant information from the insured. Once the insured has provided all the information the insurer has requested, he will have 30 days to reject or accept the claim.

These regulations apply as between the insured and direct insurer and thus reinsurers need to be involved in claims promptly.

**(c) Without prejudice, privilege and confidentiality**

Argentine law does not recognise the concept of “without prejudice”.

Under Argentine law, all client–lawyer communications are

protected from disclosure provided the content relates to legal matters.

As in most civil jurisdictions, the disclosure obligations of parties to arbitration or litigation are more limited than in English proceedings, with disclosure being limited to those documents that are essential to resolve the dispute and those documents which the court orders to be disclosed on the specific request of a party.

Under Mediation Law 24,573, a mediation process is confidential. In practice, parties to a mediation usually agree a non-disclosure or confidentiality agreement.

**(d) Limitation**

For claims based on breach of contract, proceedings must be commenced within 10 years of a breach of the contract. When founded in tort, the period is 2 years from the accrual of the cause of action.

However, there are specific timeframes for claims under insurance policies. An insured has 1 year from the date the relevant obligation becomes payable to bring a claim against his insurers pursuant to Article 58, Insurance

Law 17. This is extended for certain classes of insurance, such as consumer claims or life insurance, in which case the insured has 3 years (Article 50, Consumer Protection Law and Article 58, Insurance Law). A limitation period is also suspended whilst a formal adjustment process is underway.

**(e) Penalties for late payment of claims**

There is no specific regime for punitive awards for late payment or wrongful denial of a claim. However, damages can be imposed by the regulating authority where it considers the insurer to have acted in an unlawful manner or in bad faith.

**(f) Rights of third parties**

In general, under Argentine law, there is no right for a third party to claim directly just against an insurer. However, under the process of 'citacion en garantia', a third party claimant may bring a direct action against an insurer, provided he also sues the insured. If judgment is entered against the insured, the insurer is also held liable up to the extent of the insured amount. However the insurer cannot be held liable if no judgment is entered against the insured.

## **8. Reinsurance considerations**

Until recently, Argentine insurers have been permitted to reinsure risks with (i) foreign reinsurers registered with the SNN; (ii) unregistered foreign reinsurers, via a reinsurance broker registered with the ASI; or (iii) other Argentine insurance companies.

Following a regulation passed in September 2011, Argentine insurers are only allowed to enter into reinsurance contracts with Argentine reinsurers or Argentine branches of foreign companies, or exceptionally "admitted reinsurers" (that is, foreign reinsurers registered with the SSN) where there is no local capacity and subject to the SSN's approval on a case-by-case basis.

Leaving aside regulatory issues, all insurance law in Argentina also applies to reinsurance policies by analogy. Under Law 17,418, a number of provisions apply specifically to reinsurance contracts:

- (a) An underlying insured has no 'cut-through' rights that would enable it to bring a claim directly against a reinsurer (Article 160)
- (b) An insured has priority over other creditors in relation to insurance monies owed by a reinsurer to an insurer in liquidation.

Consequently there are no specific additional considerations that need to be taken into account when reinsurance (as opposed to insurance) is concerned.

## 9. Subrogation

As in most civil jurisdictions, subrogation rights are recognised in Argentina, and are exercisable against a third party once a claim payment has been made.

In the event of a payment, the insurers shall be subrogated to all of the insured's rights of recovery. The rights are exercised in the name of the insurer (rather than the English/US practice of adopting the name of the insured as a 'fictional' claimant) and require proof that the insurer has both paid a claim and was required to do so under the policy.

As rights of subrogation are exercised in the name of the insurer, reinsurers also have the right to bring proceedings in their own name once they have paid a claim.

Absent agreement, any recovery by way of subrogation is shared proportionally between insurers/reinsurers in accordance with their share of the loss; in contrast to the English 'top-down' approach.

When pursuing a claim in subrogation, an insurer adopts the rights of the insured vis-à-vis the third party. Accordingly the limitation period that applies between the insured and insurer is relevant. This will usually be the limitation period outlined above at paragraph 7(d), unless subject to a specific contractual variation.







Peru



## 1. Introduction and basic principles

Contracts of insurance are governed by the Insurance Contract Law No. 29946, which entered into force on May 27th, 2013. The Insurance Contract Law is applicable to all sort of insurance contracts, except for those which have explicit regulations.

The General Banking and Insurance Law - Law 26702 (hereinafter referred to as the “General Law”) regulates the incorporation, operation and supervision of insurance companies through the Superintendence of Banking, Insurance and Private Pension Administrators of Peru - *Superintendencia de Banca, Seguros y AFPs* (hereinafter referred to as “the SBS”).



## 2. Broker relationships and role

According to Article 337 of the General Law, insurance brokers can be individuals or legal entities hired by insureds in order to perform a mediation role with insurers. Brokers also have a general duty to advise insureds on all matters relating to the policy. In particular, brokers must explain the contents of the policy and communicate to the insurer, on behalf of the insured, any loss event or increase of the insurable risk, according to the insured’s declaration.

Article 24 of the Superintendence Resolution 1797-2011 establishes that the main purpose of insurance brokers is to reduce a perceived “asymmetry” that exists between the insurer and the insured.

The Insurance Contract Law provides that insurance brokers act on behalf of policy holders only if the latter had signed a document called an “appointment letter”. With said letter, the broker is authorised to act on behalf of the insured for purposes of administrative representation but not for disposition purposes. Brokerage is paid by the insurer.

As a broker acts on behalf of the insured, all declarations given to the insurer on behalf of the insured by the broker will be binding on the parties.

Brokers may also act as representatives for foreign insurers which are not registered before the SBS.

### 3. Governing law of policies

Even where Peruvian law is not specified in a policy, it will be mandatorily imposed. In addition, according to the Insurance Contract Law, It is forbidden for the insurers to include clauses by which an insured waives laws or jurisdiction that are favourable to them.

### 4. Jurisdiction and claim resolution

Policy wordings are required to contain details of the insured's rights and obligations in the event of a dispute and it is mandatory that policies be subject to Peruvian jurisdiction (court or arbitration only after the loss occurred).

#### (a) Arbitration framework

Insurance policies may be subject to arbitral jurisdiction only once the loss has occurred and if the value of the claim is at least US\$27,000 (approximately). The Insurance Contract Law provides that any provision binding the policy to arbitration is void. The Arbitration Act of 2008 (Legislative Decree 1071) is based on the UNCITRAL Model Law of 2006 and reflects the changes introduced therein.

#### (b) Regulatory/superintendent/ombudsman

In the event of a dispute the insured can make a complaint to the SBS who may suggest to the complainant

the best way of solving a dispute between insurer and insured, often recommending consultation with the Defensoria del Asegurado, a role akin to ombudsman sponsored by the Association of Peruvian Insurance Companies, (APESEG). There is a claim limit of US\$50,000 for filing a claim before the ombudsman. For amounts higher than the latter, the insured must go to the courts or arbitration. The decision of the ombudsman is binding to the insurers but not to the insureds who can file their case before courts or arbitration even if their case is rejected by the ombudsman.

### 5. Disclosure obligations and remedies for breach

Peruvian Insurance Contract Law is founded on the duty of utmost good faith. The insured is obliged to declare all relevant information required by the insurer to assess the risk, and not to make false or misleading statements.

If proper disclosure is not given, or a false statement is made, by virtue of wilful default or gross negligence of the insured, the insurer has 30 days to declare the policy as null and void due to the insurer not being able to assess the risk fully. The burden of proof of improper disclosure and/or false statement rests with the insurer.

If proper disclosure is not given, or a false statement is made, but is not by virtue of wilful default or gross negligence of the insured, and the insurer notices prior to the occurrence of a loss, the insurer has to propose to the insured a new policy with a revised premium or risk coverage. If the insured accepts the new policy, the premium has to be paid accordingly. If the insured does not accept the new policy or fails to do so in 10 days, the insurer has the right to terminate the contract. If the insurer notices after a loss has occurred, the indemnity will be reduced proportionally to the difference between the premium and the one that would have been charged if the real risk status had been known.

However, in such cases, the termination, revision and/or nullity and voidance of the policy will not proceed when:

- a) The insurer knows or should have known the real status of the risk when the policy was signed.
- b) The false or not disclosed circumstances ceased before the occurrence of the loss or when the misrepresentation or non-disclosure, that are not wilful defaults, had no influence on the occurrence of the loss or in the measurement of the indemnity.
- c) The omitted circumstances were unanswered in the questionnaire

provided by the insurer and he proceeded to sign the policy anyway.

- d) The omitted or falsely declared circumstances diminish the risk.

## 6. Warranties and conditions precedent

Contracts are often drafted in “common law style” utilising phrases such as representations and condition precedents.

However, whilst utilised in the market, the concepts of condition precedent do not have a special definition at law and there is no established interpretation from the Peruvian courts as to the consequences of their breach.

Therefore, the consequences of a breach of a policy condition will depend on the detail of the policy provision, the circumstances regarding the breach and whether the breach caused a loss.

Warranty clauses are generally recognised. However, according to the Insurance Contract Law, to determine the compliance of a warranty clause included in a policy, it is more important to look after the substantial compliance of the warranty set forth therein rather than its literal compliance.

## 7. Claim management issues

Article 74 of the Insurance Contract Law provides that a claim should be paid to the insured or its beneficiaries within

30 days following the acceptance of the claim by the insurer. The method for the acceptance of the claim will depend on whether the claim is subject to a loss adjustment process or not.

**(i) Adjusted claims for claims subject to loss adjustment the process is as follows:**

- (a) The appointment of an adjuster is made by an insured from a shortlist of three adjusters (who have to be registered before the SBS) provided by the insurer.
- (b) Once the adjuster receives the complete documentation required to adjust the loss, he has 20 days to draft a report approving or rejecting coverage and determining the amount to be paid for the loss.
- (c) If the adjuster requires further and reasonable documentation, he must ask for it within this term. This action suspends the term, which will start running again once the required documentation is provided.
- (d) In case the adjuster needs more time to draft an adjustment report, he may ask the SBS to grant him a longer term.
- (e) However, if the SBS denies such motion and the adjuster fails to determine whether the loss should be covered or not in the

20 days term, the loss will be considered as covered UNLESS the insurer challenges or rejects the claimed amount within 30 days from receiving all of the information required.

In other words the insurer has 30 days to challenge or reject a claim if an adjuster fails to comply with the 20 day time period.

- (f) Assuming the adjuster has drafted a final adjustment report in time and this is duly signed by the insured and delivered to the insurer, the procedure is as follows:
- (g) The insurer has 10 days from receiving it to approve or reject the adjustment report.
- (h) If the insurer does not respond within that 10 day term, the loss will be considered as covered.
- (i) If the insurer disagrees with the adjustment, he must raise an objection within 10 days from receipt of the report and may require a new adjustment to be completed within a term not exceeding 30 days.
- (j) Following this process the insured or insurer can accept or reject the claim, determine a new amount, propose the application of an arbitration clause or go before courts at which the adjustment report is highly persuasive albeit not binding.

**(ii) Non-adjusted claims**

- (a) For claims not subject to loss adjustment the process is as follows:
- (b) The insurer has a 30 day term from the date of delivery of the complete documentation required for the analysis of the claim in order to accept or reject coverage of the loss.
- (c) If the insurer requires any further documentation, he must ask for it within the first 20 days of the term. This action suspends the term, which will start running again once the required documentation is provided.
- (d) If the insurer requires more time to undertake additional investigations or obtain sufficient evidence regarding the origin of the claim or to adequately determine its amount, it has to ask the SBS to grant him a longer term. However, if the SBS denies such motion and the insurer fails to state whether the loss will be covered or not in the aforementioned term of 30 days, the claim will be considered as accepted by the insurer.

In either scenario, therefore, whether a claim is adjusted or not, it is important that an insurer promptly deals with, and responds to, a claim made under a policy.

**(a) Notification of claims**

Superintendence Resolution No. 3203/2013 provides that notification of a claim must be made “as soon as reasonably possible”. However, such notification has to be made in a maximum term of three days for property damage and seven days for personal insurance, unless the policy provides a longer term

Failure to comply with such terms only allows the insurer to reject coverage if said failure is due to wilful default of the insured. In cases of gross negligence of the insured, the insurer may reject the claim only if failure to comply with the term affects the assessment of the loss and the insurer has not known of the circumstances of the loss in any other way.

If there is failure to comply with the terms and is not due to wilful default or gross negligence of the insured, the insurer may reduce the indemnity, proportionally to the damage caused to the insurer by the late notice. However, if the insured proves that failure to comply with the term is due to unforeseeable circumstances, force majeure or factual impossibility, the insurer may not reduce the amount of the indemnity.

**(b) Without prejudice, privilege and confidentiality**

Without prejudice communications are not automatically protected from disclosure in Peru. Whilst it is possible to agree that communications cannot be put before a court or tribunal, any such agreement must be clear and inclusion of the term “WP” or “Without Prejudice”, will not, of itself, protect communications. It is also important to notice that there is no discovery stage in Peruvian procedures before courts or arbitration.

Similarly, the concept of privilege is not recognised in Peruvian law. However, according to the lawyers’ Code of Ethics in Peru, communications between a lawyer and client are confidential. Equally, as in most civil law systems, the disclosure obligations of litigation or arbitration are much more limited, with parties only obliged to produce the documents they rely on or that are specifically requested by the other party.

**(c) Limitation**

Article 78 of the Insurance Contract Law establishes that the general time period for bringing a claim under a policy is 10 years from the occurrence of a claim. The application of this time period to liability claims is not necessarily straightforward.

**(d) Penalties for late payment of claims**

As outlined above, Insurance Contract Law establishes a prescriptive timetable for insurers to respond to claims. If it is determined that a claim is payable and the insurer does not pay within 30 days after contesting the claim, default interest will be due.

In the case of a default in payment, the insurer must pay the insured an annual default interest of 1.5 times the average rate for lending operations in Peru for the currency expressed in the insurance contract. This is payable for the whole period of delay.

**(e) Rights of third parties**

Article 1987 of the Peruvian Civil Code, which is titled Insurers’ Liability, provides that “*The indemnity claim for damages can be brought directly against the insurer, who is jointly liable with the insured who caused the damages*”. Therefore, third parties can bring indemnity claims directly against insurers in Peru regarding civil liability insurance.

The insurer is obliged to indemnify third parties, to the extent that the damage caused to them is within the scope of the contract between the insurer and the insured. Such claims are subject to the same 10 year limitation period applicable to contractual civil liability actions.



## 8. Reinsurance considerations

There are domestic reinsurance companies operating in Peru. With one exception, overseas reinsurers generally have representative offices only. Whilst reinsurers may have a legal representative in Lima, this is no longer obligatory for the purposes of registration under Peruvian Law.

The legal treatment of reinsurance policies is similarly undeveloped, and there are no clear rules in this respect. Rather, it is likely that the insurance and general contractual provisions would be applied to reinsurance policies. This leads to some significant uncertainty.

Clearly, concepts such as claims control/cooperation clauses, follow the settlements/fortunes and the incorporation of terms from the insurance to the reinsurance have no settled meaning. Whilst a clearly drafted clause should be given effect, it is likely that a Peruvian court or arbitral tribunal would seek uniformity between insurance and reinsurance policies in respect of a claim.

In respect of cut-through clauses there is no privity of contract between a reinsurer and the original insured. However, there is equally no prohibition on such clauses and if properly provided for in the policies, the direct payment of claim from reinsurer to the original insured can be valid and effective, relieving the insurer from any further payment obligation.

## 9. Subrogation

### (a) Method

As in most civil jurisdictions, subrogation rights are recognised in Peruvian law, and insurers automatically have rights of subrogation against a third party once a claim payment has been made. The rights are exercised in the name of the insurer, rather than the insured, who must prove that the claim has been paid. Given that rights of subrogation are exercised in the name of the insurer, reinsurers also have the right to bring proceedings in their own name once they have paid a claim.

Any recovery by way of subrogation is shared proportionally between insurers and reinsurers in accordance with their share of the loss, unless otherwise agreed.

### (b) Time limits and defences

When pursuing a claim in subrogation, an insurer adopts the rights of the insured vis-à-vis the third party. Accordingly, the limitation period that applies between the insured and insurer is relevant.

The insured is liable for acts before or after the loss which may prejudice the insurer's right of subrogation against the third party.

# Spain



## 1. Introduction and basic principles

Insurance law in Spain is primarily derived from the Spanish Insurance Act (Ley 50/1980, de 8 de octubre, de Contrato de Seguro) which is a section of the Spanish Commercial Code. There are other insurance related statutes which complement the Insurance Act. Hence the law is codified.

However, Supreme Court judgments create jurisprudence (when there are at least two decisions to the same effect) and, even though not binding, the judgments can be persuasive when seeking to apply the codified position in a similar case.



## 2. Broker relationships and role

The role of the broker in Spain is also governed by the Brokers' Act (Ley 26/2006, de 17 de julio, de mediación de seguros y reaseguros privados).

The Brokers' Act describes the broker's obligations and distinguishes between "Agente de Seguro" and "Corredor de Seguro" (Insurance Agent and Insurance Broker). Even though these two entities are treated differently by the Brokers' Act, their role is very similar.

The broker is the insured's agent and therefore is under an obligation to provide the insured with relevant information and advice regarding the placement of insurance. Accordingly, the actions of the broker will be attributed to the insured.

The insurer does not always subscribe to the policy with the insured directly. The insurer can also subscribe to a policy with "tomador del seguro" – a third party on behalf of the insured. Should the insurer subscribe the policy to the policyholder rather than the insured, the rights and obligations arising out of the insurance contract will belong to the policyholder except those rights and obligations that naturally belong to the insured.

## 3. Governing law of policies

Article 107 of the Spanish Insurance Act regulates the governing law of insurance policies.

With some specific exceptions, Spanish law will mandatorily apply to insurance policies when the risk is located within Spanish territory and the policyholder (either the insured or a third person on behalf of the insured) has its residence in

Spain or when the insurance contract is issued following an insurance obligation imposed by Spanish law.

The parties, however, are entitled to choose the governing law of the contract when the insurance policy covers 'large risks': a proviso which applies to most commercial risks.

#### **4. Jurisdiction and claim resolution**

The jurisdiction of insurance policies is governed by the EU Regulation 44/2011 and this position is similar to that discussed in the guide to the position in England and Wales. Essentially, an express choice of jurisdiction will generally be upheld for a commercial insurance. Where there is no express choice, for EU risks, an insured can sue in its own domicile or that of the insurer whilst an insurer must bring proceedings in the domicile of the insured.

##### **(a) Arbitration framework**

As noted above, policies can be subject to an arbitration clause. A new Arbitration Act was passed in Spain in 2011 seeking to bring the position more in line with the UNCITRAL Model Code.

Among the changes, it is worth highlighting the conferring of jurisdiction to the High Courts of Justice for the appointment and removal of arbitrators, the invalidity

action, the acknowledgment of foreign arbitration awards and the removal of jurisdiction from the commercial courts in arbitration matters. The reforms are generally intended to make arbitration more efficient and attractive to commercial organisations.

##### **(b) Regulatory/superintendent/ombudsman**

The "Dirección General de Seguros y Fondos de Pensiones" is a Spanish administrative body that reports to the Ministry of Economy (Secretaría de Estado de Economía) under the Ministry of Economy and Finance of Spain. The insurance sector and pension funds in Spain are under the supervision and control of this body, which is responsible for monitoring and controlling the proper functioning of the sector and to provide adequate protection to customers of insurance companies, as well as to members of pension plans.

It is unusual for this body to play a significant role in respect of specific claims under commercial policies.

#### **5. Disclosure obligations and remedies for breach**

Article 10 of the Insurance Act states that the insured has a duty to disclose any circumstances that may be material to the risk prior to the conclusion of the contract of insurance. The ambit of

the proposal form determines what is relevant. Therefore, the insured need only disclose the information that is requested in the proposal form.

The insured will be released from such an obligation if the insurer does not supply a proposal form or if there are circumstances material to the risk but not included in the proposal form. It may be prudent, however, for an insured to disclose other clearly relevant information.

Article 11 of the Insurance Act imposes an 'ongoing duty to disclose' on the insured, pursuant to which, the insured, during the course of the contract, has a duty to disclose to the insurer as soon as possible any circumstance that aggravates the risk.

Whilst not specified in the Insurance Act, the preferred analysis must be that the ongoing duty to disclose will arise in relation to the matters raised in the proposal form only, rather than also in respect of matters not raised therein. The draft new insurance law confirms this to be the case.

The insured may also disclose to the insurer circumstances that diminish the risk, as per Article 13 of the Insurance Act. In that case, the new premium will have to be reduced, failing which, the insured has the right to cancel the contract.

However, there are exceptions to the general rule. In a Court of Appeal

resolution of 10 May 2011, the judge considered that a clause agreed by the parties within the policy compensated for the lack of a proposal form and a general duty to disclose arose from that clause.

If the insured has breached its duty to disclose, the insurer is entitled to rescind the insurance contract within a month from the date on which the breach is discovered. Unless the insurer acted with gross negligence, the insurer is not obliged to return the premium.

The Insurance Act does not specify the effect of rescinding the contract but Spanish law generally provides that rescission is effective only from the breach and will not prejudice the whole contract. This is the rationale for the insurer not having to return the premium.

In the event that a non-disclosure is only identified after a claim, the claim payment shall be reduced in the same proportion as the premium would have increased had the insured been aware of the non – disclosed circumstance (except where the insured is fraudulent, in which case insurers will be exempt from liability).

## **6. Warranties and conditions precedent**

The concepts of warranties and conditions precedent do not exist as such under Spanish law and therefore a breach of either will be treated as a breach of a policy condition.

## 7. Claim management issues

### (a) Notification of claims

Article 16 of the Insurance Act states that the policy holder or the insured must notify the insurer of any loss within 7 days from when the insured or policy holder becomes aware of the loss. However, the policy may establish a longer period for notification. Should the insured breach this obligation, the insurer may claim damages caused due to the delay in notification.

### (b) Reservation of rights

Spanish law does not recognise the concept of reservation of rights. However, if a party wants to protect its right to raise a specific issue, they may draft an agreement which reflects this. Any such agreement should be signed by the insurer and the insured.

### (c) Without prejudice, privilege and confidentiality

Spanish law does not recognise the “without prejudice” concept. However, in general, intra-party communications between lawyers and/or lawyers with their clients are confidential. There is no general disclosure obligation in Spanish litigation; therefore, there is no concept of ‘privilege’ attaching to lawyer/client communications. Only a judge may request such

communications if he considers there has been fraud or violation of any of the constitutional rights.

### (d) Limitation

Article 23 of the Insurance Act provides that actions derived from insurance policies will have a limitation period of 2 years, extended to 5 years for personal insurance. This period runs from the date the insured has either a) knowledge of the incident/claim against him (insurance liability) or b) the date of the incident (property policies). However, the parties may agree an alternative clause when signing the contract.

### (e) Penalties for late payment of claims

Article 20 of the Insurance Act provides that the insurer will be charged for late payment of claims. The insurer will be obliged to indemnify the insured for a delay in the payment of a claim and the indemnity will be imposed by the court. The first two years from the incident the rate will be the standard interest rate plus 2%. After that initial two years, the annual interest is not less than 20%.

However, Article 20 interest should not be applied where the insurer has a good basis to continue investigating a claim.



**(f) Rights of third parties**

A third party may claim directly under an insured's liability policy if it has suffered a loss (and regardless of any policy coverage issues).

However, if the insurer pays a claim which is ultimately not covered, the insurer, as per article 76 of the Insurance Act, can "repeat" the action against the insured if it acted "negligently". Similarly, an insurer can subsequently raise policy coverage points to reclaim any indemnity paid to the insured. By this mechanism an insurer is able to compromise a claim brought by a third party without necessarily undermining its coverage position.

**8. Reinsurance considerations**

Pursuant to Section 79 of the Insurance Contract Act, "the provisions of the Insurance Contracts Act are not mandatory for reinsurance contracts". Therefore, the general position at law will apply. Accordingly, and as there is no binding system of precedents there is not a clear understanding of concepts such as follow the fortunes/follow the settlements or claim control/cooperation clauses. Rather, the policy language used in each instance needs to be carefully considered in light of the general law applying to contracts, and clear language should be used.

**9. Subrogation**

Article 43 of the Spanish Insurance Act recognises the subrogation rights of an insurer once the insurer has paid compensation to the insured. The insurer steps into the insured's position and therefore assumes the same rights and obligations the insured would have had against third parties potentially liable for the loss.

The rights of subrogation are exercised in the name of the insurer rather than the name of the insured.

The limitation period to issue a claim against a third party is the same the insured would have had as the insurer acquires the rights and obligations of the insured.

The general limitation period under a contract in Spain is 15 years but this may vary depending on the type of contract. In tort, the limitation period is just one year and thus subrogation rights must be exercised promptly.

There is some academic debate as to whether the limitation period for subrogation actions should be the same period the insured has to issue proceedings against the insurer, being 2 years. This argument is on the basis that the 2 year limitation period for claims "arising from" an insured policy should apply. The preferred view must be, however, that the insurer is subject to the same period as the insured would be.

# London team

## Latin America



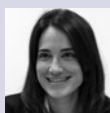
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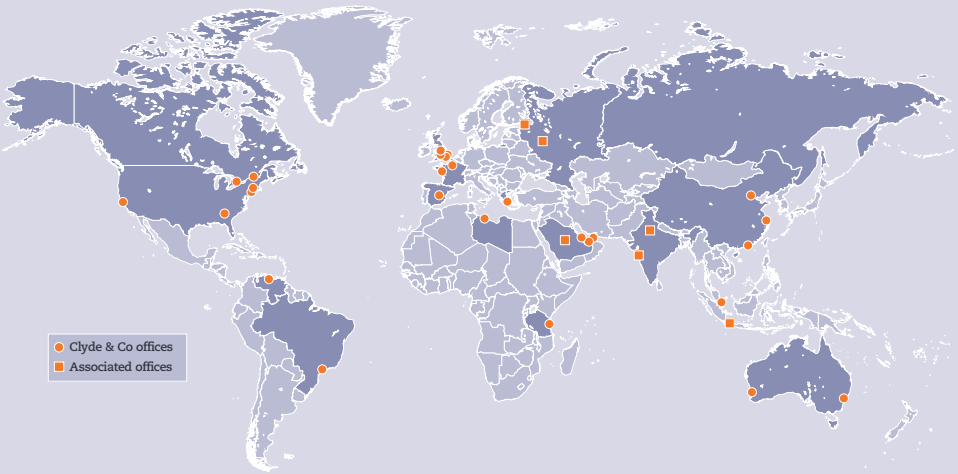


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