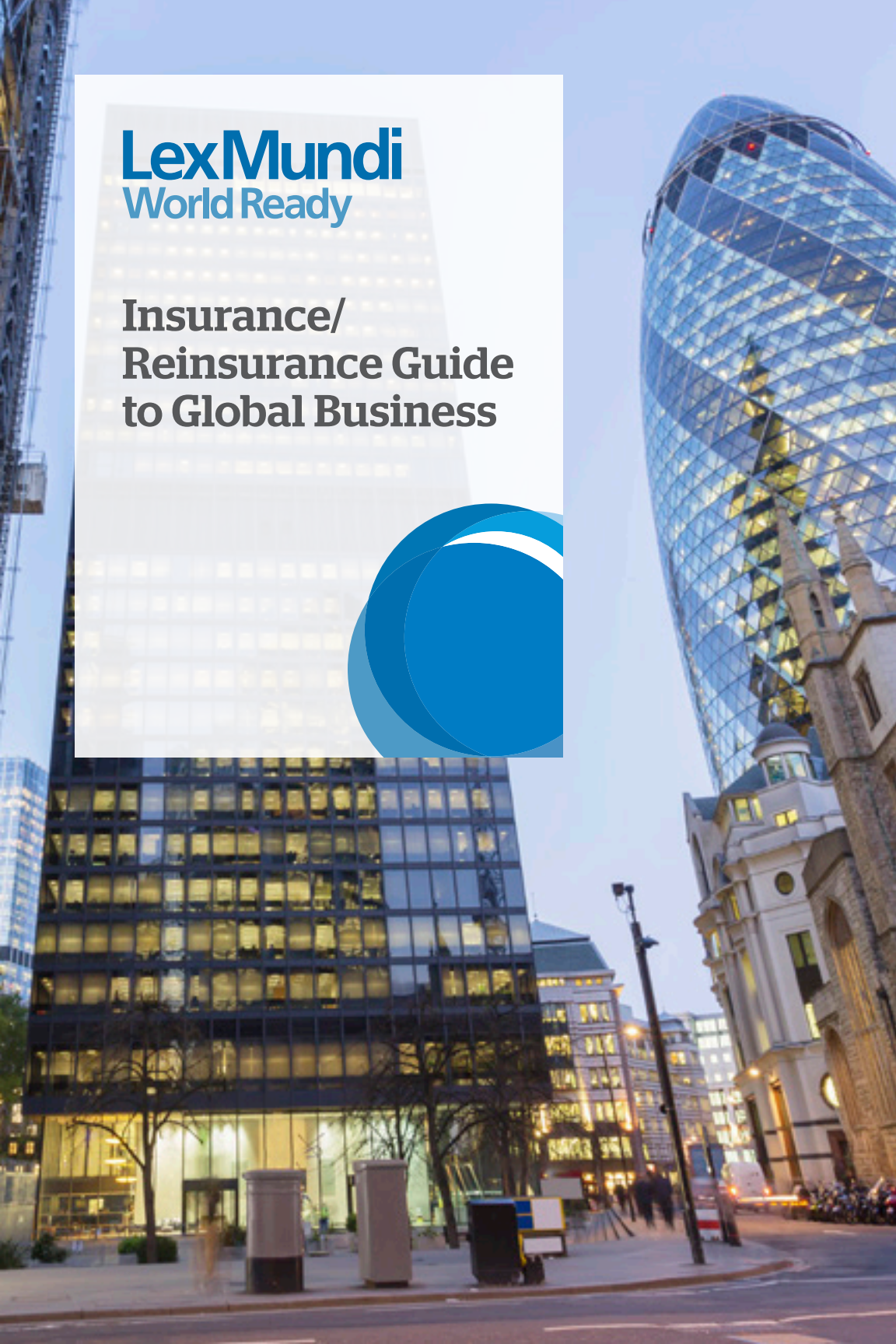

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Insurance/ Reinsurance Guide to Global Business


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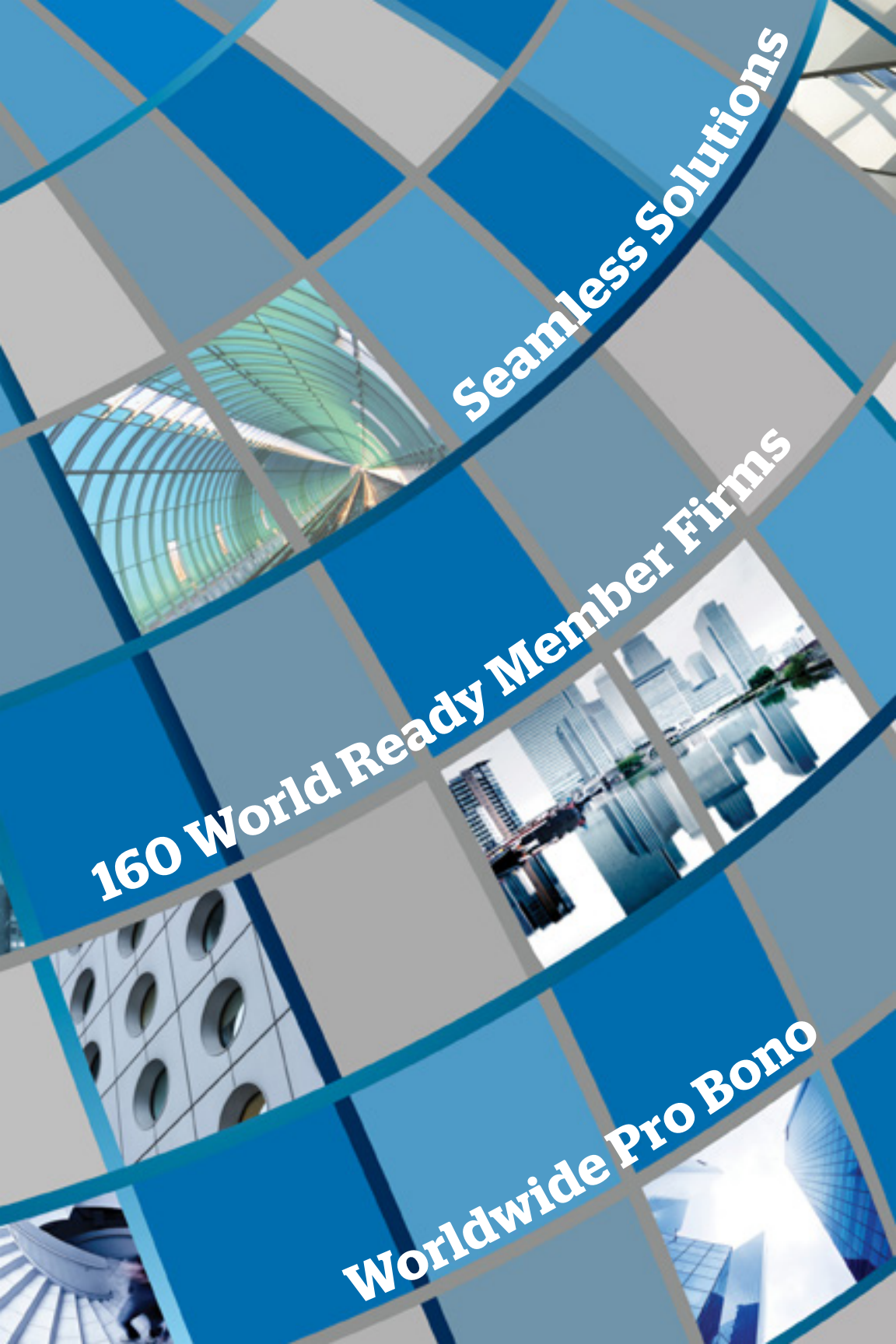
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160 World Ready Member Firms
Worldwide Pro Bono

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Lex Mundi World Ready

Lex Mundi is the world's leading network of independent law firms with in-depth experience in 100+ countries worldwide.

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Insurance/Reinsurance Guide to Global Business

The Insurance/Reinsurance Guide to Global Business is meant to be a quick reference for in-house counsel conducting business across the world. Lawyers in the Lex Mundi Insurance/Reinsurance Practice Group agree that one of the biggest day-to-day challenges their clients face is the need to find footing quickly when issues arise in less familiar markets. In this guide, the group provides practical advice on a range of common scenarios, including market entry, local regulations, distribution requirements, contract law, dispute resolution and major legislative changes on the horizon.

This publication is not intended to represent a comprehensive guide nor legal advice on the matters covered but rather provide a general overview on the subject. It may only be used as an indication and advice should always be sought from the appropriate Lex Mundi member law firm.

Please note that each response was provided on a different date, and therefore the answers to the survey refer to laws and regulations in force on that specific date.

Africa

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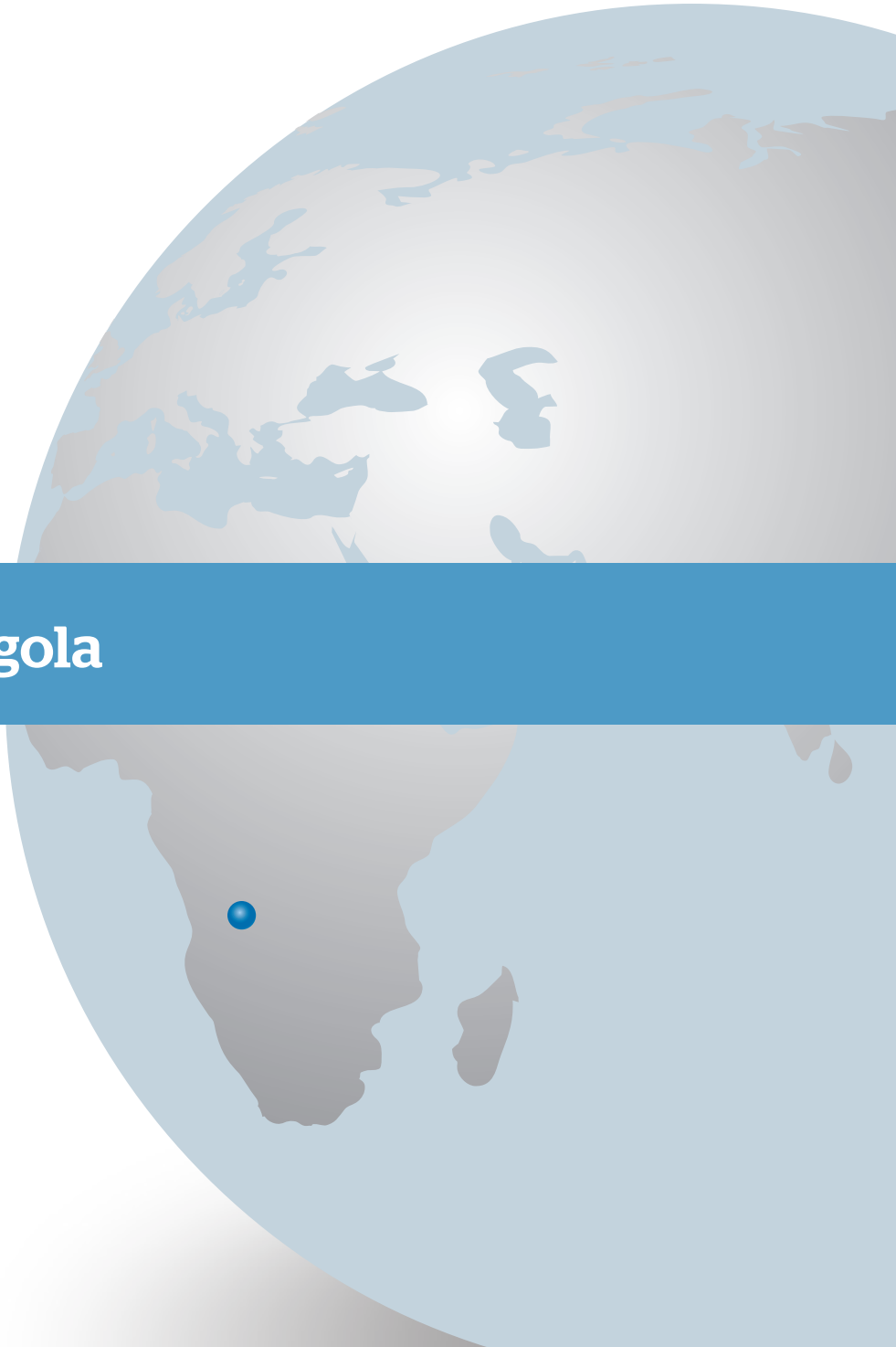

Angola

Overview

Which government bodies/agencies regulate insurance and reinsurance companies?

In Angola, the entity in charge of the regulation and supervision of insurance and reinsurance companies is currently the *Agência Angolana de Regulação e Supervisão de Seguros* ("ARSEG") which was created by Presidential Decree 141/13, of 27 September (subsequently amended by *Presidential Decree 190/13, of 19 November 2013*). *ARSEG* replaced *Instituto de Supervisão de Seguros* (the "Insurance Supervisory Institute" or "ISS"). The *ISS* was created by *Decree Law 4/98, of January 30*. All *ISS* attributions and personnel were transferred to *ARSEG*. *ARSEG*'s main attributions are the supervision of the insurance, reinsurance, insurance mediation and pension fund management activities under the superintendence of the President of the Republic and Holder of Executive Powers and, organically, the Ministry of Finance. The aforesaid superintendence powers manifest, most notably, in the fact that the members of the board of directors of *ARSEG* are nominated by the President of the Republic.

In general, *ARSEG* defines the rules necessary for the good functioning of the insurance sector and for the carrying out of the abovementioned activities. It controls and supervises the insurance sector as well as the activities mentioned above implementing, to that end, actions aiming to normalize the legal, technical and financial functioning of the insurance market, namely solvability criteria, the prudent management of technical provisions and their financial applications and of the products made available to consumers.

On the particular matter of supervision, *ARSEG*'s attributions comprehend, most notably:

- To issue opinions concerning the incorporation of insurance and reinsurance companies as well as the cancellation of the authorizations to carry out insurance and reinsurance activities in Angola;
- To initiate and oversee misdemeanor procedures, enforce the respective sanctions or advise the Minister of Finance on the enforcement of any sanctions within the scope of said Minister's attributions;
- To receive and issue opinions on any claims presented to *ARSEG* concerning the breach of any rules applicable to the insurance sector.

What are the categories of insurance licenses that exist?

In Angola, insurers may be granted two different types of licenses to carry out insurance activities, in the terms provided for by the *Law 1/2000, of February 3* (the "General Insurance Law"). The definition, names, types and areas of insurance to be open for business in the Angolan territory are set out in *Schedule II to the General Insurance Law*. The Minister of Finance has authority to approve the general and special conditions, the technical bases and the rates for compulsory insurance and other insurance requiring standardization, as well as to approve policies and other technical instruments.

Under the *General Insurance Law* only companies whose incorporation has been authorized may engage in the business of insurance and insurance mediation. It is within the Minister of Finance's authority to grant, for all national territory, authorization for the incorporation of the companies carrying out insurance and insurance mediation activities. The incorporation of companies having as shareholders non-resident individuals or companies that, in whole or in part, hold more than 50 percent of their share capital, requires the Council of Ministers' authorization, subject to the Minister of Finance's prior opinion. Authorization shall only be granted for joint operation of the compulsory and optional lines of insurance, both for direct insurance and for reinsurance, except for engaging exclusively in life insurance or in a single insurance line, where this is advisable for reasons relating to insurance practice and appropriate approval is obtained. The Minister of Finance also has authority to determine which insurance lines may be pursued. Finally, Insurance contracts entered into by a foreign insurer in Angola or relating to Angolan residents or assets located in Angola are null and void, as per Article *25 of Decree 7/02, of 9 April 2002* ("Insurance Related Infringements") and *Article 33 of Executive Decree 5/03, of 24 January 2003* amended by *Executive Decree 70/06, of 7 June 2006* ("Insurance Regulations").

Moreover, under *Article 9* of the *General Insurance Law* and *Article 26 of the Insurance Related Infringements*, insurance contracts entered into in Angola or relating to Angolan residents or assets located in Angola cannot be enforced through the Angolan courts unless they are entered into with entities authorized to conduct the insurance business in Angola. Any judgements of foreign courts based on such non-admitted insurance contracts cannot be enforced in Angola.

As provided for by Decree 6/01, of 2 March 2001 ("Reinsurance and Co-Insurance Regulations"), reinsurance may be carried out in the Angolan territory by: (a) companies previously authorized within the scope of the *General Insurance Law*, and other applicable domestic legislation, to be incorporated in order to engage in the reinsurance business on an exclusive basis; (b) international reinsurance agencies based in Angola under the terms of the special registration conditions to be authorized by the Minister of Finance after consulting *ARSEG*, namely with regard to the initial establishment fund, feasibility, good repute, timeliness and other applicable aspects of insurance legislation; (c) international reinsurance agencies in which the Angolan Government is a shareholder, as per Article 13.4 of the *General Insurance Law*; and (d) insurance companies, pursuant to the authorization for the exercise of direct insurance business they may obtain under domestic legislation.

Are insurance companies subject to taxes beyond the ordinary burden faced by all companies?

Insurance companies are subject to payment of the taxes and fees in force, as well as to payment of legally established specific contributions. *The Stamp Duty Code* (*Código de Imposto de Selo*) approved by Presidential legislative *decree 3/14, of 21 October*, establishes that stamp duty is due in respect to the insurance premiums and any other sums paid by policyholders as well as the commissions paid to intermediaries.

The Insurance Regulations foresee that 0.2 percent – life sector – and 0.3 percent – non-life sectors – of the total net revenues obtained from direct insurance by insurers are for the benefit of the supervisory authority (*ARSEG*).

What are the approved distribution channels? Are there restrictions?

In Angola, direct distribution channels include all media commonly used by insurers to reach out to their customers. Insurance intermediaries may also carry on their activities in the jurisdiction, in accordance with the *General Insurance Law*. There is still no relevant resort to distance communications, or telemarketing distribution channels.

Are there any forms of compulsory insurance?

The compulsory insurance lines of business in Angola are, most notably, the following:

i. Worker's compensation (*Decree 53/05, of 15 August 2005*);

ii. Motor vehicle liability (*Decree 35/09, of 11 August 2009*, amended by *Presidential Decree 83/11, of 25 April 2011*);

iii. Private investor insurance (*Law 14/15, of 11 August 2015*);

iv. Oil and Gas liability insurance (*Decree 9/89, of 15 April 1989*).

There are other compulsory lines of insurance applicable to different types of economic activities (*e.g.* industrial, shipping, aviation, public works and private works).

What major insurance/reinsurance legislation is on the horizon?

To our knowledge, there are no major legislative changes underway. The replacement of *ISS* by *ARSEG* was a very important change in the sector. However, a memorandum was signed very recently between the board of directors of *ARSEG* and of the Securities Exchange Commission with a view to an extensive cooperation between the two entities and the sharing of information relevant to their supervisory activities. Additionally, Order 426/15, of 29 December 2015 was recently published. Said Order establishes a committee responsible for the incorporation of the Angolan Reinsurance Company (*ANGO-RE – Empresa Angolana de Resseguro*).

Market Entry

What are the requirements/procedures for setting up a new insurance or reinsurance company?

As already mentioned above, under the *Angolan General Insurance Law* (Articles 3, 8 and 9) and the *Insurance Regulations* (Articles 32 and 33), all insurance contracts regarding Angolan entities or assets located in Angola have to be entered into with a local insurer. Only joint stock corporations (*sociedades comerciais anónimas*) whose incorporation and establishment have been duly

authorized under the law and with the following ownership structures may engage in the insurance business: (a) state-owned capital stock; (b) state and privately owned capital stock; (c) privately owned capital stock.

Additionally, in order to establish themselves in Angola, branches of international insurance and/or reinsurance companies in which the Angolan Government is a shareholding member pursuant to multilateral or bilateral agreements are required to sign a separate protocol with the Government.

The authorization for the incorporation and establishment of a new insurer always required an opinion by *ARSEG*, based on the following conditions and criteria:

(a) Quality of the services to be rendered to the public;

(b) reputation, honor and solvency of the founding shareholders;

(c) efficiency of the technical and financial resources, in accordance with the respective feasibility study;

(d) compatibility between the insurer's development prospects and the maintenance of healthy competition in the market.

Decisions to grant authorization for the incorporation and establishment of a new insurer are also based on timing and convenience criteria determined by the economic and financial situation of the country and the insurance market specific interests.

Is it mandatory that a company be physically present in the market (HQ or branch office) to write insurance/reinsurance policies?

Yes. As previously mentioned above, under the *Angolan General Insurance Law* (Articles 3, 8 and 9) and the *Insurance Regulations* (Articles 32 and 33), all insurance contracts regarding Angolan entities or assets located in Angola have to be entered into with a local insurer. Under Article 32 of the *Insurance Regulations*, the Minister of Finance may authorize that insurance contracts be entered into outside Angola with a foreign insurer, subject to the favorable opinion of the Angolan insurance regulator, *ARSEG*, whenever the specific insurance in question cannot be obtained from a local insurer and following the procedures set forth by applicable law.

Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Please refer to our previous answer. Insurance contracts entered into in Angola or relating to Angolan residents or assets located in Angola by a non admitted foreign insurer are null and void (Article 25 of the *Insurance Related Infringements* and Article 33 of the *Insurance Regulations*). However, in such a scenario where the foreign insurer would be deemed as conducting non-admitted insurance activity the relevant policy would be unenforceable through the Angolan courts. Also, any judgments of foreign courts based on such an insurance contract would be unenforceable in Angola. Under Article 8 of the *Insurance Related Infringements*, any corporate person or individual who performs in Angolan territory insurance acts and/or operations, either fraudulently or not, without the authorization required, may be sentenced to the payment of a fine.

Is the incorporation of local companies with foreign shareholders permitted?

Please refer to our previous answers. The incorporation of companies having as majority shareholders non-resident individuals or companies requires the Council of Ministers' authorization, subject to the Minister of Finance's prior opinion.

Regulatory

What are the main sources for insurance and reinsurance regulatory law?

With Angola being a civil law country, the main source for insurance and reinsurance regulatory law is statutory law, which, in Angola, may, subject to constitutional requirements, be issued either by the Angolan National Assembly or the President of the Republic which is the holder of executive and legislative powers. The main sources for insurance and reinsurance regulatory law in Angola are the *General Insurance Law* and the *Insurance Regulations* (all mentioned above).

Angola

Please describe the current regulatory environment, including pending or anticipated regulatory reform.

The recent replacement of *ISS* by *ARSEG* was a very important change in the sector. In addition, as mentioned before, a memorandum was signed very recently between the board of directors of *ARSEG* and of the Securities Exchange Commission with a view to an extensive cooperation between the two entities and the sharing of information relevant to their supervision activities. Additionally, it was recently published the Order 426/15, of 29 December 2015, which establishes a committee responsible for the incorporation of the Angolan Reinsurance Company (*ANGO-RE – Empresa Angolana de Resseguro*) Other than that, there is no word out on any impending regulatory reform. However, it should be noted that these are not always matters of public record or even easily accessible by the public.

Claims

What are the main sources for contract law?

In Angola, the main source of insurance contract law is that approved by *Decree 02/2002, of 11 February 2002* (the "Insurance Contract Law"). This statute sets forth the general rules applicable to all classes of insurance contracts on aspects such as formation, duties of disclosure and information, the payment of premiums, the inception and termination of the insurance coverage, reinsurance and co-insurance, group insurance, claims handling and termination.

The *Commercial Code* originally approved by the Portuguese State in 1888, as amended in Angola, *inter alia*, by *Law 6/03, of 3 March 2003* and by *Law 11/15, of 17 June 2015*, and the *Angolan Civil Code* originally approved by the Portuguese State by *Decree-Law 47344, of 25 November 1966*, also as amended, are two very relevant sources of contract law in Angola. Many of the rules contained in the *Civil Code* are applicable to insurance contracts. For instance, insurance contracts should be construed in accordance with the same general rules applicable to all types of contractual statements. Such rules are contained in articles 236 to 238 of the *Civil Code*, as supplemented by *Law 04/2003, of 18 February* which is the *Standard Terms Law*. Finally, there is a multitude of statutes regulating specific subtypes of compulsory or voluntary insurance. *ARSEG* may enact regulations on matters concerning insurance contracts, for the purposes of clarifying, interpreting and complementing statutory law.

In general, is the substantive law relating to insurance more favorable to insurers or insureds?

Angolan substantive law relating to insurance is the result of an endeavor to reach balanced solutions adequately to protect both insurers and insureds. The outcome of this endeavor may be seen throughout the *Insurance Contract Law*. For instance, according to Article 13 of the *Insurance Contract Law*, the policyholder and the insured must disclose, before the conclusion of the contract, all circumstances that they have knowledge of and that they reasonably consider to be able to affect the insurer's evaluation of the risk. The insurer is not under a legal duty to submit a written questionnaire with the prior identification of all potentially relevant circumstances. This rule protects the insurer by placing upon the policyholder and the insured the burden to make an effort to recall all facts that an average person would reasonably consider relevant to the assessment of the risk by an insurer. However, Angolan law sets out a few limits to this duty. It is for the insurer to identify those circumstances that the average person might not deem relevant. If the insurer does ask potential customers to fill in a questionnaire, the insurer must then ensure that the questions allow for accurate, clear and complete answers; must review the answers provided before the conclusion of the contract; and must ask for a clarification of the answers provided, in case they are omitted or incomplete, uncertain, inaccurate or contradictory. These limits are set for the protection of policyholders and insured, who are only required to exercise a moderate degree of diligence.

Finally, before the conclusion of the contract, the scope, limits and consequences of breach of the duty of disclosure must be explained by the insurer to its customers. Failure to do so may result in the insurer's liability for the loss arising from the breach of this duty. The policyholder and the insured remain bound to similar duties of disclosure throughout the life of their insurance contracts.

What is the statute of limitations on claims?

The *Angolan Civil Code (article 309)* sets forth an ordinary limitation period of 20 years as from the date of occurrence of the relevant facts.

Angola

Can a third party bring direct action against an insurer?

Pursuant to Article 35 of the *Insurance Contract Law*, every injured third party has a legal right to bring direct action against a civil liability insurer.

Can an insured bring a direct action against a reinsurer?

In the absence of any clear legal provision in this respect, we take the view that the insured does not have a direct right of action against a reinsurer unless such a right is set forth in any applicable law, which it is not, or the parties to the reinsurance agreement have agreed to its existence. However, an insurer is legally permitted to assign its rights as against the reinsurer to any third party, including the insured. Assignment may be effectively barred by a stipulation included in the reinsurance agreement. General rules on the assignment of credit rights set forth in articles 577 and following of the *Civil Code* will apply.

Dispute Resolution

Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

Assuming that local courts have international jurisdiction over a given insurance-related dispute, it will most probably fall under the competence of common or judicial courts. The procedural rules applied are mainly those contained in the *Angolan Civil Procedure Code* originally approved by the Portuguese State by *Decree-Law 44 129, of 28 December 1961* and the *Law of Organization and Operation of the Common Courts of Law*, approved by *Law 2/15*, of *2 February 2015*.

Regardless of the value of the dispute, legal action must be taken before the District Courts (*Tribunais de Comarca*), which, as a rule, are the courts of justice with jurisdiction in the first instance.

There is no right to a hearing before a jury regarding commercial insurance disputes.

What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of a) parties to the action and b) non-parties to the action?

For proof of relevant facts, a party may request the court to order the other party of the action or a non-party to disclose a document or documents. For this purpose and in accordance to articles 548 and 550 of the *Civil Procedure Code*, the party must indicate the facts that it intends to prove with the document in question and also identify the document, with as much detail as possible.

Article 520 of the *Civil Procedure Code* determine that if the court orders the other party or a non-party to disclose a document and they refuse, the court may condemn them to pay a fine. Moreover, in case of a refusal of the other party to disclose a document, the court may freely assess the probative value of the refusal, without prejudice to the reversal of the burden of proof.

Refusal to disclose documents is only possible in the following cases:

i. The violation of physical, moral and psychological integrity of a person,

ii. intrusion into a person's private life, residence, correspondence or telecommunications and

iii. breach of professional secrecy or of public officials and state secret (article 519(3) of the *Civil Procedure Code*). In the latter case, the party who has requested disclosure may ask the court to determine whether refusal on these grounds was valid. A request for an exemption from the duty of confidentiality is also possible.

Finally, the court may also take the initiative to order a party of the action or a non-party to disclose relevant documents.

Are mediation and arbitration common methods for solving insurance disputes? Are more disputes resolved in or out of court?

The minimum legal requirements of arbitration agreements under the laws of Angola are spelled out in Article 3 of the *Voluntary Arbitration Law: Law 16/03, of 25 July 2003*. Angola is not a signatory to the 1958 New York Convention on the Recognition

and Enforcement of Foreign Arbitral Awards. However, the Angolan Ministries of Justice and Foreign Affairs have made public that negotiations towards the accession of Angola to such Convention are in motion. A foreign arbitral award will thus be subject to the rules on recognition and enforcement of foreign decisions provided by the *Civil Procedure Code*. As such, enforcement of foreign arbitral awards may be cumbersome and considerations on costs and time are usually singled out as deterrent factors.

However, with the approval of four new arbitration centers in Angola in 2012 and the increasing interest in mediation, it is likely that disputes will be increasingly settled out of court as a means to avoid the inefficiency of local courts.

What are the provisions regarding timely notice, and what are the legal consequences for non-compliance with the timely notice obligation?

According to Article 19 of the *Insurance Contract Law*, the policyholder, the insured or the beneficiary must communicate an occurrence to the insurer within eight days as from the date on which they became aware of its taking place, mentioning the causes, circumstances and consequences of the occurrence. The insurance contract may however, stipulate a different term for the notice.

According to Article 13 of the *Insurance Contract Law*, the consequences of late notice are: *(i)* a reduction of the compensation payable by the insurer, taking into consideration the loss caused by late service of the notice; or *(ii)* preclusion of the right to compensation in the case of an intentionally late service of the notice which caused loss to the insurer. The relevant loss is that which could have been avoided if the notice had been timely served. However, such consequences should not occur if the insurer had knowledge of the claim by other means during the time set for the notice to be served or if the server of the notice is able to demonstrate that earlier notice could not have been served.

In the case of compulsory liability insurance, failure to serve notice may not be invoked, as against injured third parties. In such cases, the insurer shall pay up the compensation that may be due, recovering it after from the defaulting policyholder or insured, unless the insurer had previous knowledge of the claim or the former could not have reasonably have served prior notice.

What are the laws regarding bad faith claims? What damages may be awarded if the insurer is found to have acted in bad faith?

Pursuant to Article 456 of the *Civil Procedure Code*, the party who litigates in bad faith – either the insurer, the insured or the injured third party – shall pay a fine, as well as compensation to the other party if requested.

Someone will be deemed to be a bad faith litigant when it has willfully or with gross negligence:

(a) Filed an unfounded claim or presented an unfounded defense;

(b) omitted relevant facts or alleged facts known not to be truth;

(c) committed a serious breach of the duty to cooperate;

(d) made a manifestly reprehensible use of the proceedings, in order to achieve an illegal purpose, to prevent discovery of the truth, stalling the action or delay justice, without serious arguments.

Angola

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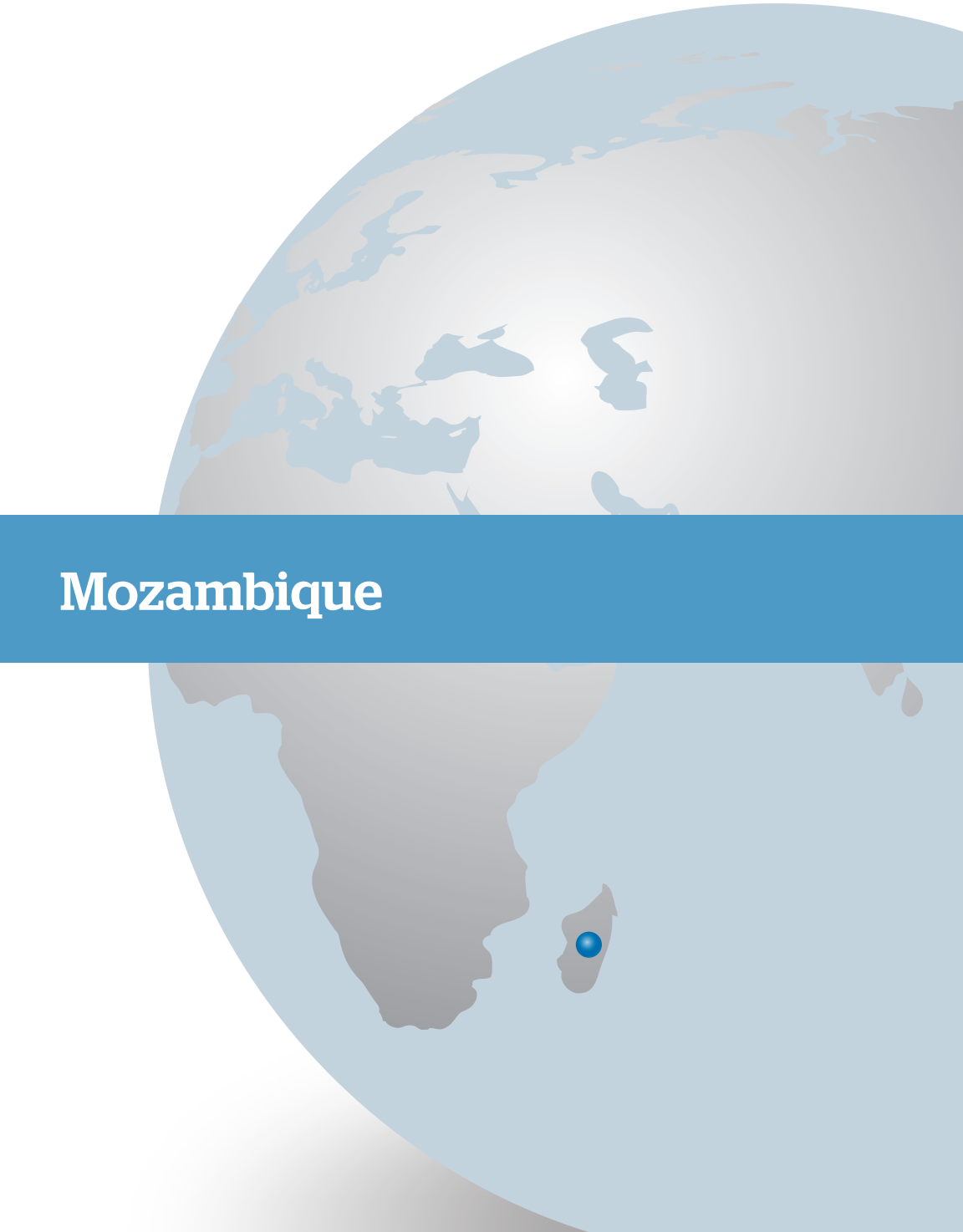

Mozambique

Mozambique

Prepared by Morais Leitão, Galvão Teles, Soares da Silve & Associados, Sociedade de Advogados, R.L.
Lex Mundi Member Firm for Portugal

Overview

Which government bodies/agencies regulate insurance and reinsurance companies?

In Mozambique, the entity in charge of the regulation and supervision of insurance and reinsurance companies is *Instituto de Supervisão de Seguros de Moçambique* (the Mozambican Supervision Insurance Institute, hereinafter "ISSM"). This regulator, which replaced the previous *Inspecção-Geral de Seguros*, was established in 2010 by *Decree-Law 1/2010, of 31 December*, which also sets forth the sector's institutional and contractual legal framework (hereinafter the "General Insurance Law"). *Decree 29/2012, of 26 July*, as amended, sets forth ISSM's current statute. ISSM's main attributions are, *inter alia*, to (i) monitor and verify compliance by entities that undertake insurance and insurance mediation activities of the rules governing their activity; (ii) issue directives and apply sanctions in connection with any irregularities identified by ISSM; (iii) propose regulations for the insurance sector; (iv) cooperate with other national public authorities particularly within the scope of the supervision of financial conglomerates; (v) cooperate with similar institutions in other states.

What are the categories of insurance licenses that exist?

In Mozambique insurers may be granted two different types of licenses to carry out insurance activities, in the terms provided for by the *General Insurance Law* and *Decree 30/2011, of 11 August (the "Regulations for accessing and carrying out insurance and mediation activities"* – hereinafter the "*Insurance Regulations*"). Under article 3 of the *Insurance Regulations*, authorization for initiating insurance activities is granted separately for the life and non-life business sectors, covering the whole of the respective businesses unless, in what concerns non-life sectors, the applicant wishes to limit its activity to some classes of risks or insurances. As such, licenses either allow the carrying out of insurance activities in the life or in the non-life business sectors.

A license related to the life insurance business sector includes, *inter alia*, the offering of insurance products of the following classes:

a. Life insurance

b. Marriage and birth insurance

c. Insurance linked to investment funds, covering all insurance provided in case of death and loss of income.

A license related to the non-life insurance business comprehends, *inter alia*, the following classes of insurance:

a. Work accidents and occupational diseases

b. Motor vehicles insurance

c. Fire and natural perils

There are also specific classes of insurance for micro-insurance, which include the life sector (when *limited* to death risk associated with a loan guarantee granted under the legislation regulating micro-finance) funeral costs, fires and livestock associated risks.

Are insurance companies subject to taxes beyond the ordinary burden faced by all companies?

In Mozambique insurance companies are subject to para-fiscal taxes beyond the ordinary burden faced by all companies for the benefit of the Mozambican government. Although not exactly a tax, according to article 7 of the *General Insurance Law*, companies qualified to carry out *insurance business act*ivities are subject to the payment of a fee due in consideration of the supervision of their activity, as follows:

a. 1.5 percent of direct gross insurance premiums for non-life insurance business, net of any returns and cancellations;

b. 0.35 percent of direct gross insurance premiums for life insurance business, net of any returns and cancellations.

Insurance intermediaries are also required to pay an annual supervision fee corresponding to:

a. Ten million *Meticais* (MZN) in the case of Brokers;

b. Three million *Meticais* (MZN) in the case of Insurance Agents;

c. One million *Meticais* (MZN) in the case of Promoters.

In some cases, an additional stamp duty also applies, as the Stamp Duty Code (*Código de Imposto de Selo*) approved by *Decree 6/2004, of 1 April*, and amended

by *Decree 38/2005, of 29 August 2005*, determines that as a general rule insurance companies are prima facie subject to the payment of stamp duty in respect of insurance premiums and any other sums paid by their clients, as well as the commissions paid to intermediaries. However, there are significant exemptions to this general rule.

What are the approved distribution channels? Are there restrictions?

Direct distribution channels include all media commonly used by insurers to reach out to their customers. Insurance intermediaries may carry on their activities in the jurisdiction, in accordance with the *Insurance Regulations*. Distance marketing of insurance products is not formally regulated in Mozambique.

Are there any forms of compulsory insurance?

There are some forms of compulsory insurance in Mozambique. The ISSM does not keep a list of such forms of insurance, nor is there an entirely reliable way of determining with an acceptable degree of certainty which forms of insurance are compulsory in Mozambique.

The following are the most significant compulsory lines of insurance in Mozambique:

a. Work accidents and occupational diseases insurance (provided by *Decree 62/2013, of 4 March*);

b. Motor vehicle liability insurance (provided by *Law 2/2003, of 21 January*).

Enforcing such legal duties to insure is amongst the ISSM's concerns. We have no statistically significant knowledge of the practical impact of the other formally in force legal duties to insure on the local market.

Sports insurance is also mandatory, according to *Decree 65/2007, of 24 December*.

In addition, and according to article 25 of the *Environmental Law approved by Law 20/97, of 1 October* and amended by *Law 16/2014, of 20 June,* all persons/entities engaged in activities involving high risk of environmental degradation and thus covered by the legislation on environmental impact assessment must take on environmental liability insurance.

Also, *Decree 41/2005, of 30 August*, which enacted the *Travel and Tourism Agencies and Tourism Information Professionals Regulations*, foresees that insurance must be taken to ensure professional liability resulting from travel agency and tourism operations.

Although the applicable regulations in force in Mozambique do not require building contractors to be insured against the specific risks of their activity, recently there have been reports in local press stating that the applicable regulations will be amended so as to include a mandatory insurance for the building contractor's activity.

What major insurance/reinsurance legislation is on the horizon?

The Mozambican government's "Strategy for the Financial Sector Development 2013-2022" states that the insurance sector is a governmental priority. According to this document, a number of initiatives and measures are to be taken in this sector in near future. Some of the key objectives included in the abovementioned strategy document include the reinforcement of the regulatory framework of the insurance sector, the strengthening of the supervising capacity, the increase of risk management and the improvement of consumer protection. There are, however, no concrete and reliable data concerning the approval of new legislation.

Market Entry

What are the requirements/procedures for setting up a new insurance or reinsurance company?

According to article 2 of the *General Insurance Law*, insurance and reinsurance activities, including micro-insurance, may only be carried out in Mozambique by:

i. Limited liability companies by shares ("*sociedades anónimas*"), mutual insurance and reinsurance companies having their registered offices in the Republic of Mozambique;

ii. Branches of foreign insurance, reinsurance and micro-insurance companies incorporated in their countries of origin as "commercial companies".

Authorized insurance and reinsurance companies mentioned above are financial institutions having as their exclusive corporate object the pursuance of insurance or reinsurance activities, being however

able to perform some specific ancillary and/or related activities. It is incumbent upon ISSM, according to the *Insurance Regulations*, to verify the formal incorporation and beginning of activity of the insurer, micro-insurer or reinsurer within the time limits established by law and also to verify the suitability of facilities, material, technical and human resources. This is also applicable to insurance intermediaries with the necessary adaptations.

Furthermore, and according to the *Insurance Regulations*:

1. An applicant wishing to incorporate an insurance company (a *sociedade anónima* or limited liability company by shares) must file a request to the ISSM addressed to the Ministry of Finance including, namely, the following:
    a. Minutes of the meeting of incorporation of the company;
    b. Draft articles of association;
    c. Identification of founding shareholders with the specific share capital by each and origin of respective funds;
    d. Detailed information on the structure of the group in which the company will be integrated;
    e. Criminal record certificate of the founding shareholders;
    f. Program of activities including general policy conditions, organizational structure and guiding principles, when applicable, for reinsurance activities.

According to *Article 17 of the Insurance Regulations*, insurers with their head offices outside Mozambique wishing to obtain an authorization to register a branch may be granted an authorization to do so if they conform to certain criteria of opportunity and convenience defined in light of the economic, financial and market interests of the Republic of Mozambique.

Moreover, branches may only be authorized to operate on areas and types of insurance for which the respective insurer is registered in its country of origin and in case the insurer has been operating in its country and incorporated as a commercial company for more than five years. Applicants must file a request to ISSM addressed to the Ministry of Finance including, namely:

a. A substantiated memorandum stating the reasons motivating the opening of the branch in Mozambique;
b. Detailed information about the applicant's international business;
c. Report and accounts covering the last 3 financial years;
d. Program of activities including information on sectors being operated, general policy conditions and the corresponding technical basis. Said program of activities must also include a costs estimate for establishing the administrative services and commercial network and reference to financial resources allocated to cover said costs; and
e. Certificate issued less than 90 days before the application is filed by the competent authority of the country of origin of the insurer, stating that the insurer is legally incorporated and operates in accordance with the applicable legal provisions, as well as indication on the classes and types of insurance which it is authorized to operate.

Is it mandatory that a company be physically present in the market (HQ or branch office) to write insurance/ reinsurance policies?

Article 8 of the *General Insurance Law* sets forth very clearly that the coverage of risks located in the Republic of Mozambique by foreign insurers not legally authorized to operate in the country is strictly prohibited.

However, the foregoing does not apply if, following a request presented by the interested party, ISSM does not object to the entering into of the contract abroad as a result of proof being produced evidencing that the companies authorized to operate in Mozambique refused to underwrite the risk..

In addition, and according to the *General Insurance Law*, any and all claims resulting from insurance contracts entered into with non-authorized foreign insurers covering risks located in Mozambique are not judicially enforceable.

Mozambique

Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Please refer to Article 8 of the *General Insurance Law.*

Is the incorporation of local companies with foreign shareholders permitted?

There are no specific legal restrictions imposed by Mozambican insurance law on the nationality of the shareholders of an insurance company, as long as the insurer complies with the incorporation requirements set out in Mozambican law, in particular in the *Insurance Regulations*. However, the abovementioned general criteria of convenience and opportunity in light of the circumstances of the local market may apply.

Regulatory

What are the main sources for insurance and reinsurance regulatory law?

The most important statute on insurance regulation is the *General Insurance Law*, which contains the Mozambican legal framework for taking up and pursuit of insurance and reinsurance activities in Mozambique. The regulatory framework in complemented by *Decree 29/2012, of 26 July*, as amended, which contains ISSM's current statute, and *Ministerial Order 300/2012, of 14 November*, which establishes the *Rules of the Mozambican Supervision Insurance Institute*.

The abovementioned *Insurance Regulations* are also of great significance.

Please describe the current regulatory environment, including pending or anticipated regulatory reform.

The Mozambican insurance industry is growing at a fast pace, but it is still relatively small, its contribution to the country's GDP being still below one percent, according to the Mozambican government's "Strategy for the Financial Sector Development 2013-2022". Publicly available and reliable information on this sector and its current status and expected developments is still scarce.

Claims

What are the main sources for contract law?

In Mozambique, the main source of contract law is the *Mozambican Civil Code* originally approved by the Portuguese Government by *Decree-Law 47344 of 23 December of 1967* and to this date still in force in Mozambique ("*CC*"). Many of the rules contained in the *CC* are applicable to insurance contracts. For instance, insurance contracts should be construed in accordance with the same general rules applicable to all types of contractual statements. Such rules are contained in articles 236 to 239 of the *CC*.

However, the most important statute, insofar as insurance contracts are concerned, is the *General Insurance Law* which sets forth the general rules applicable to all classes of insurance contracts on aspects such as formation, duties of disclosure and information, the payments of premiums, the inception and termination of the insurance coverage, reinsurance and co-insurance, group insurance, claims handling and termination. Book two of this *General Insurance Law*, which sets forth the insurance contract legal framework, was heavily influenced by the *Portuguese Insurance Contract Law of 2008.*

In general, is the substantive law relating to insurance more favorable to insurers or insureds?

Mozambican substantive law relating to insurance is the result of an endeavor to reach balanced solution adequately to protect both insurers and insureds. For instance according to article 95 (1) of the *General Insurance Law* the policyholder and the insured must disclose, before the conclusion of the contract, all circumstances that they have knowledge of and that they reasonably consider to be able to affect the insurer's evaluation of the risk. The insurer is not under a legal duty to submit a written questionnaire with the prior identification of all potentially relevant circumstances. This rule protects the insurer by placing upon the policyholder and the insured the burden to make an effort to recall all facts that an average person would reasonably consider relevant to the assessment of the risk by an insurer. However, Mozambican law sets out a few limits to this duty. It is for the insurer to identify those circumstances that the average person might not deem relevant. If the insurer does ask potential customers to fill in

a questionnaire, the insurer must then ensure that the questions allow for accurate, clear and complete answers; must review the answers provided before the conclusion of the contract; and must ask for a clarification of the answers provided, in case they are omitted or incomplete, uncertain, inaccurate or contradictory. These limits are set for the protection of policyholders and insured, who are only required to exercise a moderate degree of diligence.

Finally, before the conclusion of the contract, the scope, limits and consequences of breach of the duty of disclosure must be explained by the insurer to its customers. Failure to do so may result in the insurer's liability for the loss arising from the breach of this duty. The policyholder and the insured remain bound to similar duties of disclosure throughout the life of their insurance contracts.

What is the statute of limitations on claims?

According to Article 161 of the *General Insurance Law*, the insurer's right to the premium shall cease two years as from the date payment became due. In general, and also according to article 161 of the *Insurance Law*, any enforcement rights against the insurer based on an insurance contract shall be time barred five years as from the date on which its holder became aware of their existence. The *CC* also sets forth an ordinary limitation period of 20 years as from the date of occurrence of the relevant facts. Thus, these two limitation periods must be articulated.

Can a third party bring direct action against an insurer?

There are no general provisions concerning the right of a third party to bring direct action against an insurer. The *General Insurance Law* provides, however, in respect of the civil liability insurance, that the insurer cannot be held liable, safe in the cases where it has given its express consent, for the payment of any indemnities to third parties. The parties are always free to confer such right upon the injured third parties by stipulating it in the insurance contract.

Can an insured bring a direct action against a reinsurer?

Unless provided differently in the law or in the reinsurance contract, pursuant to article 179 of the *General Insurance Law*, there is no relationship (and therefore no right to bring suit) between the policyholders, in direct insurance, and the reinsurance company. The assignment of rights arising from an insurance contract to third parties is however possible whenever permitted by law. Assignment may be effectively barred by a stipulation included in the reinsurance agreement. General rules on the assignment of credit rights set forth in articles 577 and following of the *CC* will apply.

Dispute Resolution

Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

The applicable procedural rules are mainly those contained in the *Mozambican Civil Procedure Code* approved by the Portuguese Government by *Decree-Law 44129 of 14 December of 1962* and to this date still in force in Mozambique ("CPC").

An important statute is the *Judicial Organization Law* approved by *Law 24/2007, of 20 August*, and amended by *Law 24/2014, of 23 September*. According to said law, the courts of justice with competence in the first instance jurisdiction are, as a rule, the *Provincial Court of Law* (to which is attributed residual jurisdiction in the first instance) and the *District Court of Law* (which has residual jurisdiction for judging legal actions, in first and second class respectively, with a value not higher than one-hundred times the national minimum wage and for judging the legal actions with a value not higher than fifty times the national minimum wage).

Regarding the value of the dispute, according to Article 84 of said *Judicial Organization Law*, in civil matters the jurisdiction of the courts of the District, as already stated above, is equivalent to, in first and second class respectively, one-hundred times the national minimum wage and fifty times the national minimum .

There is no right to a hearing before a jury regarding commercial insurance disputes.

Mozambique

What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of a) parties to the action and b) non-parties to the action?

In order to prove relevant facts, a party may request the court to order the other party in the suit or a third party to disclose/submit a document or documents. For this purpose and in accordance with articles 548 and 550 of the *CPC*, the party must indicate the facts that it intends to prove with the document in question and also identify the document, providing as much detail as possible.

Articles 520 and 549 of the *CPC* determine that if the court orders the other party or a third party to disclose a document and they refuse, the court may condemn them to pay a fine. Moreover, in case of a refusal of the other party to disclose a document, the court may freely assess the probative value of the refusal, without prejudice to the reversal of the burden of proof.

According to *Article 520 (3) of the CPC*, the refusal to disclose a document is, however, legitimate when made in strict obedience of professional secrecy or when such disclosure causes serious injury to honor and esteem of oneself, of one of his ascendant, descendant, brother or spouse, or serious injury of a patrimonial nature to any of these people.

Finally, the court may also take the initiative to order a non-party to disclose relevant documents.

Are mediation and arbitration common methods for solving insurance disputes? Are more disputes resolved in or out of court?

According to Article 169 of the *General Insurance Law*, disputes over the validity, interpretation, performance and/or breach of an insurance contract may be settled by arbitration. Arbitration is regulated by Law 11/99, of 8 of July (mostly based on the *1985 UNCITRAL Model Law*).

Arbitration is not yet a very common method for solving insurance disputes involving large risks and mediation is even less used. Costs associated with arbitration as well as general unfamiliarity are usually identified as the most relevant reasons deterring the use of arbitration.

However, an out of court settlement may well be a suitable choice if we consider other advantages such as the confidentiality and the possibility of ruling on the basis of equity.

Mozambique is also a party to the New York Convention on the Recognition of Foreign Arbitral Awards (reciprocity reservation) and to the Washington Convention of 18 March 1965. This is all the more relevant considering that some other sub-Saharan African countries (such as Angola) are not.

What are the provisions regarding timely notice, and what are the legal consequences for non-compliance with the timely notice obligation?

According to Article 136 of the *General Insurance Law*, the policyholder, the insured or the beneficiary must communicate an occurrence to the insurer within the term set forth by the relevant contract or, in case the contract is silent in this respect, within eight days counted from the date on which the policyholder, the insured or the beneficiary becomes aware of its taking place, mentioning the causes, circumstances and consequences of the occurrence.

Please be advised, as mentioned above, that the insurance contract may, however, stipulate a different term for the notice.

According to Article 137 of the *General Insurance Law*, in case of late notice, the insurer must be indemnified for any damages and expenses arising from said late notice.

What are the laws regarding bad faith claims? What damages may be awarded if the insurer is found to have acted in bad faith?

Pursuant to Article 456 of the *CPC*, the party who litigates in bad faith – either the insurer, the insured or the injured third party – shall pay a fine as well as compensation to the other party, if requested.

Someone will be deemed to be a bad faith litigant when it has willfully or with gross negligence: *(a)* filed an unfounded claim or presented an unfounded defense; *(b)* omitted relevant facts or alleged facts known not to be truth; *(c)* committed a serious breach of the duty to cooperate; *(d)* made a manifestly reprehensible use of the proceedings, in order to achieve an illegal purpose, to prevent discovery of

the truth, stalling the action or delay justice, without serious arguments.

The *General Insurance Law* also addresses the matter of fraudulent claims. Thus a fraudulent claimant will be prevented from enforcing its rights under the insurance policy, pursuant to articles 95 (3), 96, 111 (1) of the *General Insurance Law*.

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Australia

Overview

Which government bodies/agencies regulate insurance and reinsurance companies?

The Australian Prudential Regulatory Authority (APRA) maintains a prudential regulatory scheme. APRA is responsible for promoting the safety and soundness of life and general insurance and reinsurance companies. The regulatory regime is strict and requires that all Australian insurers hold capital reserves adequate to meet their actual and expected claims costs. It was established in July 1998.

The Australian Securities Investments Commission (ASIC), the market conduct and disclosure regulator, administers the *Insurance Contracts Act 1984* (Cth). ASIC also exercises consumer protection related functions under the *Life Insurance Act 1995* (Cth), the *Australian Securities and Investments Commission Act 2001* (Cth) and the *Corporations Act 2001* (Cth). ASIC has power to do all things that are necessary or convenient for the administration of insurance. Originally created as the Australian Securities Commission on 1 January 1991 to unify state and federal corporate regulation, it changed into ASIC on 1 July 1998 when its responsibilities expanded into superannuation, insurance and deposit taking.

The Treasurer oversees the *Insurance Acquisitions and Takeovers Act 1991* (Cth), governing change of ownership of general insurers or life insurers. The Commonwealth Treasury department was established at Federation on 1 January 1901. The Commonwealth Department of Health and the Private Health Insurance Administration Commission (PHIAC) regulates the health insurance industry. The Department of Health was originally established in 1921, while the PHIAC was formed in 1989. In Australia, a considerable regulatory distinction lies between health insurance, on the one hand, and life and general insurance, on the other.

What are the categories of insurance licenses that exist?

The insurance industry in Australia is heavily regulated. The *Insurance Act 1973* (Cth) (this is administered by APRA, as mentioned above) regulates the conduct of general insurance and reinsurance businesses through a system of authorization. Under the *Insurance Act*, a body corporate may apply to APRA in writing for authorization to carry on insurance business in Australia. The *Life Insurance Act 1995* (Cth) regulates the conduct of life insurance business in a similar way. A body corporate may to APRA in writing for registration to carry on life insurance business.

The *Financial Services Reform Act 2001* (Cth) introduced uniform licensing, disclosure and conduct requirements for the insurance industry and intermediaries. This legislation, which now forms part of the *Corporations Act 2001* (Cth), mandates that every person who carries on a financial service business, which for some purposes will include the business of insurance, must hold an Australian financial services licence or be an Authorized Representative of an Australian financial services licensee. The financial services regulatory regime is regulated by the ASIC and operates alongside the prudential regulation by APRA.

In addition to the regulation discussed above, there are additional requirements for foreign insurers in Australia. For example, foreign insurer applicants must demonstrate that the arrangements for reporting to foreign insurer parents or head offices are adequate. Foreign insurer applicants must also satisfy APRA that they are subject to adequate prudential supervision in their home country.[1] The requirements for foreign insurance carriers wishing to set up a head office and to establish branches are all contained in the Australian Prudential Regulatory Authority Guidance Note – Guidelines on Authorization of General Insurers.[2] In considering the standard of supervision exercised by the home supervisor, APRA will have regard to the Insurance Core Principles and the Insurance Core Principles Methodology promulgated by the International Association of Insurance Supervisors.[3]

There are however specific exceptions to these requirements in place for Lloyd's Underwriters. Lloyd's are automatically authorized to carry on an insurance business in Australia, subject to certain conditions.[4]

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[1] APRA Guidance Note – Guidelines on Authorization of General Insurers, February 2002.

[2] Australian Prudential Regulatory Authority Guidance Note Guidelines on Authorization of General Insurers, February 2002.

[3] APRA Guidance Note – Guidelines on Authorization of General Insurers, February 2002.

[4] *Insurance Act 1973* (Cth), section 93(1).

In order to conduct health insurance business, a health fund is required to be registered under the *Private Health Insurance Act 2007* (Cth).

Are insurance companies subject to taxes beyond the ordinary burden faced by all companies?

General insurance companies and life insurance companies pay tax on their earnings in Australia in the same manner as other corporate citizens and residents. Calculation of these earnings for tax treatment purposes is highly complex, however, in light of the interaction between prudential regulation of reserves and policyholder vs shareholder funds, on the one hand, and tax law on the other. Specialist advice is required.

What are the approved distribution channels? Are there restrictions?

There are a wide range of distribution channels in Australia, including brokers, underwriting agencies, banks and other financial services organizations, as well as retailers acting as authorized representatives.

Hawking provisions in the *Corporations Act 2001* (Cth) limit or, in some cases, prohibit the sale of life and general insurance through unsolicited communications. An intermediary or distributor must also comply with any other relevant financial services laws and regulations. There is some dispensation for insurance distributors who meet the requirements of an ASIC class order for relief from licence obligations.

Are there any forms of compulsory insurance?

Australia has three forms of compulsory insurance:

- *Compulsory Third Party (CTP) liability insurance:* Legislation requires that owners of registered motor vehicles obtain compulsory insurance to cover liability for personal injury to third parties arising from the use of the vehicle.
- *Workers compensation insurance: Workers' Compensation Insurance* is required under legislation in each state and territory. The relevant statute will define the nature and extent of the cover, usually in a prescribed form of policy. Workers' compensation insurance policies cover the employer's liability to pay defined compensation benefits to employees injured during the course and scope of their employment. Common law liability also is usually covered.
- *Industry specific compulsory insurance:* Certain types of insurance are required in connection with particular types of work undertaken for consumers. For example, legislation in some states and territories requires builders to take out builders' (or home) warranty insurance in connection with certain residential works, to protect consumers against a builder's failure to rectify or compensate the consumer for defective or incomplete work. Other legislation requires solicitors to take out professional indemnity insurance and to the prescribed limits, etc.

What major insurance/reinsurance legislation is on the horizon?

There is no major insurance or reinsurance legislation presently on the horizon.

Market Entry

What are the requirements/procedures for setting up a new insurance or reinsurance company?

In order to carry on insurance business (either general or life) a prospective insurer must be a body corporate and obtain authorization or registration to carry on such business, by making an application in writing to APRA. The process involves providing APRA with detailed information about the prospective applicant and its proposed business.

APRA has discretion to authorize or refuse the application. It may also authorize applicants subject to conditions relating to prudential matters determined on a case by case basis. For instance, more rigorous prudential requirements may be set for newly authorized insurers in their formative years, or for those in specialist or unusual market niches. Monoline insurers such as lenders mortgage carriers, in particular, are subject to close supervision.

APRA will only authorize suitable applicants who have the capacity and commitment to conduct insurance business with integrity, prudence and professional skill, on a continuing basis. It will make this assessment by reference to the applicant's capacity to comply with applicable prudential standards including, for example, those establishing minimum capital requirements.

Australia

Depending on the nature of the insurance business to be conducted and how insurance will be sold, it may also be necessary to make a written application to ASIC for an Australian financial services licence to engage in the particular activities for which the licence is required. The grant of such a licence will similarly be assessed having regard to organizational competence and other criteria. In order for a licence to be granted, it is necessary that the applicant's responsible officers are of "good fame or character".

The grant of an Australian financial services licence will be subject to conditions limiting the types of financial services that may be provided and the specific types of financial products to which those financial services may relate. "Financial products" for relevant purposes can include contracts of insurance, where the applicant for a licence intends to "deal in" such products or to provide advice in connection with them.

Is it mandatory that a company be physically present in the market (HQ or branch office) to write insurance/ reinsurance policies?

There is no express requirement that a company be physically present in the market to write insurance or reinsurance policies in Australia. However, an Australian company must have a registered office in Australia and a foreign insurer, if it is carrying on business in Australia, must be registered to do so under Part 5B.2 of the *Corporations Act* and have a local agent present in Australia.

Notwithstanding that a company is not physically present in Australia, it may still be required to be authorized or registered by APRA, and possibly, obtain an Australian financial services licence, if it is carrying on insurance business or life insurance business in Australia. Exceptions apply to unauthorized foreign insurers in terms of what constitutes carrying on insurance business in respect of certain contracts of insurance which relate to high valued insureds, atypical risks, risks that cannot reasonably be placed in Australia and contracts required under a foreign law.

Section 118 of the *Insurance Act 1973* (Cth) requires that a foreign insurer that is authorized to carry on insurance business in Australia, have an appointed agent in Australia at all times.

Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Foreign insurers are able to write general insurance business directly in Australia without being authorized in the limited circumstances described above. These are the so-called "Treasury Exceptions" to the Direct Offshore Foreign Insurance legislation. That legislation, however, does not prevent Australian citizens from purchasing insurance offshore, from foreign insurers in their own jurisdictions. Aside from limited clauses such as Compulsory Third Party personal injury insurance involving motor vehicles, and workers compensation, Australia has no prohibitions of non-admitted coverage. Authorized insurers may write business directly.

However, no entity that is not the holder of an Australian financial services licence is permitted to engage in activities which constitute carrying on a financial services business in Australia. As reinsurance is not a financial product under the relevant legislation, such activities involving only reinsurance do not constitute carrying a financial services business and a licence is not required in respect of them. Depending on the nature of its activities a foreign insurer may, therefore, be able to avoid the need to obtain an Australian financial services licence by writing only reinsurance of domestic insurers, rather than writing business directly.

Only 'eligible foreign life insurance' companies can write life insurance business in Australia. A foreign life insurance company is considered "eligible" if it, among other things, is authorized to carry on life insurance business in a foreign country and has established, or proposes to establish, an Australian branch.[5]

Section 118 of the *Insurance Act* requires that a foreign general insurer must, at all times while it is such an insurer, be represented for the purposes of the *Insurance Act* by an agent appointed by it for the purposes of the *Insurance Act*. The agent must be an individual resident in Australia or a body corporate incorporated in Australia. APRA must be notified in writing of the agent's name, place of residence or office (for individuals or bodies corporate respectively).

[5] *Life Insurance Act 1995* (Cth), Part 2B.

Australia

Is the incorporation of local companies with foreign shareholders permitted?

Foreign-incorporated applicants may establish a locally incorporated head office to carry on insurance business in Australia (foreign-owned subsidiary). Alternatively, a foreign-incorporated insurer may obtain an authority to underwrite in Australia through a branch (foreign insurer). There are no restrictions on the number, size, or mix of operations of foreign owned subsidiaries or foreign insurers operating in the Australian market.

To ensure adequate protection of policyholders, authorized foreign-owned subsidiaries and foreign insurers are subject to the same legislative and prudential requirements as Australian-owned and incorporated insurers. In practical terms, this means on-shore Tier 1 capital requirements which are strictly applied and enforced. The Prudential Standards and Prudential Practice Guides for capital adequacy, solvency, reinsurance and risk management are complex and need to be the subject of case specific advice.

Regulatory

What are the main sources for insurance and reinsurance regulatory law?

- *Australian Prudential Regulation Authority Act 1998* (Cth)
- *Australian Securities and Investments Commission Act 2001* (Cth)
- *Competition and Consumer Act 2010* (Cth), Specifically, Schedule 2 – *The Australian Consumer Law*
- *Corporations Act 2001* (Cth)
- *Financial Sector (Business Transfer and Group Restructure) Act 1999* (Cth)
- *Financial Sector (Collection of Data) Act 2001* (Cth)
- *Financial Sector (Shareholdings) Act 1998* (Cth)
- *Foreign Acquisitions and Takeovers Act 1975* (Cth)
- *Health Insurance Act 1973* (Cth)
- *Insurance Act 1973* (Cth)
- *Insurance Acquisitions and Takeovers Act 1991* (Cth)
- *Insurance Contracts Act 1984* (Cth)
- *Life Insurance Act 1995* (Cth)
- *National Health Act 1953* (Cth)
- *Private Health Insurance Act 2007* (Cth)

Please discuss the current regulatory climate for your jurisdiction, including pending or anticipated regulatory reform.

Solvency and capital requirements

APRA has recently completed a major review of the prudential minimum capital and solvency requirements of life and general insurers – the Life and General Insurance Capital (LAGIC). This extensive regulatory reform, which took place over a number of years, seeks to align the prudential regulation of insurance capital in a manner consistent with banks and other authorized deposit taking institutions.

Confidentiality

The Commonwealth is currently making a number of changes to the privacy law regime in Australia. There have been a range of changes that have increased the powers of the Privacy Commissioner. It is also expected that further changes may introduce mandatory reporting for data breaches.

Supervision

There is extensive existing prudential and market supervision in Australia. There is no pending or anticipated regulatory reform in this area.

Corporate governance

A wide range of legislation imposes corporate governance obligations and requirements, with directors and officers of companies exposed to a large number of penalty and personal liability provisions. In 2012, the Council of Australian Governments (COAG) agreed to a set of unified principles and guidelines for the imposition of personal criminal liability on directors and officers for failure to prevent the commission of offenses by their companies. The Commonwealth, States and Territories have since moved to review and amend existing legislation to comply with this agreement. Some jurisdictions are still in the process of implementing it. The COAG principles to be adopted create three types of liability that impose differing standards of proof and positive (or negative) presumptions as to whether a director has taken reasonable steps to prevent an offense from being committed.

Reporting requirements

There are existing data collection obligations which require insurers to report information to the regulator, in addition to a range of annual licensing obligations.

Consumer protection

It is proposed by consumer groups that legislation which governs unfair terms in contracts may be extended to insurance policies. The insurance industry vehemently opposes this, on the basis that the existing consumer safeguards in the *Insurance Contracts Act* are more than adequate. From a legal perspective the industry's position has much to commend it, however, the issue is also highly politicised. It seems fair to say that the present Federal Government, which is ideologically opposed to multiplicity of regulation, is unlikely to look favorably on the proposal.

Broker remuneration

In recent years, there has been a number of reforms in the financial services industry focusing on financial product selling and advice, commencing with the Future of Financial Advice (FOFA) reforms. The FOFA reforms were aimed at preserving the integrity of financial advice to consumers by, for example, banning certain "conflicted" remuneration, such as volume commissions on the sale of financial products.

Sales and advice in relation to most insurance products have been exempt from the FOFA reforms to date. However, draft legislation was released in December 2015 which would have the effect of removing the exemption for life insurance. The current exemption for general insurance contracts will continue.

Other

On 7 December 2014, the Financial System Inquiry Final Report was released. The Financial System Inquiry was established by the Commonwealth government with the aim to *"make recommendations to foster an efficient, competitive and flexible financial system, consistent with financial stability, prudence and fairness."* The four primary areas of focus highlighted by the government have been in: (1) the allocation of Australian sourced capital to minimize the Australian economy's volatility to global capital markets; (2) the balance between competition, innovation and efficiency against stability and consumer protection; (3) the role and impact of technology, innovation and evolving consumer preferences; and (4) greater integration between Australia and the international scheme for financial regulation. The Commonwealth Government released its response to the Inquiry on 20 October 2015.

Claims

What are the main sources for contract law?

Contract law in Australia has developed substantially from the common law of contract of the United Kingdom. However, it is supplemented and replaced in certain fields by the legislation of both Commonwealth and State/Territory Parliaments, for example: the *Conveyancing Act 1919* (NSW) for conveyancing services in NSW; the *Australian Consumer Law* (being Schedule 2 of the *Competition and Consumer Act 2010* (Cth)) in relation to Australian consumer protection; and the *Insurance Contracts Act 1984* (Cth) for certain classes of contracts of insurance throughout Australia.

In general, is the substantive law relating to insurance more favorable to insurers or insureds?

The substantive law relating to insurance is more favorable to insureds. This is primarily due to the *Insurance Contracts Act 1984* (Cth) (*IC Act*).

The *IC Act* contains a number of important consumer protections. These include:

- the duty of utmost good faith (which requires each party to a contract, as well as persons taking the benefit of it, to observe the utmost good faith toward the others);
- rights to claim for third party beneficiaries (TPBs) of cover;
- ASIC intervention powers; and
- restrictions on insurers' contractual rights and remedies.

Section 13 – This significant section provides that: *"A contract of insurance is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith."*

Australia

Section 14 of the *IC Act* prevents a party from relying on a provision of an insurance contract, if to do so would be to fail to act with the utmost good faith.

The *IC Act* contains a comprehensive disclosure regime for insureds that provides important protections for consumers. This regime not only seeks to avoid the possibility of insurance disputes by ensuring that the insurer is in possession of all information relevant to accepting and paying out on a risk(s), but also moderates the contractual remedy for misrepresentation or non-disclosure, by making it proportionate to the damage suffered by the insurer.

Many safeguards are built into the *IC Act*, for example:

(a) Non-disclosure and misrepresentation- The *Act* modifies the duty of disclosure and limits an insurer's ability to rely on a non-disclosure and misrepresentation (sections 21, 21A, 26 and 28).

(b) Notification of policy terms- For prescribed contracts an insurer cannot apply "non standard" cover terms where it did not clearly inform the insured, before contracting, of the provision(s) which derogated from the standard terms prescribed by regulation. For non-prescribed policies an insurer cannot rely on an "unusual term" unless the insurer clearly informed the insured, again before contracting, of the term (sections 35 and 37).

(c) Act or Omissions of insureds – The *IC Act* restricts the extent to which an insurer can refuse indemnity because of an act or omission of an insured (section 54). Essentially, where the act or omission has not caused or contributed to the loss, the insurer is restricted to a damages remedy which is proportionate to the harm caused to it.

(d) Fraudulent claims – If only a minimal or insignificant part of the claim is made fraudulently and non-payment of the remainder would be harsh or unfair, the court can order that the insurer pay such amount as is just and equitable (section 56). A similar provision applies in the case of avoidance: section 31.

Under the *IC Act* prescribed contracts are motor vehicle insurance, home building insurance, home contents insurance, sickness and accident insurance, consumer credit insurance, and travel insurance. The Regulation contains standard cover provisions for these lines of insurance to ensure predictability and consistency of insurance contract provisions. An insurer cannot rely on a term(s) which deviate(s) from standard cover, where it has not clearly informed an insured, before contracting, of the term(s).

The *IC Act* contains a number of other protections for consumers against "unfairness" in insurance contracts that complement the duty of utmost good faith, and the restrictions on insurers' contractual rights and remedies. These include:

(a) Insurable interest not required/legal or equitable interest not required at time of loss/persons benefited need not be named (sections 16-20)

(b) Interim contracts of insurance (section 38)

(c) Installment contracts of insurance (section 39)

(d) Liability insurance: insured may require insurer to elect (section 41)

(e) Restriction on average provisions in domestic policies (section 44)

(f) Pre-existing defect or imperfection (section 46)

(g) Pre-existing sickness or disability (section 47)

(h) Right of third party to recover against insurer (section 51)

(i) "Contracting out" prohibited (section 52)

(j) Variation of contracts of insurance (section 53)

(k) Insurer to notify of expiration of contracts of general insurance (section 58)

The *IC Act* itself does not presently contain much in the way of penalties for insurers. The main sanctions are the inability to rely on contractual terms and the limitation of remedies for breach. The *IC Act* does contain a limited number of pecuniary penalty provisions which are in the nature of consumer protection. These are:

(a) *section 40* – insurer fails to inform an insured in writing about the manner of operation of claims made liability insurance;

(b) *section 74* – insurer fails to supply policy documents on request;

(c) *section 75* – insurer fails to give reasons for cancellation etc; and

(d) *section 76A* – a director of a company, or an employee or agent who intentionally or recklessly permits or authorizes a contravention of the *IC Act*.

Australia

What is the statute of limitations on claims?

There is no specific statutory time limit for making a claim under a contract of insurance/reinsurance although the contract itself may specify the time in which a claim must be made. Insurance contracts are subject to the standard Australian limitation periods for causes of action founded on breach of contract, which are six years in every jurisdiction except for the Northern Territory (where it is three years). However, time will only start to run from the date of a breach of contract by the insurer; for example, refusal to pay a claim covered by the policy or unreasonable delay.

The relevant legislation for each Australian jurisdiction is as follows (for normal cases):

- Australian Capital Territory – *Limitation Act 1985* (ACT);
- New South Wales – *Limitation Act 1969* (NSW);
- Northern Territory – *Limitation Act 1981* (NT);
- Queensland – *Limitation of Actions Act 1974* (Qld);
- South Australia – *Limitation of Actions Act* 1936 (SA);
- Tasmania – *Limitation Act 1974* (Tas);
- Victoria – *Limitation of Actions Act 1958* (Vic); and
- Western Australia – *Limitation Act 1935* (WA).

Can a third party bring direct action against an insurer?

A third party (that is, a person who is not a party to a contract of insurance) in relation to a contract of general insurance who is specified or referred to in the contract, by name or otherwise, as a person to whom the insurance cover provided by the contract extends has right, under section 48 of the *Insurance Contracts Act 1984* (Cth), to recover the amount of the person's loss from the insurer in accordance with the contract notwithstanding that the person is not a party to the contract. A similar position exists under the common law of Australia, where an insurance policy is clearly intended to provide cover not just to the contracting insured, but to the persons referred to in it as being insured under it. This is not to be confused with the position of a third party claimant against an insured.

A third party who has a liability claim against a bankrupt individual or a company in liquidation may be entitled to recover directly against the liability insurer of that individual/company, however that position is unsettled. Apart from any statutory direct rights against the liability insurer (discussed below), it is not uncommon for a third party to join the liability insurer of the insured to seek a declaration regarding insurance coverage for the third party's claim.

The third party has a priority claim on any insurance proceeds received by the trustee in bankruptcy or liquidator that is referrable to the liability, over other creditors owed money in the bankruptcy or liquidation. Section 117 of the *Bankruptcy Act 1966* (Cth) requires that a trustee in bankruptcy pay to third parties any insurance moneys recovered by the trustee in respect of the relevant insured liability. Section 562 of the *Corporations Act 2001* imposes a similar obligation on the liquidator of a company in respect of moneys received by the company or liquidator. Both provisions give third parties with a claim priority over all other creditors in relation to the money received by a company, liquidator or trustee in bankruptcy from an insurer in respect of that claim.

A third party who is owed an amount by a company that has been deregistered may, under section 601AG of the *Corporations Act 2001* (Cth), recover from the insurer of the deregistered company if the relevant insurance contract covered the liability immediately before deregistration occurred.

Section 51 of the *Insurance Contracts Act* allows a third party to proceed directly against an insurer, where the insured has died or cannot after reasonable enquiry be found. The third party must, of course, still prove both that the insured was liable to him or how and that the policy covered that liability. Recovery is subject to the policy limit.

In New South Wales, under section 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) and under similar provisions in the Northern Territory[6] and Australian Capital Territory,[7] a charge is automatically created over all insurance moneys that is or may become payable under a contract of

[6] *Law Reform (Miscellaneous Provisions) Act 1956* (NT), ss 26-28.

[7] *Civil Law (Wrongs) Act 2002* (ACT), s 206.

insurance, in respect of an insured's liability to pay damages or compensation to a person or claimant. That charge arises at the time of the event that gives rise to the liability and entitles the third party to recover amounts due to the insured directly from the insurer. These sections have raised complicated issues in interpretation and application and claims relying on these laws will require specialist advice, to determine whether a relevant charge exists.

Can an insured bring a direct action against a reinsurer?

Some reinsurance contracts may be negotiated to contain a "cut-through" clause, which renders the reinsurer directly liable to the primary insured if the reinsured should go into liquidation. This kind of clause will usually direct that the reinsurer make a payment to the insured as a way to discharge its obligations to the reinsured. Previously, the common law doctrine of privity might have prevented a "cut-through" clause from giving an enforceable right of action, even if voluntary payment by the reinsurer was still considered effective in discharging its contractual obligations.[8] In a decision by the High Court of Australia *(Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107), the common law was altered to allow "cut-through" clauses to give a primary insured an enforceable right against a reinsurer.

Where there is no "cut through" clause, section 562A of the *Corporations Act 2001* (Cth) creates an obligation on a liquidator of an insurer which is similar to that imposed on the liquidator of an insured under section 562 of the *Corporations Act 2001* (Cth).

Although the position is unclear, the charge created by Section 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) and its equivalents in the Australian Capital Territory and the Northern Territory may apply to monies payable by a reinsurer to its reinsured.

[8] Ibid [16.0190].

Dispute Resolution

Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

Both insurance and reinsurance contractual arrangements are subject to the jurisdiction of the Australian courts, in the same manner as any other commercial activities. In addition, policyholders and other insurance consumers with grievances (claims or underwriting) under life or general insurance contracts may refer their disputes to the Financial Ombudsman Service (FOS). The FOS has jurisdiction to resolve insurance disputes up to specified maximum amounts, agreed by the insurance industry with the approval of ASIC.

Determinations in such disputes are binding on the insurer, by virtue of its contractual agreement to participate in the FOS Scheme, but not on the consumer who, if dissatisfied with the outcome, retains the right to take court proceedings in the normal manner. Most insurers agree to apply the FOS Scheme only to domestic, consumer and small business classes of insurance, which is all that the ASIC requires. The Scheme is free to the consumer, however, the insurers pay a fee in respect of each referral.

The Federal Court of Australia is a superior court of record and a court of law and equity primarily charged with determining disputes related to Australian federal law (and not civil matters exclusively governed by local State or Territory laws). As a result, the Federal Court will hear many matters involving, for example, foreign and domestic corporations, financial services, native title, consumer protection, and bankruptcy. Its jurisdiction is limited to areas of law vested under the Constitution (and made operative by the *Judiciary Act 1903* (Cth)) and the one hundred and fifty or so other relevant statutes passed by the Commonwealth Parliament giving further authority. Insurance, other than intra-state insurance is regulated federally by virtue of section 51(xiv) of the Constitution of Australia, so the Federal Court will commonly have jurisdiction in an insurance dispute.

Each state also has its own court hierarchy set up to resolve commercial disputes of all kinds, including insurance. At the highest level in each jurisdiction sits

the Supreme Court, which, while having unlimited civil jurisdiction, will generally only handle claims with high monetary value. These courts also have jurisdiction in most insurance and reinsurance disputes.

- In NSW, Queensland and Western Australia, the threshold for claims to be heard in their respective Supreme Courts is AU 750,000;
- In the ACT, claims should exceed AU 250,000;
- In Victoria, the figure is AU 200,000
- In South Australia and the Northern Territory, it is AU 100,000; and
- Finally, the Supreme Court of Tasmania will hear claims over AU 50,000.

The High Court of Australia is the country's ultimate Court of Appeal. It has appellate jurisdiction in all justiciable matters within the Commonwealth of Australia but its original jurisdiction is limited to constitutional matters.

What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of a) parties to the action and b) non-parties to the action?

Discovery is governed by the rules of each court based on jurisdiction, although courts generally retain discretion as to the extent of the procedure.[9] In most Australia jurisdictions, civil procedure rules allow parties to obtain discovery, sometimes called disclosure, once proceedings have begun and without requiring a court order. These jurisdictions are the Australian Capital Territory (*Court Procedure Rules 2006* (ACT) rule 607), the Northern Territory (*Supreme Court Rules* (NT) rule 29.01), Queensland (*Uniform Civil Procedure Rules 1999* (Qld) rule 211), South Australia (*Supreme Court Civil Rules 2006* (SA) rules 136(1)-(2)), Tasmania (*Supreme Court Rules 2006* (Tas) rules 382-383), Victoria (*Supreme Court (General Civil Procedure) Rules* (Vic) rule 29.02(1)) and Western Australia (*Rules of the Supreme Court O 26* (WA) rule 1(1)). Only in the Federal Court and New South Wales do parties need to get an order from the court. In the Federal Court, discovery cannot be made unless the Court orders it under *Federal Court Rules 2011* (Cth) Division 20.12. In New South Wales, a limited discovery by written notice specifying particular documents (up to 50) is possible under *Supreme Court Rules* (NSW) Part 23 rule 2(1), but more general discovery is only available by court order (*Supreme Court Rules* Part 23 rule 3 and *Uniform Civil Procedure Rules 2005* (NSW) rule 21.2).

In certain circumstances, parties may apply to the court for an order for discovery before the commencement of proceedings, either to identify a potential defendant or to find out enough facts upon which to found a cause of action.[10]

In the first case, this requires the applicant to demonstrate that despite reasonable enquiries, they still do not have sufficient information on the defendant to enable the commencement of proceedings, and that getting preliminary discovery from the person subject to the order will provide knowledge of facts, or a document or thing, that would assist in ascertaining a defendant's identity or description. The court retains discretion in whether to grant such an order. The relevant legislation for each jurisdiction is: *Federal Court Rules 2011* (Cth) rule 7.22; *Court Procedures Rules 2006* (ACT) rule 650; *Supreme Court Rules* (NT) rule 32.03; *Uniform Civil Procedures Rules 2005* (NSW) rule 5.2; *Supreme Court Civil Rules 2006* (SA) rule 32(c); *Supreme Court Rules 2000* (Tas) rule 403C; *Supreme Court (General Civil Procedure) Rules* (Vic) rule 32.03; and *Rules of Supreme Court O26A* (WA) rule 3. In Queensland, the courts may give leave to deliver interrogatories to a person who is not a party to an action to help decide whether a person should be an appropriate party to a proposed proceeding (*Uniform Civil Procedure Rules 1999* (Qld)).

In the second case, certain jurisdictions may grant applicants orders for discovery of documents from a person who is likely to be a party in subsequent proceedings to get information that might reasonably be thought necessary in determining whether a claim should be made. Once again, this is at the discretion of the court and will require that the applicant make reasonable enquiries prior to making application. The relevant legislation for this kind of preliminary discovery is: *Federal Court Rules 2011* (Cth) rule 7.23; *Court Procedures Rules 2006* (ACT) rule 651; *Supreme Court Rules* (NT) rule 32.05; *Uniform Civil*

[9] *Burmah Oil Co Ltd v Bank of England* [1979] 3 All ER 700; [1979] 3 WLR 722; [1980] AC 1090, 1141.

[10] LexisNexis, Halsbury's Laws of Australia (at 12 December 2012) 325 Practice and Procedure, 'IV Discovery and Interrogatories' [325-4150].

Procedures Rules 2005 (NSW) rule 5.3; *Supreme Court Civil Rules 2006* (SA) rules 32(1)(a)-(b); *Supreme Court Rules 2000* (Tas) rule 403E; *Supreme Court (General Civil Procedure) Rules* (Vic) rule 32.05; and *Rules of Supreme Court O26A* (WA) rule 4. Importantly, is will be considered an abuse of process if an application for preliminary discovery is made for a "collateral purpose", *e.g.*, to determine whether the applicant should litigate or settle or to assess the strength of their own (or their opponent's) case.[11]

Finally, courts retain general powers to enforce discovery, production and inspection of documents against any parties who have an obligation to make discovery and fail or refuse to do so.[12] Usually an application to the court to use this power must be made. The relevant legislation for this kind of order is: *Federal Court Rules 2011* (Cth) rule 20.32; *Court Procedures Rules 2006* (ACT) rule 621(2)(c); *Supreme Court Rules* (NT) rule 29.11; *Uniform Civil Procedures Rules 2005* (NSW) rule 23.9; *Uniform Civil Procedures Rules 1999* (Qld) rule 223; *Supreme Court Civil Rules 2006* (SA) rule 142; *Supreme Court Rules 2000* (Tas) rules 392 and 394; *Supreme Court (General Civil Procedure) Rules* (Vic) rule 29.11; and *Rules of Supreme Court O26A* (WA) rule 9(1). It should be noted that other orders deemed appropriate in the eyes of the court may be brought to bear upon a defaulting party, rather than having the court enforce discovery.[13] Many courts have a discretion that usually requires satisfaction as to whether the discovery is necessary at all or, more specifically, is necessary at the time when the application is made.[14]

Courts have the power to order the disclosure of documents by non-parties to proceedings through the issue of subpoenas or, if documents held by those non-parties are relevantly within the control of parties to a proceeding (because of the relationship between the party and non-party), as part of an order for discovery made against that party.

In so far as the inquiry relates to obtaining disclosure of the insurance position of a defendant or a target or potential defendant, the general position is that the insurance position of a defendant or a target defendant is not a relevant and therefore:

- there is no obligation on a defendant to disclose its insurance position;
- a target defendant will not be ordered to disclose its insurance position; and
- the Court will not order a non-party insurer of a defendant or target defendant to disclose documents relevant to insurance.

The law is continuing to develop in this area and the exceptions to this general rule include:

(a) in some jurisdictions, the rules of court require disclosure of the identity of any non-party who provides funding or other financial assistance to the party for the purposes of conducting the case or who exercises direct or indirect control or influence over the way in which the party conducts the case (this would likely include an insurer who funds or controls the defence for a defendant);

(b) if a defendant company is in liquidation, the plaintiff needs the leave of the Court to proceed against the defendant and the insurance position of the defendant may be relevant to whether leave will is granted – in those cases, production of insurance documents by the company or its insurer may be ordered;

(c) a shareholder of a company can obtain disclosure of insurance documents held by the company, either before or after an action is commenced, under section 247A of the *Corporations Act 2001* (Cth);

(d) a creditor of a company in liquidation (which can include a third party who asserts a contingent liability) can obtain disclosure of insurance documents held by the company, either before or after an action is commenced, under section 486 of the *Corporations Act 2001* (Cth).

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[11] Ibid [325-4160].

[12] Ibid [325-4495].

[13] *Federal Court Rules 2011* (Cth) rules 41.01 or 41.04; *Court Procedures Rules 2006* (ACT) rules 621, 670 or 671 *Supreme Court Rules* (NT) rule 29.11(a); *Uniform Civil Procedures Rules 2005* (NSW) rule 23.9; *Uniform Civil Procedures Rules 1999* (Qld) rule 225; *Supreme Court Civil Rules 2006* (SA) rule 145; *Supreme Court Rules 2000* (Tas) rule 393; *Supreme Court (General Civil Procedure) Rules* (Vic) rule 29.11(a); and *Rules of Supreme Court O26A* (WA) rule 15.

[14] *Federal Court Rules 2011* (Cth) rules 20.11-20.12; *Supreme Court Rules* (NT) rule 29.05; *Supreme Court Civil Rules 2006* (SA) rule 139; *Supreme Court Rules 2000* (Tas) rule 389; *Supreme Court (General Civil Procedure) Rules* (Vic) rule 29.05; the remaining jurisdictions have no equivalent provision.

Are mediation and arbitration common methods for solving insurance disputes? Are more disputes resolved in or out of court?

Both insurance and reinsurance disputes in Australia can be the subject of arbitration, mediation or other alternative dispute resolution procedures, however, in the case of direct insurance this must be agreed to by both parties after the dispute has arisen. Section 43(1) of the *Insurance Contracts Act* strikes down compulsory arbitration provisions in insurance contracts to which that Act applies but does not preclude the parties from agreeing to refer a dispute to arbitration after it has arisen. Arbitration clauses in reinsurance contracts are enforceable in Australia, provided they have been properly drafted and agreed to as a term of the contract.

Arbitration is the preferred method for resolving Australian reinsurance disputes and is conducted in accordance with the Commercial Arbitration Acts in the various Australian jurisdictions, generally using either the London Court of Arbitration (LCA) or the UNCITRAL *Model Law on International Commercial Arbitration 1985* procedures. Otherwise, litigation is used.

What are the provisions regarding timely notice, and what are the legal consequences for non-compliance with the timely notice obligation?

Section 35 of the *Insurance Contracts Act 1984* (Cth) requires insurers clearly to inform an insured of any terms in a contract of insurance that would limit cover to less than the minimum cover prescribed in the corresponding regulations for that kind of insurance.[15] This must be done before the contract is entered into, and does not require the insurer to inform an insured about anything beyond the relevant minimum limit.[16] If an insurer does not comply with this obligation, it cannot then rely on the term limiting cover. Furthermore, section 37 forbids an insurer from relying on unusual terms (any provisions "of a kind that is not usually included in contracts of insurance that provide similar insurance cover") unless the insured is informed of the effect of these terms in writing before the contract is entered into. Neither section 35 nor section 37 apply to contracts of interim insurance (see section 38(3)).

Additionally, where insurance cover is provided for a particular period of time and is of a kind that is usually renewed upon negotiation (defined as "renewable insurance cover" under section 58(1)), an insurer must give the insured (or their agent) a notice in writing of the time and date at which the cover of the original insurance expires, with an indication as to whether the insurer is prepared to negotiate to renew or extend the cover (section 58(2)). This must occur not later than 14 days before the day on which the renewable insurance cover expires. If an insurer fails to comply with this notice requirement, section 58(3) creates a new contract of insurance between the parties, commencing immediately after the original insurance period expires and lasting either until the end of a period equal to the period of the original insurance cover or the time when the insured obtains replacement cover (whichever is earlier).

Where an insured fails to comply with a provision of the policy requiring the giving of timely notice to the insurer, the insurer may not refuse indemnity solely by reason of that omission even if the requirement is expressed to be a condition precedent to its liability. The insurer's remedy is limited to reduction of its claim liability by the monetary value of any prejudice it may have suffered due to the insured's delay Section 54(1) of the *Insurance Contracts Act*.

What are the laws regarding bad faith claims? What damages may be awarded if the insurer is found to have acted in bad faith?

Australian law imposes the duty of utmost good faith impartially on parties involved in an insurance contract.[17] This duty is an implied term in all such contracts under section 13 of the *Insurance Contracts Act 1984* (Cth). This section states that:

1. A contract of insurance is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards the other party, in respect of any

[15] The kinds of insurance that are prescribed for the purposes of section 35 are motor vehicle, home buildings, home contents, sickness and accident, consumer credit and travel insurance.

[16] Ball and Kelly, above n 7, [3.0070.5].

[17] F Hawke, "Utmost Good Faith – What Does it Really Mean?" (1994) 6 *Insurance Law Journal* 91.

matter arising under or in relation to it, with the utmost good faith.

2. A failure by a party to a contract of insurance to comply with the provision implied in the contract by subsection (1) is a breach of the requirements of this *Act*.

An insured may recover compensatory damages from an insurer for breach of this duty of utmost good faith in the handling of a claim. Section 13 has been found to apply to all matters arising under or in relation to the contract, embracing every aspect of claims settlement. This includes the pleading of unmeritorious defences and delays in accepting a claim, mismanaging a claim or in wrongly settling or refusing to settle claims made by third parties.[18]

The most important case considering this issue is *AMP Financial Planning Pty Ltd v CGU Insurance Ltd* (2005) 146 FCR 44, and its follow-up in the High Court (2007) 235 CLR 1. Although the subsequent High Court decision reversed the Federal Court's decision, this was not on grounds that affected the reasoning related to the duty of utmost good faith in an insurer's handling of claims. The judgments in both instances agreed that an insurer's unreasonable or capricious (not necessarily fraudulent) conduct in handling a claim or consenting to a settlement could amount to a breach of the duty of utmost good faith, making compensatory damages available to the insured for such a breach. The remedy cuts both ways, however, and an insured which deliberately or recklessly puts forward a false or inflated claim may be liable in damages for breach of the duty, for the insurer's costs of investigating it.

Australia continues to assess damages for breaches of good faith based on ordinary contractual principles, so that recovery is limited to loss suffered as a result of such breaches.

[18] Ball and Kelly, above n 7, [8.1070.25].

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India

Overview

Which government bodies/agencies regulate insurance and reinsurance companies in your jurisdiction? What date were those bodies established?

Insurance and reinsurance business in India are primarily governed by the Insurance Act, 1938, as amended by the Insurance Laws (Amendment) Act, 2015, (*"Insurance Act"*), Insurance Regulatory and Development Authority Act, 1999 (*"IRDA Act"*) and rules and regulations issued thereunder. The Government of India established the Insurance Regulatory and Development Authority of India (*"IRDA"*) to regulate and promote the insurance sector in India in April 2000.

Please list the categories of insurance licenses that exist in your jurisdiction, providing reference to the relevant code/s.

Broadly, the categories of insurance licenses/ registrations are:

i. Life insurance companies;

ii. general insurance companies;

iii. stand-alone health insurance companies;

iv. reinsurance companies;

v. branch offices of foreign reinsurance companies;

vi. syndicates of Lloyd's India (Lloyd's India is proposed to be established as a branch of Lloyd's of London which shall be regulated by the IRDA); and

vii. specialised insurance companies (for example, Export Credit Guarantee Corporation and Agriculture Insurance Corporation of India).

Insurance intermediaries such as insurance brokers, corporate agents, web aggregators, insurance marketing firms, individual agents, surveyors and loss assessors and third party assessors must also be licensed/ registered with the IRDA.

Are insurance companies in your jurisdiction subject to taxes beyond the ordinary burden faced by all companies? If yes, please list the additional tax liabilities faced by insurers.

Special rules for the calculation of taxable income for insurance companies engaged in the business of life insurance and non-life insurance business are prescribed under the Income Tax Act, 1961. Service tax is payable on activities pertaining to general insurance business, life insurance business, reinsurance business and insurance auxiliary services. Any service provided or to be provided to a policyholder or any person, by an insurer (including a reinsurer in relation to general insurance business or life insurance business) is considered to be a taxable service and the consideration received would be subject to service tax. Currently the rate of service tax is 14% on the value of the service.

Additionally, with effect from November 15, 2015, a 'Swachh Bharat Cess' at the rate of 0.5% on the value of the taxable service has been introduced by the Central Government.

What are the approved distribution channels in your jurisdiction? Are there restrictions?

Approved insurance distribution channels in India are:

i. **Individual insurance agents:** The IRDA Guidelines on Appointment of Insurance Agents, 2015 and the Insurance Act regulate the activities of individual insurance agents. Individual insurance agents are appointed directly by the respective insurance companies. An applicant can ordinarily act as an insurance agent for only a single insurer, however, he/she may apply as a 'composite agent' to represent up to one life insurer, one non-life insurer, one standalone health insurer and one of each of the mono-line insurers, at the same time.

ii. **Corporate agents:** With effect from 1st April, 2016, the IRDA (Registration of Corporate Agents) Regulations, 2015 (*"CA Regulations, 2015"*), Guidelines on Licensing of Corporate Agents, 2005 and the Insurance Act will regulate the activities of corporate agents, who distribute insurance products for and on behalf of an insurer.

The CA Regulations, 2015 permit a corporate agent to enter into arrangements with a maximum of either three life insurers or three general insurers or three health insurers or act as a composite corporate agent (with the ability to represent up to three insurers for each of the abovementioned classes of business or a combination of two of the abovementioned classes). The registration granted to a corporate agent by the IRDA shall be valid for a period of three years.

iii. **Insurance brokers:** The IRDA (Insurance Brokers) Regulations, 2013 (*"Broker Regulations"*) and the Insurance Act regulate the licensing and activities of insurance brokers. An applicant can be licensed by the IRDA under any one or more of the following categories:

a. Direct broker (life);

b. direct broker (general);

c. direct broker (life & general);

d. reinsurance broker; or

e. composite broker.

An insurance broking company is also required to satisfy the minimum capital requirements specified below:

a. INR 5 million for direct insurance brokers;

b. INR 20 million for reinsurance brokers; and

c. INR 25 million for composite brokers.

Other conditions prescribed are: (i) net worth of the broking company must not fall below 100% of the prescribed minimum capital at any time during the license period; (ii) maximum foreign direct investment in an insurance broking company is capped at 49%; (iii) the license is granted only for a period of three years and must be renewed thereafter; (iv) the broking company should maintain a professional indemnity insurance cover as prescribed throughout the license period; (v) the entity must exclusively carry on insurance broking business; and (vi) the entity should be owned and controlled by resident Indian citizens or Indian companies which are owned and controlled by resident Indian citizens.

iv. **Micro-insurance agents:** Micro-insurance agents are regulated under the IRDA (Micro-Insurance) Regulations, 2015. A micro insurance agent is permitted to work for one life insurer, one general insurer, one health insurer and the Agriculture Insurance Company of India Limited.

v. **Insurance Marketing Firm:** Insurance marketing firms (*"IMFs"*) are regulated by the IRDA (Registration of Insurance Marketing Firm) Regulations, 2015 and are permitted to (i) undertake solicitation and procurement of prescribed insurance products; (ii) undertake insurance service activities; and (iii) distribute other financial products. IMFs are, however, permitted to employ only those sales persons for insurance distribution who are domiciled in the district of operation allowed to the IMF by the IRDA. For the first three years of registration IMFs are permitted to register only a single district as its area of operation and upon expiry of this period they may register multiple districts. The registration is granted by the IRDA and is valid for a period of three years.

The maximum foreign direct investment in an insurance marketing firm is capped at 49%.

vi. **Web Aggregators:** Web aggregators are licensed by the IRDA under the IRDA (Web Aggregators) Regulations, 2013 (*"Web Aggregator Regulations"*). The license granted to a web aggregator is valid for a period of three years.

A licensed web aggregator is required to display on its website the information pertaining to insurance products of insurers with whom it has a tie-up. A web aggregator is also permitted to carry out the activities of lead generation and solicitation of insurance business through telemarketing and distance marketing modes.

The maximum foreign direct investment in a web aggregator is capped at 49%.

Does your jurisdiction have any forms of compulsory insurance?

Yes, there are statutes in India that provide for compulsory insurance in specific cases. Some of the important legislations are:

i. *Public Liability Insurance Act*, 1991: The said legislation was enacted to provide damages to victims of an accident which occurs as a result of handling any of the specified hazardous substances. Such insurance must be procured

by an entity before handling a specified hazardous substance.

ii. *Motor Vehicles Act*, 1988: The said legislation mandates that third party liability insurance is compulsory and no uninsured vehicle is allowed to ply on the roads or in any public place in India.

iii. *Deposit Insurance and Credit Guarantee Corporation Act*, 1961: All commercial banks registered with the Reserve Bank of India (*"RBI"*) are mandatorily required to insure their deposits with the Deposit Insurance and Credit Guarantee Corporation.

iv. *Brokers Regulations*: An insurance broker registered with the IRDA, is mandatorily required to procure professional indemnity insurance policy in the manner as specified in the Brokers Regulations.

v. *Web Aggregator Regulations:* A web aggregator registered with the IRDA, is mandatorily required to procure professional indemnity insurance policy in the manner as specified in the Web Aggregator Regulations.

vi. *Carriage by Air Act,* 1972: The said legislation mandates that all airlines should maintain adequate insurance covering any liabilities as specified in the Carriage by Air Act, 1972.

vii. *The Companies Act*, 2013: The Companies Act, 2013 (*"Companies Act"*) mandates that all companies barring banks who accept deposits, should mandatorily insure such deposits with insurers. This requirement is not mandatory prior to March 31, 2015.

What major insurance/reinsurance legislation is on the horizon in your jurisdiction?

In the context of insurance reforms, 2015 has been a momentous year. This is largely because the Insurance Laws (Amendment) Act, 2015 was finally passed by the Indian parliament laying the foundation for eagerly awaited insurance reforms. The passing of this statute immediately ushered in several changes to the regulatory framework along with paving the way for the implementation of a number of reforms in the coming years.

The new legislation is vital for a number of reasons, as it

i. permits an increase in foreign direct investment from 26% to 49% for insurers and insurance intermediaries;

ii. requires Indian insurance companies and insurance intermediaries to be owned and controlled by resident Indian citizens or Indian companies which are owned and controlled by resident Indian citizens;

iii. opens the door to foreign insurers to establish branch offices for undertaking reinsurance business including Lloyd's of London; and

iv. confers greater powers on the IRDA to make regulations to develop the Indian insurance sector, in the interest of policyholders and other stakeholders.

Against this backdrop, the IRDA recently released proposed regulations in various issues including on permissible commission to intermediaries, rules on management of expenses by insurers and rules on the assets, liabilities, solvency margins and investments of insurers. The IRDA is also expected to clarify the framework on operation of the branches of foreign reinsurers and their position vis-a-vis domestic insurers. Other significant reforms expected include finalization of the regulatory framework for setting up and operation of Lloyd's India (which is proposed to be a branch of Lloyd's of London).

Market Entry

What are the requirements/procedures for setting up a new insurance or reinsurance company?

The procedures and requirements to set up an insurance or reinsurance company are primarily set out under the specific regulations issued by the IRDA in this regard, i.e., the IRDA (Registration of Indian Insurance Companies) Regulations, 2000. The setting up procedure consists of a two stage approval process before the IRDA. The eligibility criteria for applicants includes that they must be public limited companies and have a minimum paid-up capital of INR 1 billion (INR 2 billion in case of reinsurers).

The first stage involves making a requisition to the IRDA for a registration application. Applicants are required to provide a detailed background at the requisition stage, including, inter alia, information on its shareholding, voting rights, key management personnel, sources of capital, proposed class of

insurance business, organizational structure, key aspects of promoters, proposed auditors, financial projections and business to be transacted.

After the IRDA approves a requisition application, applicants are permitted to apply directly for grant of registration. This application is to be furnished with extensive details on, inter alia, the proposed geographic spread of the business, market research and analysis, products to be sold, distribution channels, underwriting approach, investments, IT systems, retention limits and reinsurance, internal controls and premium rates.

For grant of registration, the IRDA typically considers criteria such as the track record of promoters, proposed directors and key management personnel, applicant's capital structure, proposed obligations for the rural and social sector (that is, the insurers must write a certain proportion of insurance business for the rural and socially vulnerable sector), nature of insurance products envisaged and level of actuarial and other professional expertise and compliance with 'Indian owned and controlled requirement'. Indian entities that are permitted to be promoters of insurance companies include companies incorporated under Indian law that are not subsidiaries, Indian banking companies, core investment companies, public financial institution, co-operative societies, Indian citizens and limited liability partnerships.

Upon completion of the second stage, the IRDA grants a certificate of registration to the applicant company which must commence insurance business within twelve months of the grant of the registration.

Is it mandatory that a company be physically present in the market (HQ or branch office) to write insurance/ reinsurance policies?

Yes, physical presence and more importantly, registration of the insurance company carrying on life insurance business, health insurance or general insurance business in India is mandatory, before writing insurance policies in India. However, a foreign reinsurance company has an option to either establish a branch office in India in accordance with the IRDA (Registration and Operations of Branch Offices of Foreign Reinsurers other than Lloyd's) Regulations, 2015 or undertake reinsurance business from India without any presence in India by registering itself as an offshore reinsurer with the IRDA. The IRDA has also recently released draft regulations under which it is proposed that syndicates of Lloyd's of London will be permitted to access the Indian reinsurance market under the platform of Lloyd's India.

Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Foreign non-admitted insurers are not permitted by law to write insurance business directly in India. However, domestic insurers may cede portions of their risks to non-admitted reinsurers, subject to mandatory cession to the national reinsurer and other conditions as prescribed by the IRDA, provided that such reinsurers meet the eligibility criteria specified by the IRDA and furnish an information sheet to the regulator in the prescribed manner, prior to taking on any risk.

Is the incorporation of local companies with foreign shareholders permitted?

A foreign entity is permitted to enter into the Indian insurance sector as an insurer by incorporating an 'Indian insurance company' carrying on the business of life insurance or general insurance or health insurance or reinsurance in India. Foreign investment in Indian insurance companies is limited to 49% of the paid up capital of the insurance company.

Given that only 49% foreign investment is allowed, any foreign entity will need to tie up with a potential Indian partner to set up a joint venture in India for carrying on life insurance business or health insurance or general insurance business or reinsurance business, as an insurer.

Regulatory

What are the main sources for insurance and reinsurance regulatory law in your jurisdiction?

TThe statutory and legal framework currently governing the Indian insurance sector is the Insurance Act, the IRDA Act and the regulations, rules, guidelines and circulars issued by the IRDA from time to time.

The Life Insurance Corporation Act, 1956, governs the Life Insurance Corporation of India and the General Insurance Business (Nationalization) Act, 1972, governs the four public sector general insurance companies. Finally, the Marine Insurance

Act, 1963 and the Motor Vehicles Act, 1988, also regulates insurance business in India.

The IRDA has issued numerous regulations, guidelines and instructions to regulate and promote the insurance industry and to protect the interests of policyholders, including:

i. **Regulations applicable to life insurance, general insurance, and health insurance companies (including but not limited to):**

   a. IRDA (Registration of Indian Insurance Companies) Regulations, 2000;

   b. IRDA (Insurance Advertisements and Disclosure) Regulations, 2000;

   c. IRDA (Assets, Liabilities and Solvency Margin of Insurers) Regulations, 2000;

   d. IRDA (Investment) Regulations, 2000;

   e. IRDA (Preparation of Financial Statements and Auditor's Report of Insurance Companies) Regulations, 2002;

   f. IRDA (Protection of Policyholders' Interests) Regulations, 2002 (*"Policyholder Interest Regulations"*);

   g. IRDA Guidelines on Advertisement, Promotion & Publicity of Insurance Companies, and Insurance Intermediaries, 2007;

   h. IRDA Corporate Governance Guidelines for Insurance Companies, 2009;

   i. IRDA Guidelines for Grievance Redressal by Insurance Companies, 2010 (*"Grievance Redressal Guidelines"*);

   j. IRDA (Sharing of Database for Distribution of Insurance Products) Regulations, 2010;

   k. IRDA (Scheme for Amalgamation and Transfer of General Insurance Business) Regulations, 2011;

   l. IRDA Guidelines on Distance Marketing of Insurance Products, 2011;

   m. IRDA Guidelines on Outsourcing of Activities by Insurance Companies, 2011;

   n. IRDA (Standard Proposal Form for Life Insurance) Regulations, 2013;

   o. IRDA (Health Insurance) Regulations, 2013;

   p. IRDA (Non-Linked Insurance Products) Regulations, 2013;

   q. IRDA (Linked Insurance Products) Regulations, 2013;

   r. IRDA (Scheme of Amalgamation and Transfer of Life Insurance Business) Regulations, 2013;

   s. IRDA (Issuance of Capital by Indian Insurance Companies transacting Life Insurance Business) Regulations, 2015;

   t. IRDA (Issuance of Capital by Indian Insurance Companies transacting other than Life Insurance Business) Regulations, 2015;

   u. IRDA (Places of Business) Regulations, 2015;

   v. IRDA (Transfer of Equity Shares of Insurance Companies) Regulations, 2015;

   w. IRDA (Maintenance of Insurance Records) Regulations, 2015;

   x. IRDA (Regulation of Insurance Business in Special Economic Zone) Rules, 2015;

   y. IRDA (Obligations of Insurers to Rural and Social Sectors) Regulations, 2015; and

   z. IRDA (Other Forms of Capital) Regulations, 2015.

ii. **Regulations applicable to reinsurance activities:**

   a. IRDA (General Insurance-Reinsurance) Regulations, 2013;

   b. IRDA (Life Insurance-Reinsurance) Regulations, 2013;

   c. IRDA Guidelines on Insurance and Reinsurance of General Insurance Risks, 2006;

   d. IRDA Guidelines on Cross Border Reinsurers, 2016; and

   e. IRDA (Registration and Operations of Branch Offices of Foreign Reinsurers other than Lloyd's) Regulations, 2015.

iii. The RBI has also issued the following regulations to regulate foreign exchange transactions in insurance activities:

   a. Foreign Exchange Management (Insurance) Regulations, 2000;

   b. RBI Master Direction – Insurance, 2016;

c. RBI Memorandum of Exchange Control Regulations relating to Life Insurance in India, 2003; and

d. RBI Memorandum of Exchange Control Regulations relating to General Insurance in India, 2002.

Please discuss the current regulatory climate for your jurisdiction, as well as any pending or anticipated regulatory reform, in the following areas:

Solvency and capital requirements

As per Indian laws, every insurer is required to value assets, determine the amount of liabilities and maintain solvency margin in accordance with the specific methods and valuation requirements as specified in the IRDA (Assets, Liabilities and Solvency Margin of Insurers) Regulations, 2000. Also, the insurer is required to maintain minimum capital as prescribed under the Insurance Act.

Confidentiality

Insurance companies and insurance intermediaries are required to ensure confidentiality of information provided by prospects/ policyholders in relation to insurance policies. They are also required to ensure confidentiality of personal information in the manner and in accordance with the Information Technology Act, 2000 and the rules and regulations issued thereunder.

Supervision

All contracts of insurance and reinsurance in India are primarily governed by the IRDA. Insurers are also required to file all insurance products with the IRDA, before they are offered for sale to the public, as mandated under the applicable IRDA file and use guidelines. Further, all reinsurance arrangements must be documented and filed with IRDA within thirty days of the commencement of each financial year.

Corporate governance

The IRDA has issued the Corporate Governance Guidelines for Insurance Companies, 2009 (*"Corporate Governance Guidelines"*), for all Indian insurance companies. These guidelines broadly deal with the governance structure, the board of directors, delegations of functions, senior management, significant owners, controlling shareholders and any conflict of interests etc. Every insurer is required to compulsorily provide a report of its compliance with the Corporate Governance Guidelines to the IRDA.

Reporting requirements

There are several disclosure and reporting requirements. For example, at the end of every financial year, every insurer must prepare a balance sheet and profit and loss account concerning its insurance business in India and submit it to the IRDA. Further, every insurer must submit periodic returns to the IRDA within six months of the end of the period to which they refer.

Consumer protection

Every insurer has the obligation to put in place a proper and effective grievance redressal mechanism to address the complaints and grievances of policy holders in accordance with the Policyholder Interest Regulations and the Grievance Redressal Guidelines.

Remuneration

For placement of insurance business, the commission and/ or brokerage payable to insurance agents, insurance intermediaries including corporate agents and insurance brokers is governed by the Insurance Act and the rules and regulations issued by the IRDA. The IRDA has prescribed limits on the commission and brokerage payable to insurance agents and insurance intermediaries. Only for reinsurance business placement, the brokerage payable to a reinsurance or composite broker is governed by global market practice.

Other

Prior IRDA approval is required for any issuance and/ or transfer of shares of an insurer exceeding 1% of the paid up share capital. Every insurer must also ensure compliance with the requirements relating to outsourcing of activities and must have in place proper and effective mechanisms regulating the quality of services provided by third party service providers.

Claims

What are the main sources for contract law in your jurisdiction?

The main sources for contract law in India are as follows:

i. *Indian Contract Act*, 1872;

ii. *Sale of Goods*, 1930;

iii. *Consumer Protection Act*, 1986; and

iv. *Insurance Act.*

In general, is the substantive law relating to insurance more favorable to insurers or insured? Please cite any sources or codes.

The statutory and regulatory framework governing insurance sector seems to be more favourable to the insured, as is evident from the following:

i. Section 45 of the Insurance Act prohibits an insurance company from questioning any policy of life insurance on any ground whatsoever after the expiry of three years from the date of the policy, i.e., from the date of issuance of the policy or the date of commencement of risk or the date of revival of the policy or the date of the rider to the policy, whichever is later. A policy of life insurance may be called in question any time within the period of three years from any of the four dates, as mentioned above, whichever is later on the ground of fraud. An insurer is required to communicate in writing to the (a) insured; or (b) legal representatives; or (c) nominees; or (d) assignees, of insured, the grounds and materials on which such decision is based.

ii. The IRDA has also put forth many measures to protect policyholders' interests. Insurers have been instructed to strengthen their grievance redressal procedures and consumer complaint resolving procedures. It is now mandatory that every insurance company must have a Policyholder Protection Committee to ensure that the insurers' internal systems are monitored effectively at the highest level of the company.

iii. The Policyholder Interest Regulations also mandates that insurers must follow due procedure at the time of sale, so that the insured can understand the terms and conditions of the insurance policy. Claims must be processed expeditiously, else, interest at prescribed rates are payable.

iv. The IRDA has instructed life insurance companies to ensure that policy documentation is simple and clear to enable the policyholder to easily understand the benefits and the applicable terms and conditions.

v. Insurance companies are also required to make a public disclosure of risks faced by the insurers which are critical for protecting the interests of the policyholders'. They help policyholders make informed decisions before entering into insurance contracts. Reliable and timely disclosures also ensure a fair and orderly insurance sector. With this in view, the IRDA has stipulated public disclosure requirements for all insurance companies.

vi. In 2011, the IRDA issued certain guidelines prohibiting insurers from rejecting life insurance claims on the basis of delayed notification, if the delay was unavoidable, unless the insurer is satisfied that the claim would have been rejected in any event.

vii. The IRDA has also directed that all health insurance policies should offer portability benefits whereby policyholders are given credit for the waiting periods already served under previous health insurance policies with that insurer or any other Indian insurer.

What is the statute of limitations on claims in your jurisdiction? Cite source where this code can be found.

Limitation periods for instituting suits in civil courts are mainly governed by the Limitation Act, 1963, which prescribes a period of three years from the date of cause of action for contracts of insurance. In respect of redressal before the consumer forums, the Consumer Protection Act, 1986 prescribes that a complaint will not be entertained unless it is filed within two years from the date on which the cause of action has arisen.

India

Can a third party bring direct action against an insurer? Cite source.

A third party can bring direct action against an insurer only in limited circumstances, such as:

i. Assignment

If an insurance policy has been assigned to third parties in compliance with policy terms and conditions, then, the assignee has the right to make a claim against the insurer.

ii. Nomination

If a policyholder has nominated a third party as his/ her nominee during the policy term, to receive the money secured under a life insurance policy, then, in the event of the policyholder's death, the nominee has the right to claim the policy benefits.

iii. Motor insurance

In case of third party motor insurance cover, a third party can make a direct claim to the insurer for personal injury or for property damage. The insurer can pay the claim proceeds directly to the third party.

Can an insured bring a direct action against a reinsurer? Cite source.

An insured can claim directly from the reinsurer and seek to enforce the reinsurance contract only if the reinsurance contract contains a cut-through clause, which is triggered in the event of the cedant's insolvency.

Dispute Resolution

Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

The civil courts and consumer forums in India are the appropriate forums for adjudicating civil commercial insurance disputes. Civil proceedings are governed by the Code of Civil Procedure, 1908 (*"CPC"*), whereas the proceedings before the consumer forums are governed by the Consumer Protection Act, 1986. In both instances, jurisdictional facts pertaining to pecuniary and territorial extent are relevant. In states like Delhi, Mumbai, Kolkata and Chennai, the High Courts have original jurisdiction to try civil suits over and above a particular value, whereas the jurisdiction of the subordinate courts is limited to that extent. In other states, the subordinate courts have no such pecuniary limitation. However, there is internal hierarchy in such subordinate courts in terms of pecuniary jurisdiction.

The Consumer Protection Act, 1986, provides for a three-tier quasi-judicial authority. The pecuniary extent of the District Forums is capped at INR 2 million and the pecuniary jurisdiction of State Commissions ranges between INR 2 million and INR 10 million and in case a dispute is valued above INR 10 million, the jurisdiction is assumed by the National Consumer Disputes Redressal Commission.

What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of a) parties to the action and b) non-parties to the action? Cite relevant codes.

The CPC governs the civil proceedings before courts in India. The CPC provides for the law on discovery and inspection of documents. Under the CPC, a party to the action may be directed to produce a document that the court may consider relevant. Inspection of documents may also be allowed to a party on the issuance of adequate notice. Even a non-party to the action may be directed by the court to produce any document which is material to the adjudication of the concerned dispute.

Are mediation and arbitration common methods for solving insurance disputes in your jurisdiction? Are more disputes resolved in or out of court? Please explain any factors that determine whether out of court settlements may be preferable to litigation in your jurisdiction.

Generally, insurance disputes are resolved through courts in India. Lately, insurers and customers are opting for mediation and arbitration for resolving insurance disputes. Insurance disputes are typically settled in court, but parties do have an option to resolve the dispute through out-of-court settlements. Out-of-court settlements may be preferable to litigation on account of the following factors:

i. It is relatively a less expensive model

ii. It may be less time consuming

What are the provisions in your jurisdiction regarding timely notice, and what are the legal consequences for non-compliance with the timely notice obligation? Cite relevant codes.

The insurance policy generally prescribes the time period under which the policyholder, nominee or assignee must inform the insurer by service of a notice of loss and submit the claim application to the insurer. It is usually a condition or a condition precedent that the insurer must be given notice of loss under the policy, both on discovery of any event likely to give rise to a claim or when the loss actually occurs. The notice must be in writing and within the time stipulated in the policy. The time period usually runs from the event, such as the loss, or occurrence. If the claimant does not make his claim within the prescribed time period, the claimant is barred from making any claim, although a relaxation may be provided by the insurer for genuine claims. In this regard, the IRDA has mandated that insurers must not repudiate claims unless the reasons for delay are specifically recorded and ascertained and the insurers are satisfied that the claim would have been rejected even if reported in time. Insurers are also required to incorporate language in the policy document condoning delay, if it is proved to be for reasons beyond the control of the insured.

Please provide the relevant laws regarding bad faith claims in your jurisdiction, including applicable codes. What damages may be awarded if the insurer is found to have acted in bad faith?

Under Indian law, a contract of insurance is considered as a contract of uberrimae fidei, meaning a contract of utmost good faith on the part of the assured as well as the insurer. When information on a specific aspect is asked for in the proposal form, the policyholder/ proposer is under a solemn obligation to make a true and full disclosure of the information on the subject which is within their knowledge. It is not open for the proposer to determine whether the information sought for is material for the purpose of the policy or not. The obligation to disclose extends only to facts which are known to the applicant and not to what he/she ought to have known. Similarly, the insurer is also under a solemn obligation to provide complete information to the policyholder and to explain the terms and conditions of the insurance contract to the policyholder.

Further, Section 45 of the Insurance Act prohibits an insurer from questioning any policy of life insurance on any ground whatsoever after the expiry of three years from the date of the policy, i.e., from the date of issuance of the policy or the date of commencement of risk or the date of revival of the policy or the date of the rider to the policy, whichever is later. A policy of life insurance may be called in question any time within the period of three years, as mentioned above, on the ground of fraud.

The Policyholder Interest Regulations requires insurers to expeditiously process claims and if a claim cannot be processed within the prescribed timelines, then, interest should be paid to the insured, at the rate of 2% above the prevalent bank rate.

There is a contractual relationship between the insurer and the insured and the insurer has a good faith duty not to unreasonably withhold the payment due to the insured under the policy. A bad faith claim occurs when the insurer refuses to pay a claim to the insured and which is owed to the insured under the policy. If an insurance company refuses to pay the claim without carrying on a proper investigation and the insured is of the view of that the claim is covered under the policy, then, the Indian courts have instructed the insurer to pay the claim to the insured along with interest and/or legal costs.

India

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Japan

Overview

Which government bodies/agencies regulate insurance and reinsurance companies?

Insurance and reinsurance companies are regulated by the Financial Services Agency ("FSA"). In July 2000, the FSA was established under the jurisdiction of the Financial Reconstruction Commission ("FRC") through a reorganization of the Financial Supervisory Agency. In January 2001, during the course of the reorganization of the central government ministries, the FSA became an external organ of the Cabinet Office (the FRC was abolished concurrently).

What are the categories of insurance licenses that exist?

No person may conduct an insurance business without having first obtained a license from the Prime Minister of Japan (Article 3(1) of *Insurance Business Act*). There are two types of licenses: 1) life insurance business license and 2) non-life insurance business license (Article 3(2) of *Insurance Business Act*). No person may obtain both a life insurance business license and a non-life insurance business license (Article 3(2) of *Insurance Business Act*).

Notwithstanding the foregoing, a person registered with the Prime Minister may conduct a low-cost, short-term insurance business (Article 272(1) of the *Insurance Business Act*). "Low-cost, short-term insurance business" means, within the insurance business, the business of only underwriting insurance that has a term of coverage which is within the period of two years or less specified by the Cabinet Order, and for which the insurance proceeds do not exceed the amount of ten million yen or less specified by the Cabinet Order (except those specified by the Cabinet Order).

Are insurance companies subject to taxes beyond the ordinary burden faced by all companies?

Insurance companies are subject to ordinary tax burdens such as corporate income tax, enterprise tax and consumption tax. However, there are special treatments with regard to taxation against insurance companies. For example, with regard to the enterprise tax, there is a difference in taxation base between ordinary companies and insurance companies.

What are the approved distribution channels in your jurisdiction? Are there restrictions?

The distribution channels are restricted to 1) registered life insurance agent, 2) an officer or an employee of a non-life insurance company (including a foreign non-life insurance company, etc.), or registered non-life insurance representative or an officer or employee thereof, 3) specified low-cost, short-term insurance agent or a registered low-cost, short-term insurance agent, and 4) registered insurance broker (Article 275 (1) of *Insurance Business Act*).

Are there any forms of compulsory insurance?

Yes. The automobile liability insurance, national health insurance and industrial accident compensation insurance are a few of the examples of compulsory insurance in Japan.

What major insurance/reinsurance legislation is on the horizon?

A bill to amend the *Insurance Business Act* has been passed in the Diet on May 23, 2014. Among other things, this bill establishes new rules for insurance solicitation. Previously, the *Insurance Business Act* provided only several prohibited activities such as false explanation. The new law requires insurance companies etc. to understand a customer's intention and to enable the customer to confirm if the insurance fits his/her intention or not (Article 294-2 of *Insurance Business Act*). Further, it requires insurance companies etc. to provide information necessary for a customer to evaluate the suitability of the insurance at the time of insurance solicitation (Article 294 of *Insurance Business Act*). These amendments will come into force by no later than May 2016.

Market Entry

What are the requirements/procedures for setting up a new insurance or reinsurance company?

The *Insurance Business Act* provides that an insurance company shall be a stock company or a mutual company and shall have in place 1) the board of directors, 2) board of company auditors or committees, and 3) accounting auditor (Article 5-2 of *Insurance Business Act*). No individual person or

other form of companies are able to apply for the above mentioned insurance business license. Further, the amount of capital or total amount of funds of an insurance company shall be equal to or greater than one billion yen (Article 6 of *Insurance Business Act*).

Is it mandatory that a company be physically present in the market (HQ or branch office) to write insurance/ reinsurance policies?

Yes. A Foreign Insurer may, only in cases where it has established a branch office, etc. in Japan and obtained a license of the Prime Minister, write business under that license at the branch office, etc. (Article 185 (1) of *Insurance Business Act*).

Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

A Foreign Insurer without a branch office, etc. in Japan shall not conclude an insurance contract pertaining to any persons with an address or residence in Japan or property located in Japan (Article 186 (1) of *Insurance Business Act*).

Is the incorporation of local companies with foreign shareholders permitted?

Yes.

Regulatory

What are the main sources for insurance and reinsurance regulatory law?

The *Insurance Business Act*, *Order for Enforcement of the Insurance Business Act* and Ordinance for Enforcement of the *Insurance Business Act* is the main source for insurance and reinsurance regulatory law.

Please describe the current regulatory environment, including pending or anticipated regulatory reform.

In light of consumer protection, Japan's FSA strictly monitors the improper non-payment of insurance money. From 2005 to 2008, the FSA reported that many major insurance companies failed to properly pay insurance money. In response to such improper non-payment of insurance money, the FSA took measures such as issuing operational improvement orders and business suspension orders against such major insurance companies.

In addition to the above mentioned new rule for insurance solicitation, the bill passed on May 23, 2014, has introduced an easing of regulations for the purpose of vitalization of the insurance market. For example, the bill eased the regulation that a domestic insurance company must not acquire a foreign insurance company that has subsidiaries who conduct businesses that are not permitted for subsidiaries of insurance companies under the *Insurance Business Act*. Under the new law, a domestic insurance company is allowed to acquire such a foreign insurance company provided that the foreign insurance company releases its control of its subsidiaries who conduct businesses that are not permitted for subsidiaries of insurance companies under the *Insurance Business Act* within five years after the acquisition.

The Japanese government is very strict with regard to consumer protection, and at the same time, tries to vitalize the insurance market by easing regulations imposed by the *Insurance Business Act*.

Claims

What are the main sources for contract law?

The *Civil Code* is the main source for contract law in Japan. The *Insurance Act* provides special rules for insurance and reinsurance contracts. Further, the *Commercial Code* has the general rules for commercial transactions and special provisions for marine insurance.

In general, is the substantive law relating to insurance more favorable to insurers or insureds?

Japanese insurance law is generally more favorable to insureds. For example, the *Insurance Act* provides unilateral mandatory provisions. Article 15 of the *Insurance Act* provides that an insurer must pay for damage caused by insured events even when the subject matter of the insurance was subsequently destroyed by non-insured events. Special agreements that are disadvantageous to insureds compared to Article 15 of the *Insurance Act* shall be void (Article 26 of *Insurance Act*).

Japan

What is the statute of limitations on claim?

The statute of limitation on insurance claim is three years (Article 95(1) of the *Insurance Act*).

Can a third party bring direct action against an insurer?

With regard to Compulsory Automobile Liability Insurance, a victim can claim an insurance payment directly against an insurer (Article 16 (1) of the *Automobile Liability Security Act*). As to other types of insurance for which laws do not specifically provide a third party's claim, basically, a third party cannot bring a direct action against an insurer. However, Article 423 (1) of the *Civil Code* provides that, under certain conditions, an obligee may exercise the right vested in the obligor where the obligee is in need of preserving its claim against the obligor, that is the obligor has a lack of funds. A third party may exercise an insured's claim against the insurer pursuant to this article.

Can an insured bring a direct action against a reinsurer?

No. However, in the case of an insurer's insolvency, an insured may exercise an insurer's claim against a reinsurer pursuant to Article 423 (1) of the *Civil Code*.

Dispute Resolution

Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

There are five types of courts under the Japanese judicial system: the Supreme Court, High Courts, District Courts, Family Courts and Summary Courts. Unlike some other jurisdictions, Japan has no commercial courts specializing in commercial disputes including insurance and reinsurance disputes. For the first instance, insurance and reinsurance disputes are brought to ordinary District Courts or Summary Courts depending on the value of the dispute. The Summary Courts have jurisdiction over civil disputes whose value is not greater than JPY 1,400,000.

What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of a) parties to the action and b) non-parties to the action?

Japan has no U.S.-style pretrial discovery systems that would allow a party to broadly request that the opposing party produce any and all relevant documents in the litigation. However, the Court may, upon petition by a requesting party, issue an order to the opposing party to the action or non-parties to the action to produce certain specified documents, unless the documents in question fall under certain categories that are exempt from the obligation to produce (Article 220, 221, and 223 of *Code of Civil Procedure*).

Are mediation and arbitration common methods for solving insurance disputes in your jurisdiction? Are more disputes resolved in or out of court?

Most insurance and reinsurance policies written in Japan do not have an arbitration or mediation clause. While alternative dispute resolution has become increasingly popular especially in international cases, litigation is still the default forum for a claim on commercial insurance disputes in Japan.

With regard to consumer insurance, such as automobile insurance, it is common for disputes concerning consumer insurance, such as claims for damages in car accident cases, to be brought to an ADR institute like the local bar association's ADR center.

In addition to cost-time saving, as litigation is open to the public in Japan, confidentiality would be a factor that determines whether out of court settlements may be preferable to litigation, especially in commercial insurance cases.

Japan

What are the provisions in your jurisdiction regarding timely notice, and what are the legal consequences for non-compliance with the timely notice obligation?

Article 14 of *Insurance Act* provides that "The Policyholders or the Insured must notify the Insurers of the loss incurred by insured events without delay after they become aware of such events." Further, generally, insurance policies have provisions that require the policyholders and the insureds to notify the insurers of the loss incurred due to insured events. Therefore, the Policyholders and the Insureds have the obligation of timely notice in Japan.

The *Insurance Act* does not have any provision regarding the legal consequences for non-compliance with the timely notice obligation. With regard to consumer automobile insurance, in the case where an automobile insurance provided that a notice must be made within 60 days after an accident and a notice was actually made three months after the accident, the Supreme Court has concluded that the insurer still had to pay the insurance benefit to the insured and only the amount of loss incurred by the insurer due to the late notice could be withheld. However, there is no established rule for non-compliance with the timely notice obligation with regard to commercial insurance.

What are the laws regarding bad faith claims? What damages may be awarded if the insurer is found to have acted in bad faith?

Japan does not have punitive damages. Liability for both tort and breaches of contract are limited to compensatory damages under the Japanese law even regarding bad faith claims. Therefore, although an insurer's bad faith act can theoretically constitute a tort, the amount of compensation will be limited to compensatory damages.

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Overview

Which government bodies/agencies regulate insurance and reinsurance companies?

The main regulatory body for, inter alia, insurance and reinsurance companies in Singapore is the Monetary Authority of Singapore ("MAS") which was established on 1 January 1971 but the regulation of the insurance industry only came under the MAS' purview in April 1977.

What are the categories of insurance licenses that exist?

(a) Direct insurer: general, life and/or composite see: section 8(5) of the *Insurance Act*

(b) Reinsurer: general, life and/or composite (Cap. 142) read with section 2(1)

(c) Captive insurer

Are insurance companies subject to taxes beyond the ordinary burden faced by all companies?

No.

What are the approved distribution channels? Are there restrictions?

Generally, banks, trade specific agents (*e.g.* tour agents).

Are there any forms of compulsory insurance?

Yes. For *e.g.* motor insurance, workmen compensation insurance.

What major insurance/reinsurance legislation is on the horizon?

Save for further refinements to the Risk-Based Capital framework for insurers in Singapore, there is no publicly available information suggesting any major insurance/reinsurance legislation on the horizon.

Market Entry

What are the requirements/procedures for setting up a new insurance or reinsurance company?

There are two main requirements/procedures to go through: (1) Insurance regulatory requirement of obtaining the requisite license to carry on the appropriate class of insurance business from the MAS; and (2) Corporate regulatory requirement of registering the business with the Accounting and Corporate Regulatory Authority ("ACRA") as a branch or incorporating a company under the *Companies Act* (Cap. 50).

Is it mandatory that a company be physically present in the market (HQ or branch office) to write insurance/reinsurance policies?

Generally, yes, the exceptions are: (a) authorized foreign reinsurers pursuant to section 34 of the *Insurance Act*, (b) approved marine, aviation and transit insurers pursuant to regulation 5 of the *Insurance* (Approved Marine, Aviation and Transit Insurers) *Regulations*.

Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Foreign insurers are able to write direct insurance business in Singapore if they have the requisite license under section 8 of the *Insurance Act*.

Is the incorporation of local companies with foreign shareholders permitted?

Yes.

Regulatory

What are the main sources for insurance and reinsurance regulatory law?

In addition to the *Insurance Act* and its subsidiary legislation, the MAS has the power to issue Directions (which consists of legally binding directives and notices), Guidelines (which are standards of "best practices"), Codes (non-statutory rules), Practice Notes (guides which may or may not be pursuant to a provision in the *Act* or subsidiary legislation), Circulars

Circulars (information documents that have no legal effect) and Policy Statements (outlines of the major policies of the MAS).

Please describe the current regulatory environment, including pending or anticipated regulatory reform.

Solvency and capital requirements

Every licensed insurer is required to maintain and establish a separate insurance fund for each class of insurance business carried on by the reinsurer that relates to "Singapore policies" and for each class of insurance business that relates to "offshore policies" and all licensed insurers (unless specifically exempted) are to comply with fund solvency and capital requirements as set out in the *Insurance* (Valuation & Capital) *Regulations*. The two key requirements in the *Regulations* are – (i) the Fund Solvency Requirement at the insurance fund level and (ii) the Capital Adequacy Requirement at the company level.

Confidentiality

The MAS expects insurers to maintain their customers' confidential information, even in the context of outsourcing arrangements. In addition to the usual common law rules on confidentiality, insurers are required to comply with the *Personal Data Protection Act* 2012 which will come into full force in July 2014.

Supervision

The MAS has fairly wide powers for the regulation and supervision of financial institutions. In the context of the insurance industry, the main areas of focus include, key executive persons and auditors, training and competency standards of front-end operatives and use of agents, insurance funds, fund solvency and capital adequacy, filing of annual returns and MAS inspections.

Corporate governance

Locally incorporated insurers are required to comply with, inter alia, the *Insurance* (Corporate Governance) *Regulations 2013*.

Reporting requirements

In addition to any specific reporting requirement which may be set out in an insurers' license, the reporting requirements include, lodging annual returns for each accounting period for each fund, quarterly returns, actuarial investigation returns, fund solvency and capital adequacy returns, reinsurance management returns.

Consumer protection

The *Insurance Act* contains a few provisions which may be said to protect the consumer. In addition, there exists a *Consumer Protection (Fair Trading) Act*.

Broker remuneration

Generally, a broker's remuneration is included in the premium paid by the insured and payment is made by the insurer to the broker. An insurer is prohibited from paying commissions to registered brokers based solely on the volume of business received from the broker.

Claims

What are the main sources for contract law?

Being a common law jurisdiction, the main source for contract law is case law.

In general, is the substantive law relating to insurance more favorable to insurers or insureds?

A general response cannot be provided as much depends on the particular policy wording, the factual matrix surrounding the policy contract and the facts of the claim. The usual principles of contract law apply to insurance, such as *contra proferentum* (which generally works against the insurer being the drafter of the policy wording), and the fundamental principles of insurance law apply in Singapore, such as good faith, material non-disclosure.

What is the statute of limitations on claims?

There exists the *Limitation Act* (Cap 163) which does not operate as a bar to an action unless the *Act* is expressly pleaded as a defense. The limitation period for actions founded on, inter alia, contract or tort is six years from the date on which the cause of action accrued. The *Act* does not expressly prohibit parties from agreeing to a different contractual limitation period.

Singapore

Can a third party bring direct action against an insurer?

Yes, in the situation where the insured under a liability insurance policy incurred a liability towards the third party and becomes bankrupt, the third party is entitled to pursue his claim against the insurer pursuant to the *Third Parties (Rights Against Insurers) Act* (Cap 395), but he gets no better right than the insured has against the insurer. A similar provision exists under the *Motor Vehicles (Third-Party Risks and Compensation) Act* (Cap 189).

Can an insured bring a direct action against a reinsurer?

If there exists a cut-through clause which applies to the particular matter, the insured should be entitled to pursue its claim directly against the reinsurer. There is no legislation for this and currently, there is no local reported decision on the issue either.

Dispute Resolution

Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

There are two main tiers in the Singapore court system: State Courts and Supreme Court. The State Courts can determine commercial insurance disputes of up to SGD 250,000. The Supreme Court can determine such disputes in excess of SGD 250,000. There is no right to a hearing before a jury in Singapore for any court.

What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of a) parties to the action and b) non-parties to the action?

The principal legislations granting our courts, inter alia, such powers are the *Supreme Court of Judicature Act* (Cap 322) for the Supreme Court and the *State Courts Act* (Cap 321). The Rules of Court contain the specific provision governing the procedure for discovery between parties to an action and non-parties to the action. The courts' powers include, dismissing a claim or striking out a defense, for failure to comply with orders for disclosure/discovery of documents.

Are mediation and arbitration common methods for solving insurance disputes? Are more disputes resolved in or out of court?

Yes. More disputes are resolved out of court. Factors which determine whether out of court settlements may be preferable to litigation in Singapore are no different from any other developed country, which are mainly commercial considerations, publicity, costs of litigation, time spent on litigation.

What are the provisions regarding timely notice, and what are the legal consequences for non-compliance with the timely notice obligation?

If drafted and construed as a condition precedent to an insurers' liability under the policy, based on the existing case law, a breach of such condition precedent notice obligation entitles the insurer to repudiate liability for the claim regardless of whether the insurer suffered prejudice as a result of such breach. *See*: *Singapore High Court case of Stork Technology Services Asia Pte Ltd (formerly known as Eastburn Stork Pte Ltd) v First Capital Insurance Ltd [2006] 3 SLR 652*

What are the laws regarding bad faith claims? What damages may be awarded if the insurer is found to have acted in bad faith?

There is no relevant legislation dealing with bad faith claims against insurers and there are currently no reported local decisions with a finding of bad faith against insurers. If an insurer is found by the courts to have acted in bad faith, the quantum of damages would depend very much on the facts of the case, including, the damages suffered by the insured as a result of the insurer's bad faith.

Singapore

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Overview

Which government bodies/agencies regulate insurance and reinsurance companies?

The insurance and reinsurance companies are regulated by the Financial Supervisory Commission ("FSC"). FSC was established in July 2004.

What are the categories of insurance licenses that exist?

Licenses are issued to firms engaged in life, non-life or reinsurance business. In addition, insurance brokerage, agency or surveyor firms also need to obtain license from FSC.

Are insurance companies subject to taxes beyond the ordinary burden faced by all companies?

No. The main taxes an insurance company is subject to are business income tax (filed annually at the rate of 17 percent), VAT (currently at the rate of 5 percent filed every two months) and taxes associated with its acquisition or disposal of assets (*e.g.* 0.3 percent securities transaction tax for its sale of shares).

What are the approved distribution channels? Are there restrictions?

Products are often sold by agents employed or engaged by insurance companies, insurance brokerage or agency firms through in person meetings with customers, internet sale, advertising in media or telemarketing arrangement. In addition, products can be distributed through other channels of financial institutions (such as banks). Postal offices can also sell certain life insurance products pursuant to the requirements of specific laws. There are regulations regulating the sale of products through TV commercials and telemarketing. The products sold through telemarketing are limited to those permitted under relevant regulations (*e.g.* limitation on premiums and insured amounts).

Are there any forms of compulsory insurance?

Every owner of automobile and motorcycle is required to acquire compulsory automobile/motorcycle liability insurance written by insurance companies. In addition, each employer is required to enroll its employees in the National Health Insurance and the Labor Insurance (including Unemployment Insurance) offered by the government and the employer shall pay part of the premiums.

What major insurance/reinsurance legislation is on the horizon?

The main legislation includes Insurance Law and its enforcement rules, the Regulations on the Establishment, License and Supervision of Insurance Enterprise, the Regulations on the Establishment, License and Supervision of Foreign Insurance Enterprise, Regulations Governing Financial and Business Operation of Professional Reinsurance Enterprise, the Regulations on the Qualification Requirements of the Responsible Person of an Insurance Enterprise and the Regulations Governing Capital Adequacy of Insurance Companies.

The *Insurance Law* was amended in February 2015. The main amendments, among others, include the requirement that an insurer shall post the existing contractual terms and conditions for the insurance products sold by it at its own website or the website designated by FSC, and it shall also disclose the designated surcharges, coverage and statutory exclusions for the products and other insurance product information designated by FSC; and the division of the capital adequacy ratio (RBC - not be lower than 200%) of an insurer into the four categories of (1)adequate capital, (2)inadequate capital, (3)significantly inadequate capital, and (4) seriously inadequate capital.

Market Entry

What are the requirements/procedures for setting up a new insurance or reinsurance company?

Any person intending to setting up a new insurance or reinsurance company shall make an application with FSC. The applicant needs to meet the requirements set forth in applicable laws and regulations and made by FSC. After the applicant obtains the approval, it needs to set up and register the company with the Ministry of Economic Affairs ("MOEA"). After the incorporation of the company, the applicant shall then apply for business license from FSC. The applicant also needs to pay deposits as requested by laws (currently 15 percent of its paid in capital) before it can commence its operation.

If the applicant is a foreign person, other than making an application with FSC, it also needs to obtain an approval from the Investment Commission of the MOEA.

The minimum paid in capital for an insurance or reinsurance company is NTD 2 billion. If the applicant is a foreign company and applies to set up a branch in Taiwan, the minimum working capital requirement for the branch is NTD 50 million. In addition, the foreign insurance company needs to meet the requirements set forth in applicable laws (*e.g.* has not been sanctioned by the regulators in its home country in the past three years for material violation of laws).

Is it mandatory that a company be physically present in the market (HQ or branch office) to write insurance/ reinsurance policies?

An insurance company needs to set up a business establishment in Taiwan (subsidiary or branch office) to write insurance policies to local customers. A reinsurance company may write reinsurance policies to local insurance companies even it does not have any business establishment in Taiwan.

Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

A foreign insurer needs to set up either a subsidiary or branch in Taiwan before it can directly write insurance policies to local customers. A foreign reinsurance company may write reinsurance to domestic insurers even it does not have any business establishment in Taiwan.

Is the incorporation of local companies with foreign shareholders permitted?

Yes. The foreign person can own up to 100 percent shares of the local insurance subsidiary it incorporates.

Regulatory

What are the main sources for insurance and reinsurance regulatory law?

The main legislation is the *Insurance Law* and its enforcement rules. FSC is the regulatory body in charge of the amendment and enforcement of that law. Any amendment to that law requires the approval of the Legislative Yuan while the enforcement rules can be amended by FSC itself within the authorization given by *Insurance Law*. The amended enforcement rules, however, shall be sent to the Legislative Yuan for review.

Please describe the current regulatory environment, including pending or anticipated regulatory reform.

Solvency and capital requirements

There is no discussion on the increase of the capital requirements now.

The solvency requirements are mainly based on RBC. FSC from time to time may amend the solvency requirements. The current required ratio is 200 percent or above.

Confidentiality

Personal Data Protection Law has been amended to tighten the collection and use of individuals' personal data and insurance companies are subject to those restrictions and requirements, too. Overall speaking, business communities have considered the amended law is too stringent and make their daily operation impossible (e.g. prohibition of collection an individual's medical records and other sensitive information as defined by law). However, the trend is that companies are required to exercise more care to ensure the confidentiality of the personal data of their customers or the persons they intend to approach.

To reduce the impact of the amended *Personal Data Protection Law*, the *Insurance Law* was amended in 2011 to add a clause which allows insurer to continue to use the personal data it collected prior the amended *Insurance Law* to the extent permitted by laws. This amended clause, however, has not become effective. FSC does not have a schedule in mind for this clause to become effective as there are many privacy and operation issues involved which require further study and consideration by FSC.

Supervision

Insurance companies are highly regulated in Taiwan. In the past, FSC has exercised great control on the entry and exit of an insurance company. Cases occurred that FSC disagreed the exit by local insurance companies set up by foreign shareholders. FSC has a new chairman sworn in on August 1, 2013. The new chairman appears more liberal and has stated that he will not refuse to grant approval for any insurance company which intends to cease

business or for any proposed disposal of investment in an insurance company by its shareholder(s).

Corporate governance

FSC has adopted certain requirements to strengthen the corporate governance of insurance companies. For instance, an insurance company which has publicly issued its shares pursuant to Securities and Exchange Law shall have independent directors in its board (minimum two and shall not be less than 1/5 of the directors) and shall set up audit committee to perform the functions used to be taken by supervisors (except those insurance companies which are 100 percent subsidiary of a financial holding company). In addition, the associations of life and non-life insurance companies have promulgated corporate governance rules, amended from time to time, for insurance enterprises to follow and said rules have been filed with FSC.

Reporting requirements

FSC has urged the insurance companies to improve the transparency of their information and such urge has been reflected in the corporate governance rules mentioned above. For instance, life insurance companies shall disclose information in connection with its financial and business conditions to the public (*e.g.* its financial for past three years and the measures it adopts for corporate governance purpose). Such information shall be made available on the insurance company's website and shall be made available to the public in written form on the business premises of the insurance company.

For the insurance companies which have publicly issued their shares, they are also subject to the various reporting requirements applicable to public companies (*e.g.* file the revenue information periodically). In addition, insurance companies need to report certain prescribed events pursuant to applicable regulations (*e.g.* change of 10 percent or more of the shareholding of the head office of the Taiwan branch of a foreign insurance company occurs or the head office has a major change in its operation policies).

Consumer protection

FSC has requested life insurance companies to provide certain information to the public (see above) as a measure to protect consumers. In addition, the government has established so called Stabilization Fund (insurance companies need to contribute to the Fund pursuant to the requirements of *Insurance Law*) to pay the claims made by the applicant, the insured or the beneficiary in the event the insurance company in question is unable to fulfill its payment obligations. Also, the *Insurance Law* has adopted the policy that in the event the wordings in an insurance contract are ambiguous, the wordings should be interpreted in a way favorable to the insured. This policy is also meant to protect the consumers.

In addition, Article 6 of *Financial Consumer Protection Law* ("*FCP Law*") provides that any agreement which limits or exempts in advance the obligations or liabilities a financial service provider (*e.g.* an insurer) has to a financial customer (*e.g.* an insured) under *FCP Law* shall be invalid.

Furthermore, the sale of insurance products is also subject to the regulation of *Consumer Protection Law*. Certain requirements in that *Law* may be applicable to insurers and their products.

Broker remuneration

Though FSC has not expressly prescribed the percentage of commission which may be paid by insurers to insurance brokers or agents, FSC has rates which it considers reasonable for different category of products in mind. Relevant regulations also provide that insurance brokerage or agency firm shall not use improper means to receive additional compensation or benefits from the applicant or the insured. In addition, they shall not request unreasonable remuneration from insurers or request insurers to enter into transactions not in ordinary course of business with them.

FSC has amended the regulations on supervision of insurance brokers or agents. Under the amendments, insurance brokers or agents shall not receive compensation and expenses not regulated in the contracts they enter into with insurers or enter into any transaction not in the ordinary course of business with insurers. Any violation of that restriction may lead to fine or revocation of license. The reason for such amendments is that some insurance brokers or agents in the past had requested insurers to provide benefits not regulated in the contracts (*e.g.* additional remuneration or gift vouchers or payment under the pretext of training costs) which in essence resulted in insurers paying commission exceeding the rates they had agreed with brokers or agents.

Taiwan

Other

FSC has, from time to time, adopted various measures to regulate the investments made by insurance companies. For instance, local insurers had invested in real estate in anticipation of the future increase of property value and had been accused of boosting up the property price unreasonably. FSC has set restrictions on the investment returns insurers shall derive from the invested real estate to prevent the insurers from speculating on the increase of property value and do not really use the acquired real estate.

In addition, FSC has amended *Insurance Law* to restrict insurers from exercising voting rights associated with the securities of listed companies they purchased, especially when the invested companies are going to elect board directors and/or supervisors. The main reason for the proposed amendment is that the election of directors and/or supervisors often involve the competition of obtaining management control by various major shareholders and insurers shall not get involved in that circumstance.

Claims

What are the main sources for contract law?

The general rules for contract are regulated in Civil Code. However, the *Insurance Law* has specific section regulating insurance contracts. The issues in connection with insurance contracts in principle should be referred to *Insurance Law* first. If an issue is not regulated in *Insurance Law*, provisions in Civil Code should govern.

In general, is the substantive law relating to insurance more favorable to insurers or insureds?

In general, the substantive law like *Insurance Law* is more favorable to the insured. For instance, Article 54 provides that the mandatory requirements set forth in *Insurance Law* shall not be changed through contractual arrangement. However, if the change is to benefit the insured, such change is permissible. In addition, when interpreting an insurance contract, the true intent of the parties shall be looked into and not limited to the literal meanings of the wordings therein. If there is ambiguity in the wordings, the principle is to interpret the contract in a way favorable to the insured.

Another example is that Article 54-1 of *Insurance Law* provides that, among others, a provision in the insurance contract shall be invalid if it either relieves insurer from its obligations under *Insurance Law* or cause the applicant, the beneficiary or the insured to abandon or restrict their rights and such relief, abandonment or restriction is unreasonable based on the circumstance at the time the insurance contract was entered into.

What is the statute of limitations on claims?

Article 65 of *Insurance Law* provides that any right arising out of an insurance contract shall be extinguished if not exercised within two years from the day when it becomes possible to exercise the right.

Can a third party bring direct action against an insurer?

Yes. Article 94 of *Insurance Law* provides that where the insured has been determined liable to compensate a third party for loss, the third party may claim for payment, within the scope of the insured amount and based on the ratio to which the third party is entitled, directly from the insurer.

Can an insured bring a direct action against a reinsurer?

Yes, through contractual arrangement. Article 40 of *Insurance Law* provides that the insured of the original insurance contract has no right to claim payment against a reinsurer. However, this restriction does not apply if the original insurance contract or the reinsurance contract provides otherwise.

Dispute Resolution

Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

Civil courts hear commercial insurance disputes. If the claim amount is NTD 100,000 or less, the courts will adopt procedures for small amount litigation. If the amount involved is NTD 500,000 or less, summary proceedings will apply. Currently, jury system is not available under Taiwan laws.

Other than claiming against insurers in courts, the insured or the beneficiary may request Financial Ombudsman Institution (the "Institution") to adjudicate his/its civil dispute with insurers pursuant to *FCP Law*. Under *FCP Law*, if a financial consumer dispute occurs, a financial consumer (*e.g.* the insured in an insurance contract), other than institutional investors or persons meeting the thresholds prescribed by laws, shall first file a complaint to the relevant financial service provider (*e.g.* insurer), which has 30 days to resolve the dispute. If the insurer fails to handle this dispute within 30 days or if the proposed resolution is not accepted by the insured, the insured may within 60 days file an application with the Institution for its review of the dispute.

Each party may inform the Institution in writing of his/its acceptance of or objection to the review decision made by the Institution. If an insurer has agreed in a prior written document that the resolution procedure under *FCP Law* shall apply to its disputes with the insured, or has indicated its willingness to adopt the said procedure in the insurance contracts or any other documents, the insurer shall accept every review decision made by the Institution to the extent that the amount to be paid by the insurer does not exceed a certain threshold (the current amount for insurance products is NTD 1 million).

What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of a) parties to the action and b) non-parties to the action?

Article 269 of *Civil Procedures Law* provides that:

The court may, prior to the oral argument, take the following measures it considers necessary to do so in order to expedite the closing of oral argument:

1. to order the parties or their statutory agents to appear in person;
2. to order the parties to produce documents and objects;
3. to notify witnesses or expert witnesses, and to send for documents or objects, or order a third person to produce documents or objects;
4. to conduct inspections, or order expert testimony, or request an agency or organization to conduct an investigation; or
5. to require a commissioned judge or an assigned judge to investigate evidence.

Article 286 of the same law provides that the court shall investigate evidence introduced by the parties, except for evidence which is considered by the court to be unnecessary.

Article 288 of the same law provides that when the court cannot obtain conviction from the evidence introduced by the parties, the court may investigate evidence on its own initiative if doing so is necessary to find the truth. When the court investigates evidence in accordance with this article, the parties shall be accorded an opportunity to be heard.

Are mediation and arbitration common methods for solving insurance disputes? Are more disputes resolved in or out of court?

Mediation and arbitration are not common methods for solving insurance disputes in Taiwan. Disputes involving companies as insured tend to be resolved in courts while quite a number of disputes involving individuals as insured have been resolved through the Institution pursuant to *FCP Law*. Based on recent statistics, around 80 percent of the reviewed cases decided by the Institution related to insurance disputes.

What are the provisions regarding timely notice, and what are the legal consequences for non-compliance with the timely notice obligation?

Following are some of the provisions of *Insurance Law* touching upon the obligations of giving notice:

Article 57 Except when due to a force majeure event, the failure of a party to an insurance contract to provide a required notification of any matter to another party, whether intentional or unintentional, may be cause for rescission of the contract by the other party.

Article 58 When an applicant, insured, or beneficiary experiences an event for which the insurer bears insurance liability, such party shall notify the insurer within five days from becoming aware of the occurrence of such event, except where otherwise provided in the *Insurance Law* or stipulated in the insurance contract.

Article 59 An applicant required to serve notice of circumstances that increase risk as stated in the insurance contract shall notify the insurer upon becoming aware of the circumstances.

If the increase in risk is caused by an act of the applicant or the insured, and the risk is increased to the extent that the premium should be increased or the contract terminated, the applicant or the insured shall serve prior notice to the insurer.

If the increase in risk is not caused by an act of the applicant or the insured, the applicant or the insured shall notify the insurer within 10 days of becoming aware of the increase in risk.

When risk is diminished, the insured may request the insurer to adjust the premium.

Article 61 The provision of Article 59 does not apply to an increase in risk under any of the following circumstances:

1. Where the occurrence of damage does not affect the burden of the insurer.
2. Where the act is done to protect the interests of the insurer.
3. Where the act is done to fulfill a moral obligation.

Article 63 An applicant or an insured who fails to serve notice within the time limit stated in Article 58 or paragraph 3 of Article 59 shall be liable for loss sustained by the insurer as a result.

What are the laws regarding bad faith claims? What damages may be awarded if the insurer is found to have acted in bad faith?

Depending on the circumstances involved in the case, the bad faith conducts or claims of the insured or the beneficiary may result in the insurance contract becoming invalid or the beneficiary's forfeiture of his/her right to receive payment from the insurer.

For instance, Articles 36 and 37 of *Insurance Law* provide that an applicant shall, unless otherwise stipulated, notify each insurer of the names of the other insurers and the amounts insured thereby in the event of double insurance. If the applicant intentionally fails to make the required notification, or obtains double insurance with the intent to acquire undue profit, the contract shall be void.

Another example is that Article 51 of *Insurance Law* provides that, if at the time the insurance contract is entered into, the insured knows that the risk has occurred or diminished and the insurer does not know that, the insurer is not bound by the insurance contract.

Article 64 of *Insurance Law* provides that at the time an insurance contract is entered into, the applicant shall make truthful representations in response to the written inquiries of the insurer.

If the applicant has made any willful concealment, nondisclosure through his/its own fault, or misrepresentation, and such concealment, nondisclosure, or misrepresentation is sufficient to alter or diminish the insurer's estimation of the risk to be undertaken, the insurer may rescind the contract; the same shall apply after the risk has occurred, provided that this provision does not apply where the applicant proves that the occurrence of the risk was not based upon any fact that he/it did or did not represent.

Article 121 of *Insurance Law* provides that a beneficiary who willfully causes the death of the insured, or attempts unsuccessfully to do so, shall lose the right to receive benefits.

In addition, depending on the measures adopted by the policyholder to claim payment from insurer, the policyholder may be found in violation of *Criminal Code* (*e.g.* fraud or forgery).

In the event an insurer acts in bad faith and fails to comply with its contractual obligations, the policyholder may claim against the insurer for the damage it/he suffers. If the court finds favorable for the policyholder, it will often award an amount to compensate the damage suffered by the policyholder. However, as insurance products are also subject to *Consumer Protection Law*, theoretically if the insurer acts in bad faith, the policyholder may claim for punitive damages up to three times the amount of actual damages caused by the willful misconduct of the insurer. In practice, the claim and award of punitive damage in insurance dispute are rare.

Taiwan

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Overview

Which government bodies/agencies regulate insurance and reinsurance companies?

Insurance business in Thailand is regulated by the Office of the Insurance Commission (OIC), which was established in 2007 by the *Insurance Commission Act* BE 2550, replacing the Department of Insurance. At the same time, ultimate responsibility for supervision of the insurance business transferred from the Ministry of Commerce to the Ministry of Finance. The OIC regulates all aspects of both life and non-life insurance, and is administered by a board of directors, which includes the permanent secretaries of the ministries of finance and commerce, the secretary-general of the Consumer Protection Board, the governor of the Bank of Thailand, the secretary-general of the Securities and Exchange Commission, and the secretary general of the OIC.

What are the categories of insurance licenses that exist?

Separate licenses are required to transact life and non-life business (defined as 'entering into a (Non)-Life Insurance contract with any person'), and composite licenses are not awarded. Any person carrying on an insurance business without a license is subject to imprisonment for a term of two to five years, and a fine of up to THB 500,000 plus an additional fine of up to THB 20,000 for each day during which the violation continues. Companies with a life or non-life license can accept reinsurance business according to their license.

What are the approved distribution channels? Are there restrictions?

Insurance contracts may be concluded directly by an insurance company, by an agent, or by a broker. Agents are required to be licensed individuals who act on behalf of one company only. Brokers may be individuals or juristic persons (companies.) No person may hold both agents and brokers licenses, and a broker may not be a director, officer or employee of an insurance company. The OIC prescribes conditions and qualifications for agents and brokers licenses.

Bancassurance is also an approved and rapidly growing distribution method in Thailand.

Are there any forms of compulsory insurance?

Compulsory insurance in Thailand is minimal. However, compulsory third-party motor insurance was introduced through the *Motor Accident Victims Protection Act* B.E. 2535 (A.D. 1992).

Market Entry

What are the requirements/procedures for setting up a new insurance or reinsurance company?

Since 2008, amendments to the *Life Insurance Act* 1992 and the *Non-Life Insurance Act* 1992 have stipulated that life and non-life insurance business may only be undertaken by a public limited company under the relevant public companies legislation, or a branch office of a foreign insurer (in both cases, subject to a license being granted to operate from the Ministry of Finance, with approval of the cabinet). Transitional arrangements were granted to private companies already registered and licensed until February 2013, from which date any non-compliant insurer may continue to operate for a further three years, but may not issue new policies. Failure to convert to a public company by February 2016 will lead to a loss of license. An application for a license to engage in the insurance business must be lodged by the company promoters with the minister of finance. Upon approval being granted by the minister, the promoters are required to incorporate a public limited company (or in the case of a foreign insurer, establish a branch office), lodge a security deposit and maintain an adequate capital fund within six months of incorporation. Upon satisfying the necessary conditions, a license will be issued. If the company is unable to satisfy the capital and deposit requirements within six months of incorporation, the approval is deemed to be withdrawn. Fees are payable for the application and annual renewal of licenses. The Thai insurance market is crowded, and in 2012 the government announced that no new licenses would be issued to foreign investors for at least five years.

Thailand

Is it mandatory that a company be physically present in the market (HQ or branch office) to write insurance/ reinsurance policies?

As described above, direct insurance may only be written by public limited companies in Thailand. A company not physically present in Thailand would not therefore be eligible to apply for a license to undertake insurance business, and would not be entitled to issue local policies. There is no law to prevent policyholders in Thailand from purchasing insurance policies from overseas insurers, but any such policy would be unlikely to be enforceable in Thailand.

Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

As described above, foreign insurers can only write direct business in Thailand via an interest in a local public limited company. Overseas reinsurers without an interest in a local entity must therefore participate by writing reinsurance of domestic insurers. Overseas reinsurers are not required to be licensed in Thailand, nor do they have to put up deposits. Every insurance company is, however, required to submit copies of their reinsurance treaties to the OIC within 30 days of the signing or renewal date and must report on their treaties on an annual basis.

Is the incorporation of local companies with foreign shareholders permitted?

At least 75 percent of the voting shares of an insurance company must be held by:

- Thai individuals or Thai non-registered partnerships, in which all partners are Thai nationals; or (in addition)
- any entity registered in Thailand in respect of which more than 50 percent of the voting shares are held by persons falling within the first point above, or by a parent company fulfilling the same conditions.

The OIC has the power to permit up to 49 percent foreign ownership, and beyond that the minister of finance has discretion to allow foreign ownership of greater than 49 per cent in certain circumstances. Since the significant losses suffered by the local market arising out of the 2011 floods, the OIC has stated an intention to encourage greater foreign investment.

Regulatory

What are the main sources for insurance and reinsurance regulatory law?

Insurance is governed by various sections of the *Thai Civil and Commercial Code*, the *Non-Life Insurance Act* B.E.2535 (1992) (as amended), and the *Life Insurance Act* B.E.2535 (1992) (as amended). Pursuant to the two *Act*s, the OIC and Minister of Finance issue various Notifications, Declarations and Regulations.

Please describe the current regulatory environment, including pending or anticipated regulatory reform.

Solvency and capital requirements

Solvency and capital requirements have been a major focus of the regulator in recent years. The *Non-Life Insurance Act* No.2 2008 and its Life equivalent introduced a risk based capital regime for the first time, replacing the previous fixed minimum paid-up capital requirements of THB 500 million (life) and THB 300 million (non-life). The RBC regime relates capital requirements and solvency margins to risk. RBC has been fully implemented by the OIC since 1 September 2011, with an initial capital adequacy ratio of 125 percent, increasing to 140 percent from 1 January 2013 and 150 to percent from 1 January 2014.

Confidentiality

There are no specific legal or regulatory requirements pertaining to confidentiality in insurance contracts. Thailand does not yet have a data protection regime, although a draft *Personal Information Protection Act* has been under consideration for some time. Confidentiality is governed by provisions contained within the *2007 Constitution*, the *Penal Code*, and the *Civil and Commercial Code*.

Supervision

Insurance business is relatively closely supervised by the OIC in Thailand. Aside from the strict statutory licensing and corporate requirements, all policy wordings and premium rates in Thailand are subject to review and approval by the OIC before they may be used. The OIC also prescribes conditions for investment of funds by insurance companies.

Thailand

Corporate governance

As insurers in Thailand are required by law to be public limited companies, they are subject to the corporate governance requirements set down in the *Public Limited Companies Act*, and are supervised by the Department of Business Development as well as the OIC.

Reporting requirements

The OIC continually issues updated requirements as to a wide variety of annual reporting requirements, which now cover the new RBC requirements, and a new regime of stress testing to demonstrate the financial health of the insurance company.

Consumer protection

Consumer protection, whilst not traditionally a high priority in Thailand, was significantly boosted by the introduction of the *Consumer Case Procedure Act* in 2008, which aimed to enable consumers (including insurance policyholders) easier and cheaper access to justice. The OIC's

Broker remuneration

The OIC prescribes maximum rates of commission that may be paid by insurance companies to brokers in various classes of business.

Claims

What are the main sources for contract law?

Contract law is governed by the *Thai Civil and Commercial Code*, as well as by certain statutory provisions including the *Consumer Case Procedure Act*.

In general, is the substantive law relating to insurance more favorable to insurers or insureds?

As a starting point, the provisions of the *Civil and Commercial Code* pertaining to contracts generally and to insurance contracts specifically, are generally neutral and reflect the principle of freedom of contract. The rights of the insurer to void a contract in the case of non-disclosure of material facts are balanced by a requirement that the right of avoidance be exercised within one month from the time when the insurer has knowledge of the ground of avoidance.

However, the *Consumer Case Procedure Act* contains certain provisions that favor insureds, including the ability to claim punitive damages, greater discretion to imply certain terms into the contract, waiver of court fees, and the suspension of limitation periods where negotiation is ongoing. Insurance contracts are generally deemed by the Thai courts to be consumer contracts, even where the policyholder is a corporate entity, and insurance disputes therefore fall within the ambit of the *Act*. Reinsurance disputes are not however generally regarded as consumer disputes.

What is the statute of limitations on claims?

Section 882 of the *Thai Civil and Commercial Code* imposes a two year prescription period on insurance claims, which starts to run from the date of loss. The prescription period may be 'interrupted' under certain circumstances, including where the insurer has acknowledged (i.e. admitted) the claim, made partial payments, or in the case of consumer contracts, where negotiation is ongoing. Otherwise the claim will be time-barred after expiry of the two year period unless court proceedings or arbitration proceedings are initiated.

Problematically, Supreme Court decisions in Thailand have also applied the same two year limitation period to reinsurance claims, meaning that an insurer's right to claim from its reinsurer under facultative or treaty reinsurance contracts could be extinguished before claims have been finalized and settled under the underlying contract.

Thai law prohibits any agreement to extend or waive the two year prescription period, so insureds and insurers looking to preserve their rights of recovery must seek to rely on one of the methods of interruption described above.

Can a third party bring direct action against an insurer?

There is no statutory or other legal right for a third party to bring an action against an insurer in Thailand, unless the third party can establish that it was intended that they should be a beneficiary under the insurance policy.

Thailand

Can an insured bring a direct action against a reinsurer?

There is no statutory right for a third party to bring an action directly against a reinsurer for coverage, but cut-through clauses are sometimes used in reinsurance agreements and reflect in the underlying direct policy. The enforceability of the clause will depend on compliance with a number of conditions required under the *Civil and Commercial Code* for third-party contract rights.

Even in the absence of such a cut-through clause, the Thai courts have on occasion been willing to allow reinsurers to be joined to existing proceedings between insured and insurer, and to grant an award payable directly by the reinsurer to the underlying insured.

Dispute Resolution

Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

Commercial insurance disputes are brought in the Thai civil courts, even if allocated as consumer claims under the *Consumer Case Procedure Act*. All cases in Thailand are heard before a panel of judges, and there is no right to trial by jury.

What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of a) parties to the action and b) non-parties to the action?

Thailand has no disclosure or discovery process by which the parties to a dispute are automatically required to disclose documents in their possession to the court or to the other parties to the dispute. Each party is merely required to submit a list and copies of documents on which they intend to rely to the court and to the other party(ies) seven days before the commencement of the presentation of their witnesses. Under the Civil Procedure Code, the court has broad discretion to subpoena witnesses and documents both from parties and non-parties.

Are mediation and arbitration common methods for solving insurance disputes? Are more disputes resolved in or out of court?

All cases brought in the civil courts will be referred in the first instance to the court-supervised mediation process. There is no obligation on the parties to mediate, but if the parties agree, the court will schedule a series of mediation hearings before standard proceedings commence. In cases where proceedings initiated for protective purposes before expiry of the two year prescription period, it is common for cases to settle by mediation or negotiation at an early stage. However, in cases where there are genuine issues in dispute, a first instance decision can generally be obtained within around two months from commencement of proceedings in Thailand, and adverse costs awards are not high enough to constitute a significant disincentive to litigate other than in low-value disputes.

Arbitration is also common, and the OIC provides a mandatory clause to be included in all insurance contracts, which provides that the insured shall have the right to refer any dispute to the OIC's own arbitration process. The OIC arbitration process is generally used as a low-cost and less formal method of resolving consumer claims, whilst commercial claims are more likely to proceed in the courts or by referral to another arbitral institute.

What are the provisions regarding timely notice, and what are the legal consequences for non-compliance with the timely notice obligation?

The *Civil and Commercial Code* provides that the insured must give notice of any loss to the insurer 'without delay' after having knowledge of the loss. If the insured fails to meet this requirement, the insurer can claim compensation for any damage suffered thereby, unless the insured can prove that it was impracticable to comply with the notice requirement.

Thailand

What are the laws regarding bad faith claims? What damages may be awarded if the insurer is found to have acted in bad faith?

Any insurer who delays or refuses to make payment under a policy in bad faith is liable to a statutory fine of up to THB 500,000.

Bad faith claims under insurance contracts are also governed by the *Consumer Case Procedure Act*. Prior to enactment of the *Act* in 2008, the only damages awardable by the courts were compensatory damages in respect of actual losses suffered, which in the context of insurance claims meant the amount that should have been paid under the insurance contract, together with any additional costs incurred because of the insurer's failure to pay. The *Consumer Case Procedure Act* granted the Thai courts the ability to award punitive damages for the first time, where the insurer can be shown to have acted willfully to take advantage of the consumer, with gross negligence, with indifference to the damage caused, or in breach of professional responsibility. Punitive damages may be awarded at up to double the amount of actual damages (or five times in cases valued at below THB 50,000).

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Overview

Which government bodies/agencies regulate insurance and reinsurance companies?

In Belgium, since 1 April 2011, the Financial Services and Markets Authority (FSMA) and the National Bank of Belgium (NBB) have been entrusted with the supervision of insurance and reinsurance companies, following the so-called "twin peaks" model, in order to reinforce the integration of micro- and macroprudential supervision with a particular attention for systemic risk.

- The NBB is responsible for the maintaining of the macro and microeconomic stability of the financial system. In addition to macroprudential supervision, the NBB is also entrusted with the individual prudential supervision of the financial market players who are allowed to hold client moneys (microprudential supervision). The NBB supervises the financial solidity of the financial institutions and checks their solvency, liquidity and profitability.
- The FSMA (previously CBFA), maintains its traditional task of supervising the correct functioning, transparency and integrity of the financial markets, as well as keeping the illicit offering of financial products and services in check. The FSMA also monitors adherence to the conduct-of-business rules, which require financial intermediaries to ensure a loyal, fair and professional commitment to their clients' interests.

What are the categories of insurance licenses that exist?

Belgian insurance companies are required to obtain a license from the NBB (Article 2bis of the *Act of 9 July 1975* on the supervision of insurance companies). The license is granted to insurance companies that comply with the conditions laid down in the *Act of 9 July 1975* and its implementation decrees. The license is granted for one or more insurance branches or insurance groups (Article 4 of the *Act of 9 July 1975*). The insurance branches and groups of branches are listed in annex I and II of the *Royal Decree of 22 February 1991* containing general rules on the supervision of insurance companies.

Belgian reinsurance companies are also required to obtain a license from the NBB (Article 5 of the *Act of 16 February 2009* on reinsurance activities). Licenses are granted for life reinsurance or non life reinsurance or for both. Licenses are granted on the basis of a plan of operations drafted by the candidate and subject to adherence to the conditions laid down in the *Act of 16 February 2009* and its implementation decrees. The *Act of 16 February 2009* only applies to companies that exclusively perform reinsurance activities (Article 4,1°). Companies performing both reinsurance and insurance activities fall under the licensing system provided under the *Act of 9 July 1975*.

Belgian (re)insurance intermediaries have to be registered as such with the FSMA under one of three categories: insurance brokers, insurance agents or insurance subagents (Article 262 of the *Act of 4 April 2014* on insurance). The agent linked to an insurance company has an additional obligation of notification towards the FSMA (Article 264 of the *Act of 4 April 2014*). To be registered, insurance intermediaries have to meet specific criteria and comply with training obligations. There are no different levels of licensing for different types of products but there are different types of training depending on the insurance products.

Are insurance companies subject to taxes beyond the ordinary burden faced by all companies?

Insurance companies are subject to an annual tax on insurance premium (commercial premium). Annual premium tax must be paid by all insurers with their principal establishment, agency, branch or representative in Belgium.

Various contracts are exempted from this tax, such as credit insurance contracts against commercial risks and/or country risks, contracts for reinsurance, etc. The normal rate is 9.25 percent, but lower rates of 4.40 percent, 2.00 percent, 1.40 percent may apply.

Insurance companies also have to pay parafiscal taxes calculated on the commercial premium to the National institute for health/disability, the Belgian red cross and the security fund for fire and explosion (rates vary between 0,35% and 10% according to the type of insurance).

Please note that insurance and reinsurance operations (except for some services supplied for instance by damage experts) are VAT exempt in Belgium.

Belgium

What are the approved distribution channels? Are there restrictions?

In Belgium, the channels for the distribution of insurance products can basically be divided in two categories: indirect insurance or direct insurance.

The traditional channel is indirect insurance, which means that insurance products are distributed through insurance intermediaries such as insurance brokers or insurance agents. Insurance intermediation is defined as activities of advising on insurance contracts, proposing or carrying out other work preparatory to the conclusion of insurance contracts, or of concluding such contracts, or of assisting in the management and performance of such contracts (Article 5, 46° of the *Act of 4 April 2014*). As already explained, the carrying out of insurance intermediation activities requires a license from the FSMA (save for the exceptions set out in Article 258 of the *Act of 4 April 2014*).

Over the past years direct insurance has become more and more significant. Direct insurance means that the insurance products are offered by the insurance company without intervention of an insurance intermediary. An important channel for direct insurance is distance selling (written correspondence, internet, telephone). It should be noted that in case of direct insurance, the insurance company is subject to several obligations imposed upon insurance intermediaries by the *Act of 4 April 2014* (notably training obligations and information duties).

Are there any forms of compulsory insurance?

Belgian law provides for several forms of compulsory insurance. Examples include[1]:

- Work accident insurance
- Motor vehicle liability insurance
- Insurance covering liability without fault in case of explosion or fire in certain places that are open to the public

However, most types of insurance remain optional, although Belgian insurance law may provide minimum insurance conditions for several kinds of insurance.

Examples of (non-compulsory) forms of insurance for which minimum insurance conditions were laid down include:

- Personal liability insurance
- Fire insurance
- Legal protection insurance
- Life insurance

What major insurance/reinsurance legislation is on the horizon?

Over the past year, several major legal changes have taken place in the insurance sector.

First of all, the insurance sector was "MiFIDized" by the *Acts of 30 and 31 July 2013* and implementation decrees of 21 February 2014. Insurance companies and their intermediaries are required to comply with the MiFID rules of conduct. This implies that as a general rule all providers of insurance products should act honestly, fairly and professionally in the best interests of their customers.

Secondly, Belgian insurance law was (partially) codified by the *Act of 4 April 2014* on insurance. As such, the *Act of 4 April 2014* groups the *Act of 25 June 1992* on insurance contracts, the *Act of 27 March 1995* on insurance intermediation and various provisions of the *Act of 9 July 1975* on the supervision of insurance companies. The act also implements into Belgian law the provisions of the *Solvency II Directive*, which are consumer-oriented, and aims to clarify the division of competences between the NBB and the FSMA. Finally, the *Act* provides new provisions aiming at increasing the transparency of life insurance products.

Furthermore, a Royal Decree adopted on 25 April 2014, at this stage only partially inforce, will require insurance companies to provide to a non-professional client, before the conclusion of an insurance contract, a financial information sheet containing the main characteristics of the product. The *Royal Decree* also lays down several new obligations regarding the advertising of insurance products.

In the coming years, changes in Belgian insurance law are expected in the light of the implementation of the *Directive on Markets in Financial Instruments (Directive 2014/65/EU)*, the Solvency II Directive (Directive 2009/138/EC), the Insurance distribution directive (directive 2016/97/EU), Regulation (EU) n°1286/2104 on key information for PRIIPs).

[1] For a an extensive (though non limitative) list of forms of compulsory insurance under Belgian law, please follow this link: *http://www.fsma.be*

Belgium

Market Entry

What are the requirements/procedures for setting up a new insurance or reinsurance company?

Under Belgian law, the main conditions and rules for setting up an insurance company are laid down in the *Act of 9 July 1975* on the supervision of insurance companies and its implementation decrees (in particular the *Royal Decree of 22 February 1991* containing general rules on the supervision of insurance companies).

As explained previously, Belgian insurance companies are required to obtain a license from the NBB. Such license is granted subject to compliance with a number of conditions regarding e.g. the management of the company, the identity of the shareholders, the ties between the insurance company and other physical persons or legal entities and the technical and financial means for the plan of operations of the company (Article 8 of the *Act of 9 July 1975*).

Insurance companies are to be set up in the form of a company limited by shares, a cooperative company or a mutual insurance company. Insurance companies should also be able to meet financial guarantees (regarding solvency margin, guarantee fund, technical reserves – Article 15 of the *Act of 9 July 1975*).

As regards reinsurance companies (which do not perform insurance activities and consequently do not fall within the scope of the *Act of 9 July 1975*), the main conditions and rules for setting up such a company are laid down in the *Act of 16 February 2009* on reinsurance activities. Since the entry into force of this act, reinsurance companies are now also subject to extensive supervision. Reinsurance companies are required to obtain a license from the NBB, which is granted on the basis of a number of factors relating among other things to the form of the company, financial guarantees (a minimum guarantee fund), the management of the company and its shareholders (Articles 13-19 of the *Act of 16 February 2009*).

Is it mandatory that a company be physically present in the market (HQ or branch office) to write insurance/ reinsurance policies?

A distinction should be made between foreign companies established in the EEA and foreign companies established outside the EEA (Solvency II Directive – 2009/138/EC).

Companies established in the EEA are allowed to operate on the Belgian territory by establishing a branch (freedom of establishment) and/or by selling services directly into Belgium (freedom of services). Such companies may carry out the insurance activities for which they obtained a license in their country of origin, without needing to obtain an additional license from the Belgian supervision authorities but with prior notification of their intention to "passport" in Belgium (Article 64 of the *Act of 9 July 1975*).

No physical presence of the company is required if the company operates under the free movement of services. However, the company will have to appoint a fiscal representative in Belgium who deals with the payment of the taxes on insurance premiums (Article 178 of the Code of miscellaneous duties and taxes) . If the company intends to offer motor vehicle liability insurance or work accident insurance, a representative will also have to be appointed for claims management. (Article 68, § 1, 4° and 5° of the *Act of 9 July 1975*).

Insurance and Reinsurance intermediaries enjoy comparable EU passport rights on to the Belgian market pursuant to the Insurance distribution Directive.

Companies established outside the EEA are only allowed to operate on the Belgian territory after having obtained a license from the NBB (Article 3,§ 1 of the *Act of 9 July 1975*). The company should provide proof of the fact that it obtained a license in its home country to perform the same insurance activities the company intends to perform in Belgium (Article 5,4° of the *Act of 9 July 1975*) and provide the same minimum guarantees regarding the Articles of association, technical organization and financial means as Belgian insurance companies (Article 12, § 1 of the *Act of 9 July 1975*). The company should also appoint a general representative with residence in Belgium who has the authority to commit the company towards third parties and to represent the company before the Belgian authorities and courts.

If the representative is a legal entity, then this entity should appoint a physical person who meets the above criteria (Article 12, §3 of the *Act of 9 July 1975*). The NBB may refuse to grant a license to a foreign company if the company's home country refuses an equal treatment of Belgian companies (Article 13 of the *Act of 9 July 1975*).

Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Foreign insurance companies are allowed to write insurance business directly on the Belgian territory, provided that they have obtained the required license either from the Belgian supervision authorities (foreign companies established outside the EEA) or from their home country supervision authorities (foreign companies established in the EEA), as explained above.

Is the incorporation of local companies with foreign shareholders permitted?

Under Belgian law, there is no prohibition for local insurance companies to have foreign shareholders. However, the NBB has the authority to verify the identity and the suitability of all shareholders with a qualifying holding in light of the necessity of ensuring a healthy and prudent management of the company.

As a consequence, a license can only be granted to a Belgian insurance company if the NBB considers that its shareholders with a qualifying holding meet the suitability requirement (Article 8, § 1 of the *Act of 9 July 1975*). Also, if a company (or a natural person) intends to acquire or increase a qualifying holding in a Belgian insurance company, it should inform the NBB thereof. A qualifying holding is defined by the *Act of 9 July 1975* as a direct or indirect holding in an undertaking which represents 10% or more of the capital or of the voting rights attaching to the securities issued by that company or which makes it possible to exercise a significant influence over the management of the undertaking in which a holding subsists.

The NBB is entitled to object to such increase or acquisition (within a certain period) if it considers that the candidate does not meet the suitability requirement. The NBB takes into account factors such as the candidate's reputation and financial solidity and the reliability and expertise of the persons who will in practice be in charge of the management of the insurance company as a consequence of the transaction (Article 23bis of the *Act of 9 July 1975*). The NBB has the same supervision powers on reinsurance companies that fall within the scope of the *Act of 16 February 2009* (Article 16 and 24).

Regulatory

What are the main sources for insurance and reinsurance regulatory law?

The main sources for insurance and reinsurance regulatory law are the following (non-exhaustive list):

- The *Act of 9 July 1975* on the supervision of insurance companies;
- The *Royal Decree of 22 February 1991* containing general rules on the supervision of insurance companies;
- The *Act of 16 February 2009* on reinsurance activities;
- The Act of 4 April 2014 regarding insurance;
- The Act of 2 August 2002 on the supervision of the financial sector and on financial services and its implementation decrees; and
- The Act of 11 January 1993 on preventing use of the financial system for purposes of laundering money and terrorism financing.

Please describe the current regulatory environment, including pending or anticipated regulatory reform.

Solvency and capital requirements

As regards the solvency margin, guarantee fund, technical reserves, the requirements are laid down in Articles 15 to 18 of the *Act of 9 July 1975*. The guarantee fund has to be equal to a third of the solvency margin.

In accordance with Article 15 of the *Act of 16 February 2009*, reinsurance companies are required to possess a guarantee fund of minimum EUR 3,000,000 indexed annually (less for captives). They also have to set up an adequate solvency margin, having regard to their activities (Article 22 of the *Act of 16 February 2009*).

Solvency II Directive (2009/138/EC) will introduce EU harmonized insurance regulatory regime. It revises solvency requirements and methods of supervision.

Belgium

Confidentiality

Under the influence of European law, data protection is highly developed in Belgium. The central piece of legislation is the *Act of 8 December 1992* on data protection, which was modified following the adoption of the Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and the free movement of such data. Pursuant to Article 5 of the *Act of 8 December 1992*, a person's personal data may only be processed if the person gave his express consent or if the processing is considered necessary under the *Act of 8 December 1992* (e.g. for the performance of a contract between the data controller and the person in question or for compliance with a statutory obligation). The processing of data regarding health is subject to additional restrictions.

The processing of personal data is a fundamental element in the insurance sector and occurs not only at the time of the conclusion of the contract, but also in the course of the contract or in case of a claim. To allow information transfers between Belgian insurers with a view to enabling them to decide on the acceptance of risks in an informed way, the insurance industry created an economic interest group, Datassur, which holds a number of databases in which personal data of policyholders and insured persons are collected (for example in case of termination of an insurance contract for non-payment of the insurance premium or in case of insurance fraud).

It may also be noted that the *Act of 4 April 2014* on insurance contains provisions on the type of information that may be obtained from an insured person for the conclusion and performance of an insurance contract and on how such information should be processed by the insurance company (Article 61).

Supervision

The supervision of the insurance sector is now conducted through a dual system, the so-called "Twin Peaks" system. On the one hand, the National Bank of Belgium (NBB) supervises the macro- and microeconomic stability of the financial system. On the other hand, the Financial Services and Markets Authority (FSMA) supervises the markets, compliance by insurers and intermediaries of business conduct rules and consumer protection.

The *Act of 30 July 2013* was approved and published, with the aim of enhancing the legislative framework, rapidly increasing the efficiency of the supervision and allowing better protection of the consumers' financial products.

The *Act of 30 July 2013* significantly enhances the FSMA's powers to supervise compliance by insurance companies and insurance intermediaries with the MiFID rules, by means such as the technique of 'mystery shopping' and permanent access to the client area of the companies' website.

Corporate governance

A specific circular of the NBB (2013_20) applies to insurance and reinsurance companies and implements some of the provisions (articles 40 to 50) of the *Solvency II Directive* (2009/138/EC) (adequate transparent organizational structure with a clear allocation and appropriate segregation of responsibilities and an effective system for ensuring the transmission of information) (*http://www.nbb.be*).

In accordance with Article 14bis§ 3 of the *Act of 9 July 1975* and Article 18 § 3 of the *Act of 16 February 2009*, insurance and reinsurance companies are required to permanently have an appropriate, independent 'compliance function' (i.e. a compliance officer or body) at their disposal. The compliance function is tasked with the supervision of compliance with the legal and/or regulatory integrity rules and codes of conduct that are applicable to the companies. The compliance function is responsible for identifying and assessing the compliance risk and sees to the supervision, testing and drawing up of recommendations and to the reporting on the compliance risk run by the company.

Furthermore, the compliance function gives advice on and participates in drafting guidelines regarding compliance with regulations (see the circular of the NBB (2014_14) on compliance function: *http://www.nbb.be*).

Reporting requirements

There are important reporting requirements for insurance companies under Belgian law, and they are laid down in the *Act of 9 July 1975* (especially Articles 22 through 23bis). Amongst other things, insurance companies have to periodically inform the NBB of their financial situation. All changes to the financial or administrative organization of the company have also to be communicated to the NBB within a short time frame.

Similar reporting obligations are also imposed upon reinsurance companies and are laid down in the *Act of 16 February 2009* (especially Article 26, 29, 37 and 38).

Furthermore, Article 286 of the *Act of 4 April 2014* entitles the FSMA to list all the information that has to be reported by insurance and reinsurance companies or intermediaries to enable it to verify compliance with the legal and regulatory provisions applicable to insurance and reinsurance companies.

The practical details of the reporting requirements are laid down in circulars and communications of the NBB and FSMA and tend to implement some of the requirements imposed under the Solvency II Directive (article 51 to 55) as regards the report on solvency and financial conditions.

Consumer protection

As mentioned previously, insurance companies and insurance intermediaries have to comply with MiFID conduct-of-business rules, which impose an obligation to (i) act honestly, fairly, and professionally in the best interests of their clients and (ii) provide their clients with information that is correct, clear and not misleading.

Additional conduct-of-business rules also apply to insurance companies and insurance intermediaries, including an obligation to promote transparency regarding the remuneration and costs associated with products ('inducements'), an obligation to recommend to the (potential) client a suitable product taking into account his knowledge and experience in the investment field, his financial situation and his investment objectives, as well as the obligation to warn the (potential) client if the product is not appropriate, taking into account his knowledge and experience ('appropriateness'). All those obligations aim to protect the best interests of the policyholder.

Furthermore, when the main provisions of the *Royal Decree of 25 April 2014* will enter into force, this Decree will require insurance companies to provide to a non-professional client, before the conclusion of an insurance contract, a financial information sheet containing the principal characteristics of the product. The *Royal Decree* also lays down several new obligations regarding the advertising of insurance products.

Finally, Book VI of the *Economic Law Code* regarding Market Practices and Consumer Protection contains obligations to which insurers are subject, notably rules on unfair commercial practices that are based on EU law.

Broker remuneration

In 2014, the application of the MiFID conduct-of-business rules was extended to all insurance companies and insurance intermediaries.

In accordance with Article 7 of the *Royal Decree of 21 February 2014* on conduct-of-business rules and the managing of conflicts of interest, only three types of remuneration can be paid to insurance intermediaries for their insurance distribution services:

- A fee, commission or non-monetary benefit paid to, or provided by, the customer or a person acting on behalf of the customer client (Article 7(a) of the *Royal Decree of 21 February 2014*);
- A fee, commission or non-monetary benefit paid to, or provided by, a third party or a person acting on behalf of a third party when the following conditions are fulfilled:
    - Prior to the provision of the insurance mediation service, the customer is notified of the existence, nature and amount of the fee, commission or non-monetary benefit, or, if the amount cannot be ascertained, the method by which the amount will be calculated; and,
    - The payment of the fee, commission or non-monetary benefit benefits the quality of the service provided to the customer and does not affect the obligation of the insurance intermediary to act in the best interests of the customer (Article 7(b) of the *Royal Decree of 21 February 2014*);
- Proper fees which enable the provision of insurance mediation services or are necessary, e.g., legal costs, taxes, and that do not conflict with the insurance intermediary's duty to act honestly, fairly and professionally (Article 7(c) of the *Royal Decree of 21 February 2014*);

As a consequence, the remuneration which can be awarded to insurance brokers is now strictly controlled.

For more information on broker remuneration, see the circular of the FSMA of 16 April 2014 and its amendments (01.09.2015) *http://www.fsma.be*

The Insurance Distribution Directive (IDD - 2016/97/UE) to be transposed in Belgium for 23 February 2018 extends its scope to insurance companies selling

directly to their customers. It introduces stricter rules on conflict of interests, remuneration and information for packaged retail investments products ("PRIPs"). The directive also organizes new rules for bundled products (insurance product offered together with another non-insurance product or service).

Claims

What are the main sources for contract law?

The main sources for contract law in the Belgian insurance/reinsurance sector are the following (non exhaustive list):

- *The Act of 4 April 2014* regarding insurance
- *The Royal Decree of 24 December 1992* implementing the *Act of 25 June 1992*
- *The Royal Decree of 14 November 2003* on Life Insurance activities

In general, is the substantive law relating to insurance more favorable to insurers or insureds?

The Insurance Contracts Act mainly contains mandatory provisions (Article 56 of the *Act of 4 April 2014*). Even if today the legislator pays more attention to the protection of the insured, many provisions of the *Insurance Contracts Act* aim to protect the interests of the insurer (for example: Articles 58-60 of the *Act of 4 April 2014* regarding the disclosure of the risk; Article 62 of the *Act of 4 April 2014* regarding the exclusion of intentional loss; Articles 69-71 of the *Act of 4 April 2014* regarding default of payment of the premium; Articles 74-76 of the *Act of 4 April 2014* regarding the notification of the claim). The mandatory nature of the provisions of the *Act of 4 April 2014* concerns thus both the insured and the insurer.

However, Article 3 of the *Act of 4 April 2014* clearly states that "the *Act* aims to protect the rights of the policyholders, the insured, the beneficiaries and any third party who has an interest in the performance of the insurance contract".

Recent developments in insurance regulation (see the *Act of 30 July 2013* implementing the MiFID rules to the insurance sector) have led to numerous new obligations (in particular information obligations) for insurers and brokers with the aim of protecting the interests of the policyholders.

In general, substantive law is thus more favorable to the insured, especially when the insured is a consumer (See *Book VI of the Economic Law Code* regarding Market Practices and Consumer Protection).

What is the statute of limitations on claims?

Claims resulting from an insurance contract are subject to a limitation period of three years following the day of the occurrence of the event giving rise to the claim (Article 88 of the *Act of 4 April 2014*). However, if the claimant proves that he became aware of the event at a later time, the claim is subject to a limitation period of five years following the occurrence of the event.

Special limitation periods exist in case of personal insurance and liability insurance. The limitation period of the beneficiary's claim resulting from a personal insurance contract only starts from the day on which he became aware of the existence of the contract, of his capacity as beneficiary and of the event that gives rise to payment of the insurance benefits. In case of life insurance, the limitation period for a claim on the reserve extends to thirty years.

In the case of liability insurance, the three-years limitation period of the claim of the insured against the insurer starts on the day on which a claim is filed by the injured party against the insured.

There are, of course, several grounds for interruption or suspension of the limitation period (Article 89 of the *Act of 4 April 2014*), such as the timely filing of a claim, which interrupts the limitation period until the insurer's written decision regarding the insurance coverage.

Can a third party bring direct action against an insurer?

In accordance with Article 150 of the *Act of 4 April 2014*, which concerns liability insurance, the injured party – who is a third party with respect to the insurance contract – can bring a direct action against the insurer in order to obtain compensation of his damage or loss. Any injured party who suffers damage or loss because of the fault of the insured can bring a direct action against his liability insurer.

Article 122 of the *Act of 4 April 2014* is a specific application of this general principle in the case of

lessee liability insurance, stating that the owner or the third party who suffers damage or loss due to a fire has a direct claim against the insurer.

The injured party's direct claim against the liability insurer becomes time-barred after five years following the event giving rise to the damage or loss or following the day on which the injured party became aware of the existence of the claim (which requires that he be aware not only of the fact that the liable party is covered under a liability insurance contract, but also of the identity of the insurer). In any case, the injured party's direct claim against the liability insurer becomes time-barred after ten years following the event giving rise to the damage or loss.

Can an insured bring a direct action against a reinsurer?

There is no specific provision under Belgian law granting a direct claim to an insured against a reinsurer.

Dispute Resolution

Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

If the insured is a merchant and enters into the insurance contract for the purpose of his professional activity, the dispute falls within the jurisdiction of the Commercial Court. If the insured is a consumer or enters into the insurance contract for non-professional purposes, the dispute falls within the jurisdiction of the Court of First Instance, if the value of the dispute is more that EUR 2,500. However, the insured can choose to bring the case against his insurer before the Commercial Court. If the value of the claim is less that EUR 2.500, the dispute falls within the jurisdiction of the Justice of the Peace.

There is no right to a hearing before a jury under Belgian Law for commercial cases. Indeed, the jury is only present for the criminal cases, before the highest Criminal Court (Cour d'assises).

What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of a) parties to the action and b) non-parties to the action?

In Belgium, there is no pre-trial discovery. However, any documents relied upon during the proceedings must be communicated (article 736 of the *Judicial Code*). The powers of the courts regarding the disclosure of documents are limited as set out in Articles 877 to 882 of the *Judicial Code*.

Pursuant to Article 877 of the *Judicial Code*, where there are precise, consistent and serious presumptions that a party or a third party holds a document containing evidence of a relevant fact, the court may order the production of this document or a certified copy thereof.

If the document is held by a third party, the court can order this third party to produce the document, and this third party has the right to make its view known (Article 878 of the *Judicial Code*). However, there is no possibility to lodge an appeal or opposition against the court decision ordering the production of the document (Article 880 of the *Judicial Code*).

If the party or the third party fails to comply with the decision without good reason, this (third) party can be sentenced to pay damages (Article 882 of the *Judicial Code*).

Are mediation and arbitration common methods for solving insurance disputes? Are more disputes resolved in or out of court?

In Belgium, the legislator is in favor of out-of-court dispute settlements. In the insurance sector, an Ombudsman service was set up in 1987 in order to deal with policyholder complaints and to try to mediate disputes (Article 15bis of the Royal Decree of 22 February 1991 – Article 302 of the Act of 4 April 2014).In 2014, the Insurance Ombudsman received more that 4,300 intervention requests (See Annual Report http://www.ombudsman.as). In order to promote this mediation service, the insurer has to inform the insured, prior to the signature of a contract, of the existence of the Insurance Ombudsman (Article 15 of the *Royal Decree of 22 February 1991* – Article 32 and 35 of the *Act of 4 April 2014*).

Concerning arbitration, it needs to be stressed that arbitration clauses are forbidden in insurance contracts, in accordance with Article 90 of the *Act of 4 April 2014*. It is however possible for the parties to agree to resort to arbitration after the dispute has arisen. There are also a few exceptions to the prohibition of arbitration clause, listed in Article 1 of the *Royal Decree of 24 December 1992*. In those policies (mainly large risks), arbitration clauses are frequently encountered.

Therefore, generally, large insurance or reinsurance disputes are resolved by arbitration.

Despite the existence of these alternative dispute resolution processes, many cases are still brought before the courts. It is hard to give the exact distribution between the two processes.

The main advantages of alternative dispute resolution mechanisms are confidentiality (hearings are, in general, public) and rapidity (having regard to the judicial backlog, especially before Brussels Courts). Furthermore, a registration duty may be applicable to court decisions.

What are the provisions regarding timely notice, and what are the legal consequences for non-compliance with the timely notice obligation?

The relevant Articles regarding the notification of a claim are Articles 74 and 76 of the *Act of 4 April 2014*.

Article 74 provides that the insured should declare a claim as soon as possible and at least within the term laid down in the contract. However, Article 74 also states that the insurer cannot rely on the term set in the contract if the insured made the notification as soon as was reasonably possible. Moreover, Article 76 provides that the late notification of a claim will only entitle the insurer to refuse coverage if the insured committed fraud. If the insured breached his obligation to make a timely declaration without fraudulent intention, the insurer is only entitled to reduce the insurance benefits in proportion to the prejudice resulting from the late notification.

Regarding the obligations of the insurer, there is no specific sanction if the insurer fails to timely notify his refusal of coverage to the insured. However, as mentioned previously, the limitation period is suspended from the date of the timely filing of a claim, which interrupts the limitation period until the insurer's written decision regarding the insurance coverage. The insured's remedy for the delay taken by the insurer to indemnify will be interest on the amount claimed by the insured.

What are the laws regarding bad faith claims? What damages may be awarded if the insurer is found to have acted in bad faith?

When, at time of subscription, the risk did not exist or already occurred and the policyholder acted in bad faith or made an inexcusable error, the insurance contract is void and the premium earned until the insurer was informed of the inexistence of the risk remains due to the insurer (Article 79 of the *Act of 4 April 2014*).

In case of intentional omission or inaccuracy in the description of the risk that misled the insurer in the evaluation of the risk, the insurance contract is void. The premium earned until then remains due to the insurer (Article 59 of the *Act of 4 April 2014*).

If an increase of the risk of occurrence of the event insured is not reported fraudulently by the policyholder to the insurer, the insurer may refuse to indemnify the loss and is entitled to keep the premium as damages (Article 81 of the *Act of 4 April 2014*).

Notwithstanding any clause to the contrary, the insurer is not required to grant coverage to anyone who intentionally caused the loss (Article 62 of the *Act of 4 April 2014*). However, in case of life insurance, the insurer must cover suicide committed one year or more after the subscription of the insurance contract.(Article 164 of the *Act of 4 April 2014*). There are no punitive damages under Belgian law. If an insurer is found to have acted in bad faith, damages can be awarded to the insured but the latter has to prove the amount of his damage or loss caused by the behavior of the insurer, as well as the causal link between his damage or loss and the bad faith of the insurer.

Belgium

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England

Overview

Which government bodies/agencies regulate insurance and reinsurance companies in your jurisdiction? What date were those bodies established?

The Prudential Regulation Authority ("PRA") supervises the prudential aspects of the insurance industry and the Financial Conduct Authority ("FCA") supervises conduct of business, in each case with effect from 1 April 2013.

The PRA's relevant statutory objectives are (1) to promote the safety and soundness of regulated firms and (2) to contribute to the securing of an appropriate degree of protection for policyholders and those who may become policyholders.

The FCA has the strategic objective of ensuring that the relevant markets function well, and it has three operational objectives namely: (1) to secure an appropriate degree of protection for consumers, (2) to protect and enhance the integrity of the UK financial system, and (3) to promote effective competition in the interests of consumers for regulated financial services.

Lloyd's managing agents are by regulated by Lloyd's, as well as by the PRA and the FCA. To minimize duplication, there are agreements between Lloyd's and the PRA and FCA for co-operation on supervision and enforcement.

What are the categories of insurance licenses that exist in your jurisdiction?

Pursuant to the *Financial Services and Markets Act 2000* ("FSMA"), section 19, which is known as the "*General Prohibition*", a person who carries on a regulated activity in the UK must be authorized (unless the person is exempt).

"Effecting a contract of insurance as principal" and "carrying out a contract of insurance as principal" are regulated activities: Article 10(1) and 10(2) of the *Financial Services and Markets Act (Regulated Activities) Order 2001* (SI 2001/544) (the "*RAO*"). Insurers must therefore be authorized to carry out such activities in the United Kingdom.

An insurer is required to have "permission" for each class of insurance which it provides. The classes are set out in Schedule 1 to the *RAO*, and are summarized below.

Contracts of general insurance

1. Accident
2. Sickness
3. Land vehicles
4. Railway rolling stock
5. Aircraft
6. Ships
7. Goods in transit
8. Fire and natural forces
9. Damage to property
10. Motor vehicle liability
11. Aircraft liability
12. Liability of ships
13. General liability
14. Credit
15. Suretyship
16. Miscellaneous financial loss
17. Legal expenses
18. Assistance

Contracts of long-term insurance

1. Life and annuity
2. Marriage and birth
3. Linked long term
4. Permanent health
5. Tontines
6. Capital redemption contracts
7. Pension fund management
8. Collective insurance etc.
9. Social insurance

England

Are insurance companies in your jurisdiction subject to taxes beyond the ordinary burden faced by all companies?

Insurance premium tax ("IPT") is payable on insurance premiums if the risk is situated in the UK. IPT is calculated with reference to the premium paid.

There are currently two IPT rates:

1. a standard rate of 9.5 percent (increased from 6 percent on 1 November 2015); and
2. a higher rate of 20 percent (increased from 17.5 percent on 4 January 2011) for travel insurance and some insurance for vehicles and domestic/electrical appliances (this is the same rate as the rate of value-added tax charged on most goods and services).

IPT does not apply to premium on most long-term insurance, reinsurance, insurance for commercial ships and aircraft, and insurance for commercial goods in international transit.

What are the approved distribution channels in your jurisdiction? Are there restrictions?

Distribution can be carried out by insurers themselves or by intermediaries, using a variety of methods including face-to-face sales, telephone sales, written correspondence and the internet.

The requirements relating to distribution vary according to (1) whether the product is distributed by an insurer or intermediary, (2) the type of insurance product and class of insurance (e.g., income protection or life insurance), (3) the type of customer, (4) whether there is an overseas element to the product's distribution, and (5) the manner and/or medium of sales distribution.

We have mentioned above that insurers are required to be authorized because effecting and carrying out contracts of insurance as principal are regulated activities. Dealing as agent in contracts of insurance, arranging contracts of insurance, and advising on contracts of insurance are also all regulated activities: *RAO Articles 21, 25 and 53*. As a result, insurance intermediaries are, generally, also required to be registered.

Assisting in the administration and performance of a contract of insurance is also a regulated activity, although exceptions apply for expert appraisers, loss adjusters and claims managers: *RAO Articles 39A and 39B*.

There are some situations where persons who are not authorized in their own right are permitted to carry on insurance mediation. The most widespread example is where a person supplies non-real time information about insurance products and the insurance is related to their main profession or business: this exception is often used by businesses such as vets and dentists, which have customers who are interested in insurance but where it would be excessive for the business itself to become authorized (various other conditions apply to such distribution).

Does your jurisdiction have any forms of compulsory insurance?

Yes. The most common compulsory insurances are those relating to liability for vehicles under the *Road Traffic Act 1988*, and employers' liability under the *Employers' Liability (Compulsory Insurance) Act 1969*.

Other instances include liability for nuclear installations under the *Nuclear Installations Act 1965*, professional indemnity insurance in respect of the members of certain professions (such as solicitors and estate agents), and in respect of certain risks associated with shipping and aviation.

What major insurance/reinsurance legislation is on the horizon in your jurisdiction?

(a) Insurance contract law

Traditionally, English insurance contract law has been rather pro-insurer in its approach compared to some other jurisdictions. Insurers had the right to avoid the insurance policy (i.e., to treat the contract as never having been made) if the insured makes a material mis-representation or non-disclosure, commits a breach of the duty of "utmost good faith", or commits a breach of warranty.

The Consumer Insurance (Disclosure and Representations) Act 2012 came into force on 6 April 2013, and attenuated those rules for consumer insurance contracts (i.e., where the insurance is bought by an individual for a purpose unrelated to their trade, business or profession).

In such situations, the insurer's ability to avoid the policy became dependent on whether the consumer carelessly or deliberately gave wrong information. The Act also precluded insurers from using so-called "basis of contract" clauses to convert all of the policy terms into warranties.

English law regarding insurance contracts will be significantly impacted by introduction of the Insurance Act 2015, which will come into force on 12 August 2016. This represents the most significant change to insurance contract law in over 100 years.

The most significant areas of reform, discussed below, relate to (1) disclosure and misrepresentation in business insurance contracts, (2) warranties, in particular a prohibition on "basis of contract" clauses, and (3) insurers' remedies for fraudulent claims. The Act will not apply retrospectively, so will only apply to new policies or variations agreed on or after that date; in this review we summarise the position both before and after the application of the Act.

In most instances the Insurance Act 2015 lays down default positions which will apply unless they are contracted out of. Insofar as it will apply to consumer insurance contracts, the Act will prohibit insurers from using any contractual term which reduces the protections provided by that statute. For business insurance, the Act will be merely a default regime which (apart from the prohibition on "basis of contract" clauses) the parties may contract out of. However, to be effective, transparency is required in relation to any term which would put the insured in a worse position as respects any of the Act's default provisions.

The Act is available at: *http://www.legislation.gov.uk/ukpga/2015/4/contents/enacted*

(b) Regulation

Most of the UK's insurance regulation derives from EU legislation. Changes under way at the EU level include *Solvency II* and the revised *Insurance Mediation Directive* (discussed below).

Market Entry

What are the requirements/procedures for setting up a new insurance or reinsurance company?

A new insurance or reinsurance company must apply to the PRA using the application form at *www.bankofengland.co.uk/pra/Pages/authorizations/newfirm/insurance.aspx*. In practice, before making such an application the applicant will discuss with the PRA the proposed application and the information which the PRA is likely to require.

The PRA and FCA assess new applications against threshold conditions, which require that:

- the insurer's head office, and in particular its "mind and management", will be in the UK if it is incorporated in the UK;
- the insurer's business will be conducted in a prudent manner, and in particular that the insurer will maintain appropriate financial and non-financial resources;
- the insurer will be fit and proper and will be appropriately staffed; and
- the insurer and its group will be capable of being effectively supervised.

The PRA must determine the outcome of a complete application within six months from the date of its receipt.

The fees payable to the PRA for an application range from GBP 1,500 for simple applications, to GBP 25,000 for complicated applications.

Is it mandatory that a company be physically present in the market (HQ or branch office) to write insurance/reinsurance policies?

As explained above, effecting and carrying out contracts of insurance in the UK are regulated activities: such activities may be performed only by persons who are authorized or exempt. "Effecting" a contract of insurance relates to underwriting and related activities, and "carrying out" a contract of insurance includes paying claims.

A person who is domiciled in the European Economic Area (the "EEA") has the right to establish itself in, and to provide services into, any other EEA member

state. In the case of an insurer which is incorporated and established in any EEA member state, the EU insurance directives[1] permit it to operate in the UK market by establishing a branch (freedom of establishment) and/or by selling services directly into the UK (freedom of services) – freedom of establishment and freedom of services are both referred to as "passporting". An insurer which intends to "passport" into the UK must give notice of its intention to do so.

Reinsurance undertakings which are authorized in accordance with the *Reinsurance Directive*[2] can also passport into the UK market, through branches and/or on the freedom-of-services basis.

Insurance intermediaries enjoy comparable EU passport rights on to the UK market, pursuant to the *Insurance Mediation Directive*[3] and implementing national legislation.

Passporting insurers must comply with UK rules which are imposed for the "general good", including conduct of business rules (but the EU rules provide that the prudential regulation of insurers, principally solvency questions, is reserved to the home state regulator).

An insurer which is from outside the EEA (a "third country") must generally apply for PRA authorization in order to set up a branch or subsidiary. The requirements are simplified in certain cases, for example access to the UK market by Swiss non-life insurance undertakings[4] or by insurers established in the British Crown Dependencies (*e.g.* the Channel Islands and the Isle of Man).

A UK branch of a third-country insurer does not qualify for EU passport rights in order to carry on business in other EEA member states, whereas a UK subsidiary of a third-country insurer does.

[1] As set out in the Consolidated Life Directive (Directive 2002/83/EC) and in certain *non-life directives*, namely Directives 73/239EEC, 88/357/EEC and, in particular, 92/49/EEC. The *Solvency II Directive*, i.e. Directive 2009/138/EC, which will apply from 1 January 2016, retains EU passporting rights.

[2] Directive 2005/68/EC.

[3] Directive 2002/92/EC.

[4] Agreement between the European Economic Community and the Swiss Confederation on direct insurance other than life assurance, adopted by Decision 91/370/EEC.

Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

An incoming EEA firm can passport into the UK from another EEA state and write business directly.

Non-EEA insurers effecting or carrying out contracts of insurance in the UK must be authorized by the PRA and set up a branch or subsidiary (although the requirements are simplified in certain cases – see above).

Is the incorporation of local companies with foreign shareholders permitted?

There is no prohibition on foreign shareholders incorporating a company.

Any person who is proposing to acquire a controlling interest in an insurance company must notify the PRA, so that the PRA may determine whether the proposed acquirer fulfils various criteria including as to integrity and professional competence. The PRA should generally presume that the requirements are fulfilled where the proposed acquirer is a person who is already supervised by the PRA or by a regulator in another EEA country; and it may also decide that the requirements are fulfilled where the proposed acquirer is supervised by a regulator in another country which has substantially equivalent regulation.

Regulatory

What are the main sources for insurance and reinsurance regulatory law?

Most UK insurance and reinsurance regulatory law derives from EU legislation.

The main UK legislation which regulates insurance and other financial services, and gives effect to most of the relevant EU legislation, is FSMA.

FSMA grants to the FCA and the PRA the power to make rules which have the force of law and to impose binding obligations on firms that are subject to them. The PRA and FCA Handbooks contain extensive rules covering matters ranging from inter alia, an insurer's or reinsurer's prudential requirements, the supervisory process, an insurer's or reinsurer's systems and controls and its approved persons. Two parts of the Handbooks which are of particular relevance to insurance are the Insurance Conduct of Business Sourcebook ("ICOBS") and the Conduct of Business

Sourcebook ("COBS"), which set out conduct of business rules applicable to pure protection and general insurance contracts, and to investment insurance contracts, respectively.

Please describe the current regulatory environment, including pending or anticipated regulatory reform.

Solvency and capital requirements

Solvency II is an EU legislative program which must be implemented in all EU member states, including the UK. It will introduce a new, harmonized EU-wide insurance regulatory regime replacing the existing EU insurance directives. The Solvency II Directive revises solvency requirements, and is intended to deliver improved consumer protection, modernized methods of supervision, deepened EU market integration, and increased competitiveness for EU insurers internationally. After a considerable delay in finalizing the details of the new framework, Solvency II became fully applicable from January 2016.

By January 1, 2016 only the Swiss prudential regime has been recognized as fully "equivalent" to Solvency II standards and the recognition of the prudential regime applicable in Bermuda is in the final stages of the recognition process. Meantime, the national supervisory authorities are starting to take additional, Solvency II-driven regulatory measures in relation to EU operations of insurers and reinsurers from various "non-equivalent" third countries.

Confidentiality

Data security was a priority for the former regulator, the Financial Services Authority, and remains a priority for the FCA, which is building on thematic work and reports conducted by the FSA. Heavy fines have been issued against firms which have failed to have appropriate systems and controls in place to protect customer data: for example, in August 2010 the UK branch of an EU insurer was fined over GBP 2 million for losing disks containing customer data.

The FCA has provided firms with self-assessment questionnaires and checklists relating to data security, to assist with assessing whether their approach meets expectations.

Supervision

The FCA will focus on the following key areas:

- A strategic markets-led approach to regulation;
- Market-focused work programme;
- Wholesale market integrity;
- Competition;
- Protecting consumers;
- Pensions and an aging population;
- Consumer credit;
- Individual accountability;
- Changing culture;
- Senior managers and certified persons regimes;
- Remuneration codes;
- Enforcement action against individuals;
- Whistleblowing;
- International issues;
- International engagement;
- Implementing EU policy; and
- Financial crime.

The PRA's approach to prudential supervision is driven by its objectives of promoting the safety and soundness of regulated firms, and helping to secure an appropriate degree of protection for policyholders. The PRA's supervisory approach relies heavily on the judgement of supervisors regarding, for example: the risks that a firm is running; whether the firm is likely to continue to meet the threshold conditions; how to address any problems or shortcomings identified; and which risks are the most material and should be addressed.

The PRA has made it clear that it does not aspire to have no insurance company insolvencies. Its position is that firms should be allowed to fail, so long as the failure occurs in an orderly manner.

At an EU level, *Solvency II* will implement the new EU regulatory framework for the supervision of insurance and reinsurance companies.

England

Corporate governance

Following the financial crisis of 2007/08, many quarters expressed concern regarding corporate governance standards and risk management in financial institutions. The FCA expects senior management to be involved in issues such as risk management and TCF (treating customers fairly), and guidance has been issued reaffirming the strong role which non-executive directors are expected to play in challenging and questioning the decision-making of the board.

Articles 38 and 40 to 50 of the *Solvency II directive* set out requirements for the governance and risk management of insurance companies. A firm must have in place an effective system of governance that provides for the sound and prudent management of its business, including an adequate transparent organizational structure with a clear allocation and appropriate segregation of responsibilities, and an effective system for ensuring the transmission of information. The system of governance should be subject to regular internal review.

Reporting requirements

Reporting under *Solvency II* will include both private reporting to supervisors and public disclosure. Both types of report will combine qualitative and quantitative information about the risk position and capital adequacy of a firm and will describe the risk management process. There will be a main annual report, and more limited quarterly reports, to supervisors. For large insurers, additional information may be required for financial stability purposes.

Consumer protection

As described above, the previous UK regulator (the Financial Services Authority) has been split into two regulators, one of which (the Financial Conduct Authority) focuses solely on the conduct of business.

The FCA initially described itself as a "strong consumer champion". Following concerns voiced by the industry that the FCA would take on the role of acting for consumers against financial institutions, rather than regulating the conduct of their activities impartially, the FCA backed away from this description. It is now said that consumers are central to the FCA's regulatory outcomes, but that consumers remain responsible for making their own choices.

The FCA has involved itself in ensuring that financial institutions pay over £20 billion to 10 million customers in relation to complaints of mis-selling of Payment Protection Insurance ("PPI"). It has also taken a vigorous approach to imposing fines on financial institutions including insurers.

Note also the comments above regarding the *Consumer Insurance (Disclosure and Representations) Act 2012*.

From October 2015, the *Consumer Rights Act 2015* introduced a number of reforms for consumer insurance contracts. The main impact in the insurance context is in new laws for digital content and ancillary products, unfair contract terms and changes in the mechanisms for consumer redress. As the FCA already required firms to treat customers fairly, the changes made by the Act should not have significant impact on insurers.

Digital content: All digital content (whether paid for, or supplied free with a purchase) must be of satisfactory quality according to the expectations of a reasonable person. Any ancillary products must be capable of cancellation at the same time as the principal product is cancelled.

Unfair contract terms: The Act consolidates and clarifies consumer legislation on unfair contract terms. The Act applies to both 'consumer contracts' and 'consumer notices' (such as renewal notices, promotions and announcements intended to be read by a consumer). Under the Act, a term may be excluded from an assessment for fairness only where it is both *transparent* and *prominent*. A term is transparent where it is legible, and expressed in plain and intelligible language. "Prominent" means brought to the consumer's attention in such a way that the average consumer (a consumer who is reasonably well-informed, observant and circumspect) would be aware of the term. Onerous exclusions should be prominently set out in order to avoid an assessment for unfairness.

Mechanisms for redress: The Act introduces a range of mechanisms for redress including (1) compensation or other redress to consumers who have suffered a loss as a result of the conduct in question; (2) measures offering the consumer the right to terminate (but not vary) a contract, and (3) where consumers cannot be identified or can be identified only at disproportionate cost, measures for the collective interest of consumers. The Act also introduces a regime for consumer collective redress for anti-competitive behaviour.

Broker activities and remuneration

From 15 January 2005, the *Insurance Mediation Directive ("IMD")*[5] set out requirements for the promotion, sale and administration of insurance products by intermediaries across the EU; these regulations were subsequently implemented by Member States into their national law.

The Insurance Distribution Directive ("IDD"), which was adopted on 15 December 2015, recasts the IMD. Member States will have 24 months to implement the IDD into national law. It may apply to market participants from January 2018 (date to be confirmed), at which time the IMD will be repealed.

The IDD:

- sets out requirements for managing conflicts of interest, particularly regarding remuneration;
- standardises pre-contractual disclosures to customers; and
- focuses on market conduct risk through organisational, product oversight and governance requirements, by monitoring cross-selling and through stronger enforcement.

The main changes made by the IDD are as follows:

- (re)insurance undertakings and their employees are brought within scope, subject to adjustments to reflect requirements under Solvency II;
- registration and professional qualifications are harmonised to a greater extent;
- for cross-border operators, there are wider grounds for host States to intervene;
- pre-contractual disclosures to customers are more detailed and lengthy, covering remuneration for the first time. Member States may maintain existing commission bans or introduce them, both for general insurance and insurance-based investment products;
- product oversight and governance requirements are introduced; and
- enforcement is enhanced, with specified breaches and sanctions for Member States to apply in national law.

Like the IMD, due to specific market features and diversity in distribution networks, the IDD is a "minimum harmonisation" Directive. Member States are given flexibility to maintain or introduce more stringent provisions for consumer protection reasons. Any such provisions must be proportionate and consistent with EU law, must be notified to the Commission and EIOPA (European Insurance and Occupational Pensions Authority), and must be published.

It is proposed to introduce mandatory disclosure of remuneration on general insurance contracts. Some intermediaries and insurers consider this to be unnecessary, and note that there is no widespread evidence of non-compliance, or consumer dissatisfaction, with existing rules regarding the disclosure of broker remuneration. The EU Parliament and Council were intending to adopt *IMD2* in early 2014, but this has been delayed.

Claims

What are the main sources for contract law?

Most contract law derives from the common law, in other words from decisions of judges. The cases, some of which date back to the 18th century, reflect a desire to protect the insurance industry from possible abuse by customers.

Certain aspects of insurance contract law were codified in the *Marine Insurance Act 1906*. Since then, legislation has been *ad hoc*: for example, as mentioned above, the *Consumer Insurance (Disclosure and Representations) Act 2012* was introduced to attenuate the potential harshness of disclosure rules in the context of consumer insurance contracts, and the *Unfair Terms in Consumer Contracts Regulations 1994* gave effect to an EU directive on unfair contract terms. As discussed above, the *Insurance Act 2015* will introduce, from August 2016, a number of changes to duties, warranties and remedies.

[5] Directive 2002/92/EC

In general, is the substantive law relating to insurance more favorable to insurers or insureds?

The substantive law relating to insurance has traditionally been more favorable to insurers than in some other jurisdictions. The most notable insurer-friendly principles are as follows, some of which will be ameliorated by the introduction of the *Insurance Act 2015*.

First, insurance contracts are currently subject to a duty of "utmost good faith". This places a positive duty on insureds to disclose all material facts and to make no material misrepresentations; a fact is "material" if it is one which the insurer would have wished to know when considering the risk. If the insured breaches this duty and that affected the insurer's decision about whether to accept the risks or on what terms, then the insurer is entitled to avoid the policy, in other words to treat the policy as if it had never existed.

The *Insurance Act 2015* will amend the duty on business policyholders, so that the insured is required only to make a *"fair presentation"* of the risk." In order to make a fair presentation, the insured must disclose *"every material circumstance which the insured knows or ought to know"* or, failing that, provide *"disclosure which gives the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances."* This formulation shifts some of the burden on to the insurer, by placing a greater emphasis on the insurer making enquiries. The Act also provides the insurer with a number of proportionate remedies when the duty is breached in contrast to the previous remedy of avoidance, which is all-or-nothing and potentially disproportionate in its effect.

The second insurer-friendly principle is that (currently) the breach of a warranty in an insurance contract discharges the insurer from any further obligation to pay a claim; if the warranty was untrue when the policy was concluded then the insurer may have no obligation to pay claims.

The *Insurance Act 2015* provides that, if there is a breach of warranty, the insurer's liability should be suspended, rather than discharged, so that insurance coverage is restored after a breach has been remedied. The Act also provides that breach of a warranty or similar term should not allow an insurer to refuse to pay a claim if the insured shows that the breach was irrelevant to the loss suffered.

Thirdly, the courts are willing to uphold terms and conditions which impose strict obligations on insureds, for example as to the timely notification of claims.

Individuals and small businesses are entitled to take complaints against insurers to the Financial Ombudsman Service ("FOS"). The FOS may order the insurer to pay compensation, and such an order is binding on the insurer (whereas if the complainant is dissatisfied then they remain free to disregard the order and instead pursue the complaint in the courts). The FOS is not required to apply the law when deciding the outcome of a complaint: it makes decisions based on what it considers to be fair and reasonable. Many of its decisions are more favorable to complainants than the courts would be.

What is the statute of limitations on claims?

In relation to insurance claims, the limitation period is generally six years from the date of the insured loss: *Limitation Act 1980*, section 5. The statutory limitation period can be amended by agreement between the parties.

Can a third party bring direct action against an insurer?

Generally a third party cannot bring a direct action against an insurer, but there are three circumstances in which it can.

First, under the *Contacts (Rights of Third Parties) Act 1999*, a third party is entitled to enforce a contract term where the contract expressly permits or purports to confer benefit on him or her. However, the right can be excluded, and in insurance policies it often is.

Secondly, a third party who wishes to bring a claim against the owner of a vehicle is, in the event of the insolvency of the insured, permitted to proceed directly against the insurer under section 153 of the *Road Traffic Act 1988*.

Thirdly, if a potential defendant becomes insolvent the claimant may bring proceedings against the potential defendant's liability insurers directly, under the *Third Parties (Rights Against Insurers) Act 1930* (the "*1930 Act*"). The Law Commission has identified a number of problems with the *1930 Act*. These problems included:

- the third party is required to establish the existence and amount of the insured's liability before it can issue proceedings against the insurer;
- the third party is required to proceed against both the insured and the insurer.
- the *1930 Act* does not cover certain types of voluntarily incurred liabilities, such as legal expenses;
- the rules regarding disclosure of information to the third party are unsatisfactory;
- rights transferred to the third party are subject to any defenses which the insurer could have used against the insured. This means that insurers can rely on technical defences to defeat third party claims (such as that the insured failed to notify the insurer of the claim, even if the third party has given this notification instead); and
- in cases with a foreign element, it is unclear whether the *1930 Act* applies.

New legislation, the *Third Parties (Rights Against Insurers) Act 2010*, has been enacted in order to remedy these problems but has not yet entered into force.

Can an insured bring a direct action against a reinsurer?

No. The *Third Parties (Rights Against Insurers) Act 1930* (section 1(5)) and the *Third Parties (Rights Against Insurers) Act 2010* (section 15) expressly exclude reinsurance contracts.

In every lawsuit, the court will make an order as to the disclosure which should be given. The court will expect the parties to try to agree what types of document should be disclosed, including what arrangements should be made regarding the disclosure of electronic documents, before asking the court to make an order. The most common order for disclosure is that each party should disclose (1) all documents on which it relies, (2) all documents which adversely affect any party's case and (3) all documents which support another party, and should produce for inspection such of those documents as the other party wishes to see.

Additionally, each party can seek "specific disclosure" of particular documents which are mentioned in pleadings or witness statements or are said to be relevant to the matters in issue.

Documents which are "privileged" need not be produced, although they must still be described generically in the list of documents. A document is privileged if it was created for the purpose of giving or obtaining legal advice from a lawyer, or if it is a (a) communication between either the lawyer or the client and a third party, or (b) a document created by or on behalf of the client or its lawyer; and, in either case, it must have been created for the purpose of litigation.

Under CPR 31.17, third parties can sometimes be ordered to disclose documents.

Dispute Resolution

Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

London is one of the world's hubs for the underwriting of insurance and reinsurance business. Most of the significant insurance and reinsurance disputes arising in London relate to losses which are international and tend to be of a high value. Such disputes are generally heard by the Commercial Court (or in arbitration). Insurance lawsuits are tried by judges who have strong experience of the sector. Juries are not involved.

What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of a) parties to the action and b) non-parties to the action?

The relevant rules are set out in part 31 of the *Civil Procedure Rules ("CPR")*. There are two stages: "disclosure" proper, which is the production of a list of documents, and "inspection", which is the production of originals or copies of the listed documents to the other party.

Arbitrators have flexibility as to whether, and to what extent, any disclosure should be given. Arbitrators from an English law background are often willing to give disclosure consistent with the approach taken by English courts.

Disclosure can enable parties to ascertain the strengths and weaknesses in their position before trial, and provides them with useful evidence for trial, but it can be time-consuming and expensive.

Are mediation and arbitration common methods for solving insurance disputes? Are more disputes resolved in or out of court?

Large insurance and reinsurance disputes are often resolved by arbitration.

Many international insurance contracts provide for disputes to be arbitrated in London, regardless of the governing law of the policy. For example, "Bermuda form" insurance policies are usually governed by New York substantive law but provide for any dispute to be resolved by arbitration in London.

Mediation of commercial insurance disputes is becoming more common.

The vast majority of disputes are ultimately resolved by settlement. The cost of litigation/arbitration can be very substantial, and encourages settlement. The losing party is usually ordered to reimburse most of the winning party's legal costs, and this discourages parties from fighting particularly if the merits of their position are not clearly strong.

What are the provisions regarding timely notice, and what are the legal consequences for non-compliance with the timely notice obligation?

Parties are generally free to negotiate their own terms regarding the notification of claims. Where the contract states that notification requirements are a "condition precedent" to cover, the insurer is entitled to deny coverage if the requirement is not complied with.

The position is attenuated in consumer contracts by the Unfair Terms in Consumer Contracts Regulations 1999 and insurers' duty to treat customers fairly.

What are the laws regarding bad faith claims? What damages may be awarded if the insurer is found to have acted in bad faith?

English law does not award bad faith damages for breach of an insurance contract. If the insurer does not pay the claim in a timely manner then the insured's remedy for the delay is usually limited to interest: *Spring v Royal Insurance* (UK) Ltd [1999] 1 Lloyd's Rep IR 111.

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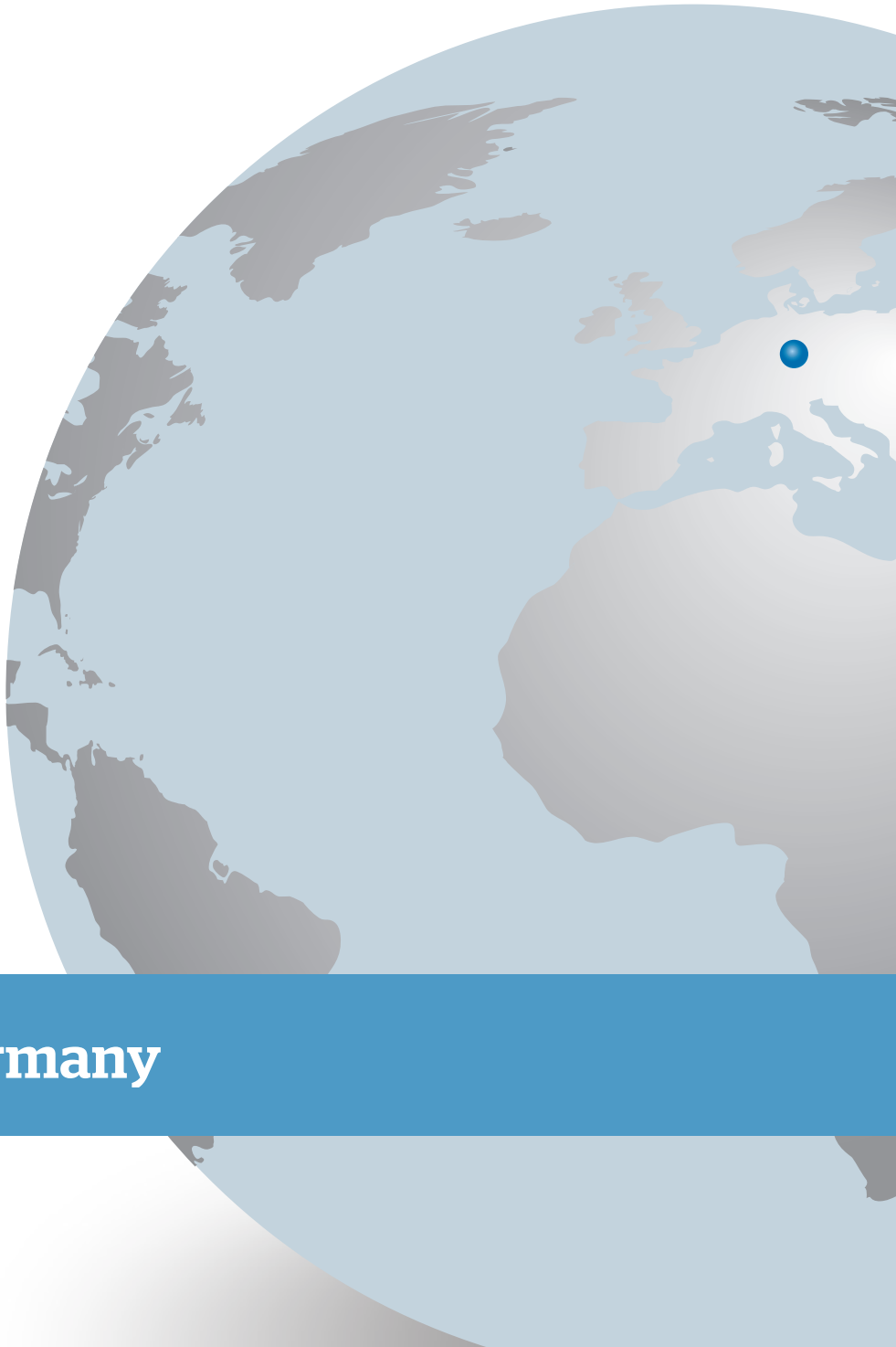

Germany

Overview

Which government bodies/agencies regulate insurance and reinsurance companies?

Since established in May 2002, the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht – BaFin*) is responsible for the regulation of insurance and reinsurance undertakings (*www.bafinde/EN*). BaFin is an independent public-law institution and is subject to oversight of the Federal Ministry of Finance. The relevant law for the regulation of (re)insurance companies is the *Insurance Supervision Act* (*Versicherungsaufsichtsgesetz – VAG*) of which an English translation is available at BaFin's website.

What are the categories of insurance licenses that exist?

Insurance companies in Germany may obtain authorization by BaFin either as insurance or reinsurance company. Authorization as insurance company is subject to the provisions in section 5 *VAG*, authorization as reinsurance company subject to the provisions in section 119 *VAG*. BaFin on its website maintains a database of the authorized insurance companies where there is also specified for which area of activity authorization is granted (*http://www.bafin.de/EN/Service/QuickLinks/Unternehmensdatenbank/unternehmensdatenbank_node.html#doc2685172bodyText3*).

Authorization as reinsurance company pursuant to section 119 *VAG* applies to reinsurance companies that exclusively conduct reinsurance business. Mixed insurance companies that conduct both insurance and reinsurance business are with regard to their entire business activity processed according to the rules on insurance companies. However, as regards their activity as reinsurance company, the regulatory concept of the special provisions for reinsurance companies (sections 119 *VAG et seq.*) also has to be taken into account.

Moreover, the authorization is granted for each class of insurance separately. Classes of insurance are specified in part A of the Annex to the *VAG*. The authorization may also be granted jointly for several classes of insurance under designations specified in part B of the Annex.

Are insurance companies subject to taxes beyond the ordinary burden faced by all companies?

There is no special tax for insurance companies in Germany. However, insurance companies are affected by the *Insurance Tax Act* (*Versicherungssteuergesetz – VersStG*). Insurance tax under this law applies to the payment of an insurance premium based upon an insurance relationship which has come about either by contract or in some other way. The tax rate is in general 19 percent of the insurance premium without insurance tax.

Tax debtor of the insurance tax is the policyholder. However, insurance companies are affected as they in general are tax payment debtors (section 7 (2) VersStG). As tax payment debtor an insurance company must, as an independent liability, pay the tax on behalf of the policyholder. The insurance company as tax payment debtor and the policyholder as tax debtor are joint and several debtors. The liability for payment of tax is equivalent to the tax liability. In the relationship between the insurer and the policyholder, the tax is deemed to constitute part of the insurance premium to the extent that the collection and legal enforcement of the tax are involved. Further details on the payment of this tax are specified in the *Insurance Tax Act*.

What are the approved distribution channels? Are there restrictions?

Insurance in Germany is either distributed via insurance intermediaries or through direct sales by the insurance companies themselves.

There are two categories of insurance intermediaries in Germany, insurance agents and insurance brokers, section 59 *Insurance Contract Act* (*Versicherungsvertragsgesetz – VVG*). The main distinction is that an insurance agent acts on behalf and in the interest of the insurance company whereas an insurance broker represents the interests of the policyholders. Commercial activities as an insurance broker or insurance agent in Germany are subject to supervision. Competent is the Chamber of Industry and Commerce at the location of the insurance intermediary.

An insurance agent is anyone contracted by an insurer or insurance agent to arrange or conclude contracts of insurance on a commercial basis. An insurance agent is a representative of the insurance company

on a contractual basis obligating the insurance agent to endeavor the conclusion of contracts of insurance for the insurer. Therefore, the insurance agent's primary association is with the insurer acting on its behalf and thereby safeguarding its interests and following its instructions. The insurance agent will receive a commission by the insurance company. It is very common in Germany that an insurance company distributes its products via insurance agents who work only for this respective insurance company.

An insurance broker is anyone who contracts to arrange or conclude contracts of insurance for a client on a commercial basis without having being contracted to do so by an insurer or an insurance agent. Accordingly, an insurance broker is not contractually bound to a specific insurance company or companies but is obligated to find sources for contracts of insurance on behalf of his clients. Therefore, he places policies directly with whichever company can most suitably serve the needs of his client. Although an insurance broker acts in the interests of their clients, it is common practice for them to receive the commission from the insurer.

In case of direct sales the insurance company sells its products directly to the customers/policyholders. A major part of this direct business is conducted via the internet.

Are there any forms of compulsory insurance?

There are a great number of compulsory insurances in Germany. The most prominent ones are health insurance, third party motor insurance and professional liability insurance for a number of professions, such as lawyers, tax advisors, accountants and insurance intermediaries.

What major insurance/reinsurance legislation is on the horizon?

In the implementation of *Directive 2009/138/EC* (*Solvency II*) (see below "Regulatory"), the *German Insurance Supervision Act* will be revised in the next years. A timeline for this revision has not yet been announced.

Market Entry

What are the requirements/procedures for setting up a new insurance or reinsurance company?

Setting up a new (re)insurance company requires – subject to exceptions under EU single passport regime – that the company obtains authorization with BaFin pursuant to Section 5 *VAG* (direct insurers) of Section 119 *VAG* (reinsurers). According to Section 5 *VAG* (and similarly under Section 119 *VAG*), with the application, the company shall submit an operating plan, disclose the purpose and structure of the business, the region in which business is to be conducted and, in particular, clearly state the conditions which shall secure that the future liabilities of the undertaking may be fulfilled at any time.

The operating plan shall include, *inter alia*, the articles of association as well as information about the classes of insurance that are to be carried on and which risks of a class of insurance are to be covered. Further, the operating plan shall give evidence of the existence of own funds in the amount of the minimum guarantee fund and provide estimates for the first three financial years with respect to the expenses for commissions and other current operating expenses, expected premiums, expected charges for claims incurred and the expected liquidity situations. Additional information is required for health insurance and coverage of certain risks, about the intended reinsurance arrangements, on estimated expenses for setting up administration and the sales network, as well as on the managers and directors reliability and qualification.

Authorization may only be granted to public limited companies, mutual societies and corporations and institutions under public law. The head office must be located in Germany.

Is it mandatory that a company be physically present in the market (HQ or branch office) to write insurance/reinsurance policies?

No, it is not in any case necessary that a company is physically present in the market. An insurance company located in the European Union (EU)/ European Economic Area (EEA) may conduct business in Germany via the so-called "passporting." Any authorization to carry on business granted

by an EU or EEA member state is valid in all other EU and EEA member states. This is referred to as "European Passport" or "Single-License-Principle". To be permitted to conduct business in Germany, undertakings incorporated in an EU or EEA member state must comply with the required notification procedure. Information on this notification procedure may be obtained from the respective local supervisory authority. After successfully passing the notification procedure, such insurance undertaking may carry on business in Germany.

For insurance companies outside the EU/EEA, the following applies: A mixed insurance company not located in the EU/EEA may conduct business in Germany without being physically present in the market under the conditions set out in Section 105 *VAG*. According to Section 105, a non-EU/EEA mixed insurance company which exclusively carries on reinsurance business in Germany neither needs to be licensed by BaFin nor needs to set up a branch in Germany if certain requirements are fulfilled.

Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

In order to write German insurance and reinsurance business, foreign insurers and reinsurers need to comply with preconditions of German insurance regulatory law. Under the EU single passport regime, EEA-insurers and reinsurers are permitted to write German (re)insurance business either via domestic branch or under the freedom to provide cross-border services without requiring separate authorization in Germany. In contrast, non-EEA (mixed) insurers must regularly apply for authorization with the German regulator and establish a German branch, except where no intermediary is involved in underwriting direct business. BaFin construes the term intermediary very broadly, though. Regulation is less strict for non-EEA reinsurers, which only need to obtain authorization if establishing a German branch. For cross-border business, they merely need to provide sufficient certification regarding their proper authorization and supervision in their home country. Under the same requirements, non-EEA (mixed) insurers may exclusively underwrite reinsurance business in Germany.

Is the incorporation of local companies with foreign shareholders permitted?

Yes, the incorporation of local companies with foreign shareholders is, in general, permitted. However, there are special provisions as regards holders of qualified participating interests (*Inhaber bedeutender Beteiligungen*), sections 7a (2), 104 *VAG*. Any restrictions, thus, rather refer to particular characteristics than to location of the shareholders.

The provisions on holders of qualified participating interests are of relevance in both the authorization process as well as in the ongoing supervision of insurance companies by BaFin.

A qualified participating interest shall be deemed to exist if at least 10 percent of the capital or the voting rights in a public limited insurance company or the initial fund of a mutual society are held directly or indirectly through one or more subsidiaries or a similar relationship or through collaboration with other persons or undertakings, in the holder's own interest or in the interests of a third party, or if a significant influence can be exercised on the management of another undertaking, section 7a (2) sentence 3 *VAG*. Important prerequisite is that the holders of a qualified participating interest in the insurance undertaking must meet the demands required in the interest of ensuring sound and prudent management of the insurance undertaking, in particular the requirement of reliability. If the participating interest is held by legal persons or partnerships the same applies to the natural persons who have been appointed by virtue of law, the memorandum and articles of association or the partnership agreement to manage the business affairs and represent the insurance undertaking and to the personally liable partners.

There are special provisions also on the acquisition of a qualified participating interest, in particular on notification requirements. Any person who intends to hold such qualified participating interest in an insurance undertaking shall immediately notify BaFin of the amount of the intended qualified participating interest. Furthermore, the holder of a qualified participating interest shall immediately notify BaFin of any intention to increase the amount of the qualified participating interest to the extent that the thresholds of 20 percent, 33 percent or 50 percent of the voting rights or nominal capital are reached or exceeded, or to the extent that the insurance undertaking becomes a controlled undertaking. BaFin will then assess the notification and may within an

assessment period under certain conditions (e. g. lack of reliability, hindrance of effective supervision of the insurance undertaking) prohibit the intended acquisition of or increase in the qualified participating interest. Moreover, BaFin has also to be notified by anyone intending to give up a qualified participating interest in a primary insurance undertaking or to reduce the amount of a qualified participating interest beyond the thresholds of 20 percent, 33 percent or 50 percent of the voting rights or the capital, or to change the participating interest in such a way that the primary insurance undertaking is no longer a controlled undertaking.

Regulatory

What are the main sources for insurance and reinsurance regulatory law?

The main source is the *Insurance Supervision Act* (*Versicherungsaufsichtsgesetz – VAG*). In addition to that, BaFin develops the supervisory law in force at the time by means of Circulars, Guidance Notices and interpretative decisions based on its own administrative practice.

Precedents are no relevant source for insurance regulatory law in Germany. There is hardly any case law on insurance supervisory law aspects. Most cases are handled or decided at the administrative level and not made public.

Please describe the current regulatory environment, including pending or anticipated regulatory reform.

Currently, as for all member states of the EU, the major reform influencing German insurance supervisory law at all those levels is Directive 2009/138/EC (*Solvency II*). *Solvency II* is currently the most important project for insurance supervision at the EU level. The main purposes of the *Solvency II Directive* are to increase the protection of policyholders, create a level playing field for the insurance industry in the European single market and ensure substantially uniform supervisory practices throughout Europe. *Solvency II* shall be implemented with effect as of 1 January 2016. However, the insurance industry in Germany is already in a process of adapting these new requirements.

Solvency II defines capital and risk management requirements to be applied across all member states and establishes uniform reporting standards for insurance undertakings. The new supervisory regime uses a more principle- and risk-based approach and thus facilitates a more flexible supervision. *Solvency II* will be applied across all 28 EU member states and in three member states of the European Economic Area. As a European standard, *Solvency II* is meant to assist in protecting the interests of policyholders by reducing the probability that insurance undertakings become insolvent. *Solvency II* applies to both insurance and reinsurance companies.

As regards insurance intermediation law, the current major reform affecting Germany and the other EU Member States is the revision of the *EU Directive 2002/92/EC* on insurance mediation (*IMD 2*). This directive, inter alia, aims to expand the scope of insurance mediation to include direct insurers, as well as intermediaries, and manage and mitigate conflicts of interest. Moreover, consumer protection shall be increased. Pursuant to discussions at European level, the directive might have influence on disclosure requirements regarding broker commissions. However, a final decision on the revision of this Directive is still pending.

Claims

What are the main sources for contract law?

The primary source of German insurance law is the *Insurance Contract Act* (*Versi-cherungsvertragsgesetz – VVG*; translation provided at: *www.gesetze.juris.de/englisch_vvg/index.html*). The *Insurance Contract Act* underwent comprehensive revision as of 1 January 2008. Part 1 of the *Insurance Contract Act* contains general provisions applying to all classes of insurance, *e.g.*, rules on the formation of the insurance contract, its duration, pre-contractual disclosure obligations, premiums as well as special provisions for insurance for the account of third parties, provisional cover and open policies. There are extensive rules on intermediaries and their duties to advise the policyholder. Finally, Part 1 includes general provisions for indemnity insurance and specific rules for property insurance. Part 2 of the *Insurance Contract Act* contains provisions for individual classes of insurance including liability, legal expenses, transport and fire insurance, as well as life, occupational disability, accident and health insurance. In its final Part 3, the *Insurance Contract Act* contains provisions on reinsurance and maritime insurance, large risks, pension funds and conciliation, as well as

jurisdiction of the German courts including specific rules on venue in the event of risks underwritten by Lloyd's syndicates.

Besides the *Insurance Contract Act*, insurance contracts are governed by the general rules of German *Contract Law* as laid out in the *Civil Code* (*Bürgerliches Gesetzbuch – BGB*; translation provided at: *www.gesetze.juris.de/englisch_bgb/index.html*). This includes provisions on contract interpretation in sections 133 and 157 *BGB*. When interpreting insurance contracts, it is necessary to ascertain the true intention of the parties rather than adhering to the literal reading of the contractual provisions, taking good faith and practice into consideration. For the interpretation of standard terms, the general interpretation standard is the reasonable understanding of an average policyholder who does not have any specific insurance knowledge. Naturally, this standard differs depending on the policyholder being a consumer or a professional undertaking.

German law will apply to insurance contracts where international private law calls for its application or where the parties to the insurance contract have effectively chosen German law. For insurance contracts concluded after 17 December 2009, EC Regulation 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (*Rome I Regulation*) is the source of reference to be applied by German courts in determining the applicable law. Article 7 of the *Rome I Regulation* deals with insurance contracts whether the risk covered is situated in a member state or outside the EU/EEA. For so-called large risks, Article 7(2) of the *Rome I Regulation* leaves the applicable law to the parties' choice. Absent such choice, the insurance contract will be governed by German law if the insurer is situated in Germany or if German law is manifestly more closely connected to the contract than the law of the insurer's location. In all other cases, pursuant to Article 7(3) of the *Rome I Regulation*, the parties may choose German law if the insured risk is situated in Germany at the time of conclusion of the contract, if the policyholder has its habitual residence in Germany, if the policyholder is a German national in the case of life assurance or if the insured risks are located outside but may occur only in Germany. Finally, German law will apply where a policyholder pursues a commercial or industrial activity or a liberal profession and the insurance contract covers two or more risks which relate to those activities and are situated in different member states if the policyholder has its habitual residence or if the risk is situated in Germany. To the extent that the applicable law has not been chosen by the parties, the insurance contract shall be governed by the law of the member state in which the risk is situated at the time of conclusion of the contract. Finally, specific rules apply to obligatory insurance contracts, *e.g.*, car insurance or professional indemnity insurance of lawyers or other professions.

While German law comprehensively regulates primary insurance contracts, there is no specific statutory law governing reinsurance contracts. Particularly, pursuant to its section 209, the *Insurance Contract Act* shall not apply to reinsurance. Thus, it is primarily the parties' contractual agreements that make the law of reinsurance. Moreover, since reinsurance contracts are commercial transactions, they are generally subject to the provisions of the *Commercial Code* (*Handelsgesetzbuch – HGB*). The *Commercial Code* particularly contains provisions on the settlement of accounts which may also be applied to the reinsurance relationship. Further, section 346 *HGB* confirms the generally accepted understanding that reinsurance customs and usages are to be regarded in the interpretation of reinsurance contracts and that such customs and usages may supersede dispositive statutory law.

Besides the *Commercial Code*, the *Civil Code's* provisions, *e.g.*, on contract formation and interpretation, apply to reinsurance contracts. Furthermore, the general requirement of good faith as laid out in section 242 *BGB* is of utmost relevance in the interpretation of reinsurance contracts.

German reinsurance law is dominated by (internationally) recognized customs and usages of trade. In particular, it is accepted that it is, on the one hand, the cedant's right and obligation to manage the underwriting, administration and handling of the underlying policies. On the other hand, it is the reinsurer's obligation to follow the *bona fide* and businesslike settlements of the reinsured (follow the settlements). In addition, under the follow the fortunes-principle, the reinsurer must follow the underwriting fortunes of its reinsured. As counterpart of the follow the settlement and follow the fortunes principles, the cedant is obliged to pre-contractually disclose material risk factors, and the reinsurer may be entitled to rescind or to avoid the reinsurance contract in case of non-disclosure misrepresentation. The reinsurer is also entitled to inspect the reinsured's books and claims files. Finally, while depending on the individual circumstances, the reinsurer may be obliged

to advise the reinsured in the conclusion of the reinsurance contract as well as during the ongoing contractual relationship.

In general, is the substantive law relating to insurance more favorable to insurers or insureds?

In revising the *Insurance Contract Act* as of 1 January 2008, the legislator intended to promote consumer protection. For example, the new law, on the one hand, introduced extensive duties for insurers to inform and to advise policyholders before the formation of the insurance contract and, on the other hand, restricted sanctions in case of breach of the policyholder's obligation to disclose material risks pre-contractually or to cooperate with the insurer in the claims handling. Accordingly, most provisions of the *Insurance Contract Act* serving consumer protection are semi-mandatory, *i.e.*, the parties cannot derogate from such provisions to the detriment of the insured.

However, these restrictions on party autonomy do not apply if the insured risk qualifies as a so-called large risk. In line with European law, pursuant to section 210 VVG, such large risks include certain transport, liability and credit insurances as well as certain property, liability and other indemnity insurances if the policyholder exceeds at least two of the following characteristics: (i) EUR 6.2 million balance sheet total; (ii) EUR 12.8 million net turnover; and (iii) an average of 250 employees per fiscal year. If the policyholder belongs to a group of companies which must prepare a consolidated financial statement, it is the figures contained in the consolidated financial statement which shall be material to the establishment of the size of the enterprise. Section 210 VVG thus enables insurers to contract out certain consumer protection-oriented provisions which would, in fact, be opposed to a balanced wording and level playing field and do not reflect the necessities of commercial and industrial insurance.

Even where the *Insurance Contract Act* leaves room for party autonomy, certain restrictions apply regarding standard insurance terms and conditions. In this respect, the provisions on standard business terms and conditions in sections 305 *et seq. BGB* are particularly significant and play a major role in many coverage proceedings. Pursuant to section 305c(1) *BGB*, provisions which are so unusual that the other party to the contract with the user need not expect to encounter them, do not form part of the contract. Under section 305c(2) *BGB*, any doubts in the interpretation of standard business terms are resolved against the user. Moreover, according to section 307 *BGB*, provisions in standard business terms shall be ineffective if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract with the user. Such an unreasonable disadvantage may arise from the provision not being clear and comprehensible. Further, an unreasonable disadvantage is, in case of doubt, assumed to exist if a provision is not compatible with essential principles of the statutory provision from which it deviates, or limits essential rights or duties inherent in the nature of the contract to such an extent that attainment of the purpose of the contract is jeopardized. While this rather strict test plays a predominant rule in consumer insurance, it is also applied in the case of insurance of commercial and industrial risks. For example, German courts are reviewing claims-made provisions in directors' and officers' liability (D&O) and other insurance contracts against the standards of sections 305 *et seq.*, requiring insurers to provide for certain protections of the insured if claims-made policies left the insured without adequate coverage.

What is the statute of limitations on claims?

The general rules on the statute of limitations are contained in sections 194 *et seq. BGB*. The standard limitation period is three years (section 195 *BGB*). The limitation period commences at the end of the year in which a claim arose and the claimant obtained or should have obtained knowledge, without gross negligence, of the circumstances giving rise to the claim od of the identity of the obligor (section 199 (1) *BGB*).

Unless agreed otherwise, these general rules also apply on insurance and reinsurance claims. Regarding the underlying insured claims, other specific rules on the statute of limitations may apply.

Can a third party bring direct action against an insurer?

As a general rule, only the insured has a claim for coverage against the insurer. There are exceptions, though, in particular for liability insurance. For compulsory liability insurance, section 115 (1) VVG entitles the third party to bring a direct action against the insurer i) in the case of third party motor insurance, ii) if insolvency proceedings have been opened in respect of the assets of the policyholder, or iii) if the policyholder's whereabouts are unknown.

Moreover, section 108 (2) VVG states that liability insurers may not prohibit in standard insurance terms and conditions that the insured assigns its claim for indemnification to the third party bringing the damage claim. A prohibition of assignment may, thus, only be agreed individually or in the case of a large risk and, in the latter case, will have to stand scrutiny of general insurance terms and conditions according to the rules of the *Civil Code*. If the assignment is valid, the third party shall be entitled to demand indemnification directly from the insurer.

Can an insured bring a direct action against a reinsurer?

Under German Reinsurance Law, there is no direct claim of an insured against a reinsurer, unless specifically agreed, *e.g.*, by means of a cut-through clause.

Dispute Resolution

Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

Insurance disputes are heard in the courts competent for civil law matters. These are the Federal Court of Justice (*Bundesgerichtshof – BGH*), 24 Courts of Appeals (*Oberlandesgericht – OLG*), 115 District Courts (*Landgericht – LG*) and 650 Local Courts (*Amtsgericht – AG*). But for the Local Courts, all courts usually have specialized chambers or senates for insurance matters. Both the Local Courts and the District Courts are courts of first instance. In insurance matters, the court of first instance will be a District Court if the amount in dispute exceeds EUR 5,000. Against a first instance judgment by a District Court, an appeal on facts and law can be brought to the competent Court of Appeals (or to the competent District Court in case of a first instance judgment by a Local Court). The appeal decision can be again be appealed, yet solely on legal grounds, by an appeal to the Federal Court of Justice.

What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of a) parties to the action and b) non-parties to the action?

German civil procedure does not know pre-trial discovery as particularly known from US litigation. Rather, civil proceedings follow the rule that each party must prove the facts that support its position and must produce any documents supporting the relevant facts.

However, there are certain exceptions for the taking of evidence which to a certain extent resemble document production according to the IBA Rules on the Taking of Evidence in International Arbitration. Accordingly, a party may apply for a court order requiring the other party to produce specific documents in order to prove certain facts if such documents are in possession of the other party and if the other party is obliged to furnish the documents. If the other party does not produce the requested documents, the court may consider the allegations of the party applying for document production as true. Under the same prerequisites, third parties who are not involved in the litigation must also produce documents within a deadline set by the court. Within this time frame, a party may be required to take legal action to enforce the non-party's obligation.

Further, courts have discretion to order a party or even a third party to produce specific documents which a party has referred to in its pleadings. If a party does not comply with a respective court order without good reason, the court will take this into consideration in its evaluation of evidence. Third parties may be imposed with a fine.

Are mediation and arbitration common methods for solving insurance disputes? Are more disputes resolved in or out of court?

In direct insurance, arbitration is rather the exception than the rule and sometimes used for special risks, *e.g.*, aviation, transport or D&O insurance. In contrast, in line with worldwide practice, German reinsurance contracts usually contain an arbitration agreement. While this does not make reinsurance contracts different from other international business contracts, reinsurance arbitration has its unique characteristics. From the start, reinsurance arbitration has so far

mostly been *ad hoc*. Further, it has been a typical feature of reinsurance arbitration agreements to require that arbitrators are serving or have served as directors of insurance or reinsurance undertakings (or in an equal position) for a considerable period of time. As a result, it sometimes proves difficult finding qualified and appropriate arbitrators. Moreover, reinsurance arbitration has, in many instances, rather resembled mediation focusing on a business solution. Yet, reinsurance arbitration is undergoing change as insurers and reinsurers take a more strategic approach in their dispute resolution, tending to focus more on a professional legal resolution of their disputes.

Generally speaking, over the past decade, Germany has become an increasingly significant venue for international arbitration proceedings. This development is supported by a number of factors. In comparison, German arbitral proceedings are recognized for being efficiently and cost-sensitively organized. Further, German arbitration law as well as court practice follow an arbitration-friendly approach. Having adopted the *UNCITRAL Model Law on International Commercial Arbitration in 1998*, Germany provides a modern arbitration regime designed to protect party autonomy and to afford effective arbitral justice.

The most prominent German arbitration institution is the German Institution of Arbitration (*Deutsche Institution für Schiedsgerichtsbarkeit e.V. – DIS*). For insurance and reinsurance disputes, ARIAS Europe (*www.arias-europe.org/*) has published a specific arbitration and mediation model clause and provides for a list of certified arbitrators.

Mediation and conciliation are also increasingly used, yet, generally speaking, still on a rather low level. In 2012, the legislator enacted the *Mediation Act*, thereby implementing the *EU Directive* on certain aspects of mediation in Civil and Commercial Matters. Mediation is meanwhile regarded as a more established dispute resolution method and is likely to gain more relevance for business decisions. The new act also introduced new types of mediation related to court proceedings. In insurance, mediation is particularly used under legal expenses insurance. However, contrary to, *e.g.*, the London market, mediation is still rarely employed in commercial and industrial insurance and reinsurance.

Insurance and reinsurance disputes are often settled, either out-of-court or in the course of litigation or arbitration proceedings. In particular, judges are requested and empowered to encourage settlement at any stages of litigation proceedings.

What are the provisions regarding timely notice, and what are the legal consequences for non-compliance with the timely notice obligation?

Upon occurrence of the insured event, the insured has to give respective notice to the insurer. Insurance contracts often specify the requirement of notification. Pursuant to section 30 VVG, as a general rule, notification is to be given without undue delay. In the case of liability insurance, section 104 VVG obligates the insured to disclose to the insurer within one week those facts which could give rise to his responsibility vis-à-vis a third party. If the third party asserts a claim against the policyholder, the policyholder is obligated to disclose that fact to the insurer within one week. Further, where a claim is asserted against the insured in court, the insured is obligated to disclose that fact to the insurer without undue delay. The same applies when criminal proceedings have been initiated against the insured on account of the occurrence of the loss giving rise to the claim.

In case of breach of the notice obligations by the insured (just as in case of breach of any other insurance obligations), the insurer may be released from its coverage obligations pursuant to section 28 VVG. Pursuant to this provision, the insurer shall be released from liability if the insured policyholder intentionally breached the obligation. In the case of a grossly negligent breach, the insurer shall be entitled to reduce any benefits payable commensurate with the severity of the insured's fault. The burden of proof that there was no gross negligence shall be on the insured. However, unless the insured breached its obligations fraudulently, the insurer shall remain liable insofar as the breach neither caused the occurrence or the establishment of the insured event nor the establishment or the extent of the insurer's obligations. For information and disclosure obligations after the occurrence of an insured event, these remedies will only apply if the insurer instructed the insured in separate correspondence and in writing of the legal consequences. Finally, these remedies will only be applicable if agreed in the contract.

Germany

What are the laws regarding bad faith claims? What damages may be awarded if the insurer is found to have acted in bad faith?

German Insurance Law does not provide for bad faith claims as particularly known in the United States of America. In this context, it is to be noted that the principle of good faith under German law is not an independent source of enforceable rights and obligations but rather a standard applied in the interpretation of contracts and to the parties' conduct in the course of their contractual relationship, prohibiting, *e.g.*, a party to contradict its previous actions (*venire contra factum proprium*). Hence, the principle of good faith under German law significantly deviates from the concept of (utmost) good faith in other jurisdictions.

At the same time, an insurer will face legal sanctions, *e.g.*, default interest, in case the insurer unlawfully denies coverage or protracts a coverage decision. In this instance, severe legal consequences may particularly apply in the case of liability insurance. In particular, the insured will no longer be bound by its insurance obligations and the insurer will be bound by a good faith resolution of the liability dispute, be it by judgment, acknowledgement or settlement. Furthermore, sanctions may also apply where the liability insurer provides coverage but decides to defend a claim which proves to be given. Under statutory rules and unless validly agreed otherwise in the contract, while it is in the liability insurer's due discretion whether to defend or to indemnify a claim, if opting for defense coverage, the insurer may be obliged to cover costs and interest in addition to the insured limit.

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Ireland

Overview

Which government bodies/agencies regulate insurance and reinsurance companies?

The Central Bank of Ireland ("CBI") is the competent regulator of insurance and reinsurance in Ireland. In 2003, the Irish Financial Services Regulatory Authority (the "Financial Regulator") was established by the *Central Bank and Financial Services Authority of Ireland Act*. The Financial Regulator was the sole regulator of financial institutions in Ireland and formed a distinct component of the Central Bank and Financial Services Authority of Ireland. *The Central Bank Reform Act, 2010* "re-unified" the Financial Regulator and the Central Bank of Ireland and established the CBI as a single integrated structure under a unitary board – the Central Bank Commission. The CBI is responsible for authorising and supervising all financial institutions in Ireland, including insurance and reinsurance companies and insurance intermediaries.

What are the categories of insurance licenses that exist?

The CBI, the competent regulator of insurance business in Ireland, regulates the following insurance industry participants:

Life Insurers – an entity can be authorized as a life insurer pursuant to the *European Union (Insurance and Reinsurance) Regulations 2015* (the *"Regulations"*). The *Regulations* transpose the European *Solvency II Directive*[1] in Ireland. Life insurers can be authorized in any of the classes of life assurance set out at Schedule 2 to the *Regulations*.

Non-Life Insurers – an entity can be authorized as a non-life insurer pursuant to the "*Regulations.*" Non-life insurers can be authorized in any number of classes 1 – 18 of general insurance set out at Schedule 1 to the *Regulations*. Composite Insurers – As a general rule, it is not possible to be authorized in Ireland as a composite life and non-life insurer. That is to say, subject to a limited exception for certain insurers, it is not possible for an insurer to be licensed to write life and non-life business simultaneously.

Composite Insurers – As a general rule, it is not possible to be authorized in Ireland as a composite life and non-life insurer. That is to say, subject to a limited exception for certain insurers, it is not possible for an insurer to be licensed to write life and non-life business simultaneously.

Captive Insurers – Insurers can be authorized as "captive" non-life insurers pursuant to the *Regulations* cited above. In Ireland, captive insurers are insurers that exclusively insure the risks of the corporate group to which they belong. These captive insurers enjoy a more relaxed regulatory regime than other non-life insurers.

Reinsurers – Under the *Regulations*, reinsurers are subject to authorization requirements and prudential supervision that are not dissimilar to the regime for direct insurers. However, unlike direct insurers, reinsurers can be authorized as "composites" i.e. authorized to reinsure life and non-life risks simultaneously.

Special Purpose Reinsurance Vehicles ("SPRV") – Under the *Regulations*, it is also possible to establish as an SPRV. SPRVs are undertakings which assume risk from insurance/reinsurance undertakings under reinsurance contracts and fully fund their exposure through a debt issue or some other financing arrangements. SPRVs benefit from a faster authorization process and are subject to less supervision than regulated reinsurers. The Regulations do not apply to SPRVs authorised under the previous regime as set out in the *European Communities (Reinsurance) Regulations 2006* (the *"Reinsurance Regulations"*) (which transposed the European Reinsurance Directive[2]). The Regulations apply to new activity commenced by an SPRV from 1 January 2016 onwards.

Certain (re)insurance undertakings are excluded from the scope of the *Regulations* on the basis of size, level of business activities etc. The regulatory regime that applies to those entities is set out in the *Finance (Miscellaneous Provisions) Act 2015*.

Intermediaries – an entity wishing to perform mediation activities must be registered pursuant to the *European Communities (Insurance Mediation) Regulations 2005* (the *"Mediation Regulations"*), although this is set to change with the implementation of the Insurance Distribution Directive (IDD) in Ireland by early 2018 (see below).

The Mediation Regulations transpose the European Insurance Mediation Directive[3] (*IMD*) in Ireland. Insurance mediation has a very broad meaning under

[1] Directive 2009/138/EC

the Mediation Regulations and a wide range of insurance related activities are within scope:

"Insurance Mediation – "any activity involved in proposing or undertaking preparatory work for entering into insurance contracts, or of assisting in the administration and performance of insurance contracts that have been entered into (including dealing with claims under insurance contracts), but does not include such an activity that:

- is undertaken by an insurance undertaking or an employee of such an undertaking in the employee's capacity as such; or
- involves the provision of information on an incidental basis in conjunction with some other professional activity, so long as the purpose of the activity is not to assist a person to enter into or perform an insurance contract;
- involves the management of claims of an insurance undertaking on a professional basis; or
- involves loss adjusting or expert appraisal of claims for reinsurance undertakings."

An entity or person can avoid registration as an intermediary if they satisfy certain cumulative conditions, which are set out in Regulation 6 of the *Mediation Regulations*.

All intermediaries (whether they act for many or few insurers) are registered under the *Mediation Regulations* as "an intermediary." Prior to the introduction of the *Mediation Regulations*, insurance intermediaries had been subject to a domestic authorization and supervisory regime under the *Investment Intermediaries Act 1995* from 2001 onward. However, this domestic regime is less relevant for intermediaries seeking authorization since the introduction of the *Mediation Regulations*.

The *IDD* will bring about a number of changes to the regime governing insurance intermediaries in Ireland. Although it is a minimum harmonizing directive, it will significantly raise the minimum standards set by the IMD and will apply to all sellers of insurance products, including direct insurers. It will also bring about more stringent and specific professional requirements for insurance intermediaries as well as expanding the requirements around information that must be provided to the consumer (see below).[2]

Are insurance companies subject to taxes beyond the ordinary burden faced by all companies?

Corporate Tax – Like other Irish trading companies, Irish insurers and reinsurers are taxed at the Irish corporate tax rate of 12.5 percent, with certain limited exceptions (i.e. certain historic life assurance business may not avail of the 12.5 percent rate). For Irish life insurers, payments to non-Irish policyholders are generally made free of tax and are tax deductible for that insurer.

SPRVs can be established on a tax neutral basis (presuming the SPRV qualifies under Section 110 of the *Taxes Consolidation Act 1997* (as amended)). SPRVs are liable to 25 percent Irish corporate tax. However, the SPRVs are generally structured so that the net taxable profits are maintained at a negligible level as there is no minimum profit requirement for Irish tax purposes.

Insurance Premium Tax – Irish insurers are also subject to certain taxes based on their premium income.

Non-life insurers must pay Insurance Premium Tax to the Irish Revenue Commissioners. The rate of tax is based on the insurer's aggregate gross premium income referable to Irish risks (Irish tax law sets out rules for determining what constitutes an "Irish situate risk"). The *Insurance Premium Tax* is not payable on certain lines of insurance e.g. life insurance and marine aviation. Non-life insurers are also subject to stamp duty on certain insurance policies.

Life insurers must also pay insurance premium tax to the Irish Revenue Commissioners. The rate of tax payable by a life insurer is based on its gross written premium which is referable to Irish risks (Irish tax legislation sets out rules on determining what constitutes an Irish situate risk).

What are the approved distribution channels? Are there restrictions?

Insurers can distribute products either directly or through channels of intermediaries. Generally, insurers are restricted to distributing products through intermediaries that are registered (or benefit from an exemption from registration) under the *Mediation*

[2] Directive 2005/68/EC

Regulations (or the comparable legislation in another European Economic Area member state ("EEA")[3]).

For this reason, many Irish banks are also registered as intermediaries under the *Mediation Regulations*. Intermediaries are generally categorized in accordance with the number of appointments they hold – "Agents" (who act for a small number or just one insurer) and "Brokers" (who hold a number of appointments from a number of insurers and advise policyholders on that basis.

Are there any forms of compulsory insurance?

Yes, motor insurance is compulsory under the *Road Traffic Act, 1961* in Ireland. In addition, insurance is often a requirement of membership of professional bodies. For example, to be a member of the Irish Law Society each solicitor must have professional indemnity pursuant to the *Solicitors Acts 1954 to 2011* (Professional Indemnity Insurance) *Regulations 2014* (as may be amended). Insurance intermediaries are also required to hold adequate professional indemnity cover pursuant to Article 17 of the *Mediation Regulations*.

What major insurance/reinsurance legislation is on the horizon?

As Ireland is a member state of the European Union, it is obliged to transpose all European directives into domestic legislation in accordance with the deadline set out under those directives. *Directive 2009/138/EC* of the European Parliament and of the Council of 25 November 2009 on the taking up and pursuit of the business of Insurance and Reinsurance (*"Solvency II"*) was transposed into Irish law on 4 November 2015 and took effect on 1 January 2016. This is four years later than the originally intended transposition date of 31 October 2012. *Solvency II* radically overhauls the regulatory regime that applies to insurers and reinsurers across the EEA.

The purpose of the current *European Insurance Directives*[4] (which previously governed the activities of insurance and reinsurance undertakings) was to facilitate the development of the single market in insurance services while at the same time ensuring an adequate level of consumer protection. The *European Insurance Directives* aimed to establish a single market by introducing an "EU passport" (single licence) for insurers based on the concept of minimum harmonization and mutual recognition.

Many EEA member states concluded that the minimum requirements set out in the *European Insurance Directives* were not sufficient for purpose and implemented their own reforms. This led to a situation where there was a patchwork of regulatory requirements across the EEA, which hampered the functioning of a single market. The new *Solvency II* rules replace these requirements and establish more harmonised requirements across the EEA, thus promoting competitive equality as well as a high and more uniform level of consumer protection. *Solvency II* also introduces economic risk based solvency requirements across the EEA for the first time. These new solvency requirements are more risk-sensitive and more sophisticated than in the past, thus enabling a better coverage of the real risks run by any particular insurer/reinsurer. These requirements move away from the previous "one model fits all" way of estimating capital requirements to more entity–specific requirements.

Market Entry

What are the requirements/procedures for setting up a new insurance or reinsurance company?

Insurance Companies

Under the *Regulations,* the process by which a Life/Non-Life Insurer (an "Insurer") becomes authorized is set out in summary terms. The *Regulations* require the applicant to submit certain information including a "scheme of operations" which is comprised of a detailed business plan for the proposed insurer. Notwithstanding this, there is no specific form of application to set up an insurer. However, the CBI has issued detailed guidance on the authorization process i.e. explaining the process and timing for the submission of the application for authorization, together with a "checklist" (discussed below) of the matters which should be addressed in the application and the documents that should be attached thereto.

To authorize an Irish insurer, the promoters must first set up a corporate organization. Insurers are free to adopt different types of corporate organizations

[3] EEA member states are all the member states of the European Union and Iceland, Liechtenstein and Norway.

[4] The European Consolidated Life Directive (Directive 2002/83/EC) and the European Non-Life Insurance Directives (Directives 92/49/EEC, 73/239/EEC and 88/357/EEC).

(*e.g.* an unlimited company or a European Company (SE)). However, most insurers will generally choose to incorporate a designated activity company.

Under the *Regulations*, an insurer must limit its operations to the business of life/non-life insurance business or operations arising directly therefrom to the exclusion of all other commercial business.

The checklist referred to above covers the specific content requirement of the applicant's business plan, as well as the broader information that the CBI may require in assessing the application. Following the receipt of a fully completed application (and depending on the quality of the application), an indicative timeline to CBI issuing an authorization is three months.

Reinsurance Companies

As with direct insurance, the process for authorization is very similar to that required for direct insurers.

Is it mandatory that a company be physically present in the market (HQ or branch office) to write insurance/ reinsurance policies?

No, it is not mandatory that an EEA authorized insurer/reinsurer be physically present in the market to write insurance. The *European Insurance Directives* created a single market in insurance by allowing insurers to "passport" their licence to conduct insurance business into other EEA member states, which continues under *Solvency II*. Therefore, insurers/ reinsurers authorized in one member state (the "Home Member State") can passport into another EEA member state (the "Host Member State") without needing a separate authorization on a freedom of services basis. This means that the insurer has no physical presence in the market. An EEA based insurer/reinsurer can also passport on a "freedom of establishment" basis, meaning that it has a physical presence in this market.

The CBI remains responsible for the prudential supervision of any insurer/reinsurer it has authorized, including any business such insurer/reinsurer conducts in any other EEA member state, whether on a services or on an establishment basis.

Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Under *Solvency II*, a foreign insurer (i.e. an insurer with its head office outside the European Union) must set up a branch in Ireland to write direct business.

Is the incorporation of local companies with foreign shareholders permitted?

Yes, there is no restriction on Irish insurers having non-Irish incorporated parent companies. However, the suitability of any proposed shareholder must be assessed in advance by the CBI in accordance with the legislation implementing the *European Acquisitions Directive*. Therefore, any person or entity seeking to acquire 10 percent or more of the issued share capital or voting rights of an Irish insurer/reinsurer or if that person proposes to increase its existing shareholding/ voting strength over certain relevant thresholds, it must first get the pre-approval of the CBI.

Regulatory

What are the main sources for insurance and reinsurance regulatory law?

The key legislative requirements to which insurers and reinsurers are subject to are set out below:

Insurers – The *Regulations*; the *Insurance Acts 1909-2011, the Central Bank Acts* and the various codes of conduct, guidance and guidelines issued by the CBI as prudential regulator (*e.g. the Corporate Governance Requirements for Insurance Undertakings 2015* (the *"Requirements"*). Specific codes of conduct also apply to consumer facing insurers *e.g. Consumer Protection Code* (the *"CPC"*).

Reinsurers – The *Regulations*; Reinsurers are also subject to the *Central Bank Acts* and various codes of conduct, guidance and guidelines issued by the CBI (*e.g.* the *Requirements* and the CBI's Fitness and Probity standards). A reinsurer may also be subject to other CBI requirements depending on the nature of its business.

Please describe the current regulatory environment, including pending or anticipated regulatory reform.

Solvency and capital requirements – Under *"Solvency I"* (which is the name given to the former regulatory

regime underpinning the European Insurance Directives) the solvency requirements of an insurer were not risk-sensitive. They were not forward looking, took no consideration of market risks and did not involve any stress-testing. As noted above, *Solvency II* introduces a new EU wide supervisory regime for insurers/reinsurers.

Solvency II introduces economic risk based solvency requirements across the EEA member states for the first time. These solvency requirements are more comprehensive than in the past. *Solvency II* takes account of the "asset-side" risks as well as the liability-side risks (i.e. insurance risks) of an insurer. The new regime is a "total balance sheet" type regime where all the risks and their interactions are considered. For example, under *Solvency II*, insurers are required to hold capital against market risk (i.e. fall in value of the insurer's investments) credit risk (*e.g.* where third parties cannot repay their debts) and operation risk (e.g. risk of systems breaking down or malpractice). While these risks were not covered by the previous regime, experience has shown all these types of risk can pose a material threat to insurer's solvency.

Confidentiality

Generally, the obligation on insurers to treat policyholder information as confidential derives from the *European Union Data Protection Directives*. Those *Directives* impose obligations on both controllers of personal data and processers of personal data at a European wide level. At a domestic level, the CBI's *CPC* also imposes rules on regulated financial services providers such as insurers in relation to the maintenance of customer records. In practical terms, the parties to a contract may impose obligations of confidentiality with regard to information shared with the other (*e.g.* information exchanged between an insurer and an intermediary and/or information exchanged between an insurer and a reinsurer).

In December 2015 the institutions of the European Union agreed on a finalised draft of the General Data Protection Regulation (the *"GDPR"*) which will replace the current Data Protection Directive. The *GDPR* will come into force two years after its publication in the Official Journal of the European Union and will be directly effective across the EU and will not require transposing legislation in the member states. This will lead to a more unified data protection landscape rather than the current situation which requires business operating in the EU to be familiar with 28 different pieces of domestic legislation each of which interpret the same Directive differently. While the main principles of data protection will remain the same, the *GDPR* aims to modernise the law of privacy; provide for more extensive rights for individuals; and more extensive powers of enforcement and sanction (including increased fines) for regulators.

The Central Bank (Supervision and Enforcement) Act 2013 (as amended by the Protected Disclosures Act 2014 and the Consumer Protection (Regulation of Credit Servicing Firms) Act 2015) (the *"2013 Act"*) also provides for individual "whistleblowers" within financial services providers to report alleged breaches of financial services legislation to the Central Bank in relation to wrong doing in the workplace. The *2013 Act* facilitates whistleblowing by offering protection for all workers against penalization where they disclose such information (referred to as "protected disclosures"). The *2013 Act* also placed a positive obligation on certain persons occupying key positions within regulated financial services providers to report on any contraventions of the *2013 Act* and provides protection for such individuals.

Supervision

The CBI supervises insurers by way of a risk sensitive regime. The Probability Risk and Impact System ("PrisM") is the CBI's risk based framework for the supervision of regulated firms. Under PrisM, those insurers with the ability to have the greatest impact on financial stability and the consumer receive a high level of supervision under structured engagement plans leading to early intervention to mitigate potential risks. Conversely, those insurers which have the lowest potential adverse impact will have a lower level of supervision. The CBI takes targeted enforcement action against insurers across all impact categories whose poor behavior risks jeopardising statutory objectives including financial stability and consumer protection.

As well as the new economic risk-based solvency requirements discussed above, *Solvency II* requires insurers to observe new rules in respect of all other aspects of their business. The *Solvency II Directive* consists of three main areas or "pillars" of regulation which are designed to be mutually reinforcing. Pillar 1 consists of the quantitative requirements (i.e. how much capital an insurer should hold). Pillar 2 sets out requirements for the governance and risk management of insurers, as well as for the effective supervision of insurers.

The focus of Pillar 3 is on supervisory reporting and transparency requirements. EEA based insurance regulators are required to undertake a "Supervisory Review Process" (SRP) (Article 36 of *Solvency II*). The purpose of the SRP is to enable supervisors to better and earlier identify insurers which might be heading for difficulties. Under the SRP, supervisors will review and evaluate insurers' compliance with the laws, regulations and administrative provisions set out under Solvency II and its implementing measures.

Corporate governance

In 2010, the CBI introduced a Corporate Governance Code (the "*Code*"). *The Code* set out the minimum core standards of corporate governance which apply to both insurers and reinsurers regarding board composition and size, frequency of meetings, committee composition and the role of the Chairman and Chief Executive Director. Institutions that are categorized as "Major Institutions" under *The Code* are subject to additional requirements. The CBI also requires all insurers to be managed soundly and prudently. It submits all key function holders within insurers/reinsurers to a pre-approval process pursuant to the CBI's Fitness and Probity regime. For example, all directors of insurers/reinsurers are vetted by the CBI before they can take up their position.

In December 2013, the CBI published a new *Corporate Governance Code* for Credit Institutions and Insurance Undertakings 2013 which took effect on *1 January 2015*. It introduced amendments to existing requirements regarding matters such as the physical presence of directors at board meetings, requirements such as an obligation to appoint a Chief Risk Officer and a requirement to introduce a diversity policy for board members. In 2015, the CBI separated requirements for insurance undertakings and credit institutions. With effect from 1 January 2016, insurance undertakings are subject to the newly entitled *Corporate Governance Requirements for Insurance Undertakings 2015*.

Solvency II requires insurers to establish "functions" or specific areas of responsibility and expertise to deal with the risk management, compliance, internal audit and actuarial issues. These "functions" have been specifically identified in order to help insurers in their practical implementation of the new rules under *Solvency II*. Under *Solvency II* an insurer must also have an adequate and transparent governance system with a clear allocation of responsibilities and effective reporting lines. Other requirements relate to internal control and internal audit, the need to carry out a self-assessment of the insurer's risks and solvency position and the need for board members and senior management to be "fit and proper." As mentioned above, the CBI has already introduced many of these requirements into its prudential regime.

Reporting requirements

Under *Solvency II*, Irish insurers/reinsurers are subject to numerous reporting requirements in excess of the preceding reporting regime e.g. a key requirement applying to both direct insurers and reinsurers is the requirement to submit the Solvency and Financial Condition Report on an annual basis.

Separately, there is a requirement on the directors of insurers/reinsurers to submit compliance statements to the CBI on an annual basis confirming compliance with legal obligations under the relevant regulations. Directors must also comply with a separate obligation to certify compliance with the *Corporate Governance Code*.

Solvency II requires insurers to report information in a prescribed format to the CBI to facilitate effective supervision. *Solvency II* also requires insurers to disclose certain information publicly to a far greater extent than was previously the case.

Consumer protection

In 2006, the CBI introduced the *CPC* in order to protect consumers of financial services providers in a consistent manner. The *CPC* was revised in 2012 to ensure the highest level of protection for consumers of financial services products. The provisions of the *CPC* are binding on regulated entities such as insurers and intermediaries. The *CPC* includes general principles which apply to all regulated entities in dealing with all customers including acting honestly and fairly in the best interests of customers. The *CPC* also includes detailed rules on the provision of insurance products.

At a European level, *Solvency II* is intended to increase consumer protection as it requires insurers to take account of all relevant risks. This should be reflected in the design of their products and level of their premiums. Furthermore, as referred to above, the current *IMD* which governs the sale by intermediaries of insurance products to consumers is set to be replaced with the *IDD*. It is widely accepted that the current regime does not adequately protect consumers as it does not encompass all of the distribution channels for

insurance products in Europe (for example, direct insurers are not subject to its requirements). Also, as it is a "minimum harmonization" Directive, there has been an inconsistent transposition of the regime into the various EEA member states. For that reason, many consumers get different standards of advice in different countries, depending on the local transposition of the *IMD*. The *IDD* is required to be transposed into national law two years after its publication in the Official Journal of the European Union and the latest indications are that the deadline will be in early 2018. However, it is anticipated that the *IDD* will be implemented in Ireland by mid/late 2017.

Broker remuneration and CPC

As a matter of Irish law, the rules relating to the disclosure of fees and remunerations of brokers are set out under the *CPC*. As a general rule, under the *CPC*, regulated entities i.e. any regulated financial services provider including insurers/reinsurers intermediaries must display on their website and in their offices a schedule of fees and charges it imposes on consumers.

Separately from that, an intermediary must comply with certain disclosure requirements prior to the sale of a product.

Under *IDD*, further more detailed disclosure requirements will be introduced in respect of fees and commission structures for intermediaries and for sale staff of direct insurers. The requirements will be particularly detailed on the life insurance investment side and less detailed on the non-life insurance side having regard to the proportionality principle set out in *IDD*.

Claims

What are the main sources for contract law?

The principles of common law such as they apply to contract law and statutory provisions.

In general, is the substantive law relating to insurance more favorable to insurers or insureds?

It is not possible to cite any sources or codes to support the proposition that the law relating to insurance is more favorable to insurers or insureds. The general perception in this jurisdiction is that courts tend to be more favorable to insureds principally because of the principle of contra proferentem where insurance contract clauses may be construed against the insurer.

What is the statute of limitations on claims?

There are different limitation periods in this jurisdiction for different types of actions, *e.g.*, personal injury claims, breach of contract etc. The principle of source is the *Statute of Limitations 1957* and the *Statute of Limitations (Amendment) Act 1991*. The limit for contractual claims is six years.

Can a third party bring direct action against an insurer?

It would be unusual for a third party to bring an action against an insurer. A third party would normally bring in the action against the insured.

However, in certain circumstances where the insured becomes insolvent, it is possible under our companies legislation for a third party to bring a direct action against the insurer.

Can an insured bring a direct action against a reinsurer?

Such claims are unusual in this jurisdiction but there is nothing to prevent an insured initiating such proceedings.

Dispute Resolution

Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

The appropriate court for commercial insurance disputes is the Commercial Court. The Commercial Court deals with claims with a value of over EUR 1 million. There are no jury trials in commercial disputes in this jurisdiction.

Ireland

What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of a) parties to the action and b) non-parties to the action?

The courts have powers to order discovery/disclosure and inspection of documents in respect of parties. The rules relating to discovery in this jurisdiction are broadly similar to those which pertain in the UK or U.S.

In the event that a party requires non-party or third party discovery it is possible in this jurisdiction to bring a motion seeking such discovery against a non-party or third party.

Are mediation and arbitration common methods for solving insurance disputes? Are more disputes resolved in or out of court?

Both mediation and arbitration are common methods for solving insurance disputes. Arbitration has always been a well-recognized method of resolving insurance disputes. Recently mediation has become more prevalent in resolving these disputes. More disputes are resolved out of court than in court.

There can be many factors which influence whether out of court settlements are preferable to litigation but paramount to those would be an attempt by the parties to reduce trial costs.

What are the provisions regarding timely notice, and what are the legal consequences for non-compliance with the timely notice obligation?

Obligations in relation to notice are mainly enshrined in our Rules of the Superior Courts. In a court scenario where the obligation to deliver responses within a defined period is ignored, the party has the option to move a motion compelling delivery of such documentation. In addition, where proceedings are delayed or not prosecuted in a timely fashion the defending party has an option to move a motion to dismiss such proceedings for want of prosecution.

What are the laws regarding bad faith claims? What damages may be awarded if the insurer is found to have acted in bad faith?

Bad faith claims are more likely to be principally dealt with by the Financial Services Ombudsman in this jurisdiction. Larger bad faith claims will be dealt with by the courts. It can be very difficult to indicate what damages might be awarded if an insurer is found to have acted in bad faith. This can depend very much on the nature of the policy, the nature of the insureds bad faith and the consequences thereof. These claims are principally grounded as claims for damages for breach of contract.

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Ireland

KEY

CBI – the Central Bank of Ireland;

Code – the *Corporate Governance Code* for Credit Institutions and Insurance Undertakings;

CPC – the Consumer Protection Code;

EEA – means a European Economic Area member state;

European Consolidated Life Directive – Directive 2002/83/EC;

European *Insurance Mediation Directive* – Directive 2002/92/EC;

European Non-Life Insurance Directives – Directives 92/49/EEC, 73/239/EEC and 88/357/EEC;

European Insurance Directives – European Consolidated Life Directive and the European Non-Life Insurance Directives.

European *Reinsurance Directive* – Directive 2005/68/EC;

Financial Regulator – the Irish Financial Services Regulatory Authority;

IMD – the *Insurance Mediation Directive*;

Insurer – a Life/Non-Life Insurer;

Intermediary – an entity wishing to perform mediation activities must be registered pursuant to the *European Communities (Insurance Mediation) Regulations 2005*;

Life Insurer – an entity authorized as a life insurer pursuant to the Life Regulations;

Life Regulations – the European Communities (Life Assurance) Framework Regulations 1994;

Mediation Regulations – the European Communities (Insurance Mediation) Regulations 2005;

Non-Life Insurer – an entity authorized as a non-life insurer pursuant to the Non-Life Regulations;

Non-Life Regulations – the European Communities (Non-Life Insurance) Framework Regulations 1994;

PRSAs – Personal Retirement Savings Accounts;

PrisM – the Probability Risk and Impact System;

the "Regulations" – together, the Life/Non-Life Regulations;

Reinsurance Regulations – European Communities (Reinsurance) Regulations 2006;

Reinsurer – an entity authorized to accept risks ceded by an insurance undertaking, or by another reinsurance undertaking pursuant to The Reinsurance Regulations;

Revised Code – the CBI's *Corporate Governance Code* for Credit Institutions and Insurance Undertakings (effective as of 1 January 2015);

Solvency I – Refers to the current regulatory regime underpinning the *European Insurance Directives* and on which the Regulations are based;

Solvency II – refers to Directive 2009/138/EC of the European Parliament and of the Counsel of 25 November 2009 on the taking up and pursuit of the business of Insurance and Reinsurance;

SPRVs – special purpose reinsurance vehicles.

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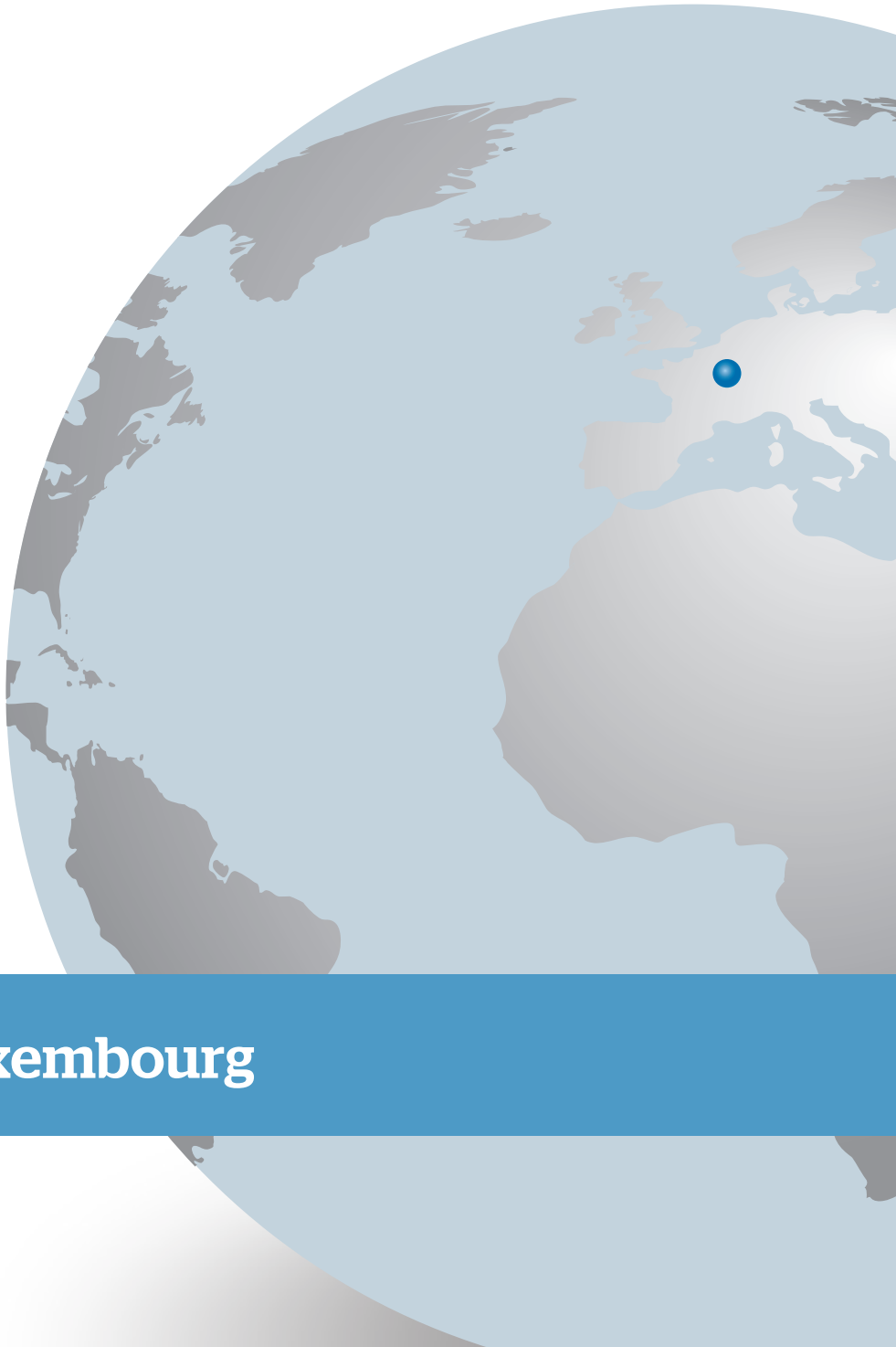

Luxembourg

Overview

Which government bodies/agencies regulate insurance and reinsurance companies?

In Luxembourg, the *Commissariat aux Assurances* (the "CAA") is the body responsible for the regulation of insurance and reinsurance companies. The CAA is a public-law agency subject to the oversight of Ministry of Finance.

The CAA's powers and organization are laid out in the first part of the law of 7 December 2015 on the insurance sector (the *"Law of 2015"*) (Articles 1 to 31). Pursuant to Article 2 of the *Law of 2015*, the CAA's main attributions are, *inter alia*, (i) the examination and review of all applications for approval of insurance and reinsurance companies as well as insurance intermediaries and the professionals of the insurance sector, (ii) the prudential supervision of those entities, (iii) the issue of regulations, and (iv) to ensure that those entities comply with their professional obligations as regards anti-money laundering and counter terrorism financing.

What are the categories of insurance licenses that exist?

Insurance companies in Luxembourg may obtain authorisation either as life or non-life insurance company. Authorisation as insurance company is subject to the provisions in Part II, Title II of the *Law of 2015*. The CAA maintains a database of the authorised insurance companies on its website.

The provision of insurance activities in Luxembourg is subject to a prior authorisation by the Minister of Finance (Article 44 of the *Law of 2015*). The authorisation may be granted for one or more insurance classes. A distinction is made between life insurance and non-life insurance activities; each of them being divided into different classes.

The non-life insurance classes include:

- Accidents (class n°1);
- Sickness (class n°2);
- Land vehicles (class n°3);
- Railway rolling stock (class n°4);
- Aircrafts (class n°5);
- Ships (class n°6);
- Goods in transit (class n°7);
- Fire and natural forces (class n°8);
- Other damages to property (class n°9);
- Motor vehicles liability (class n°10);
- Aircraft liability (class n°11);
- Liability for ships (class n°12);
- General liability (class n°13);
- Credit (class n°14);
- Suretyship (class n°15);
- Miscellaneous financial losses (class n°16);
- Legal expenses (class n°17); and
- Assistance (class n°18).

The life insurance classes include:

- Whole life insurance, endowment insurance, annuity insurance – other than marriage insurance and birth insurance – not linked to investment funds, and insurance complementary to such insurance (class I);
- Marriage insurance, birth insurance (class II);
- Whole life insurance, endowment insurance, annuity linked to investment funds (class III);
- Permanent health insurance (class IV);
- Tontines (class V);
- Capital redemption operations (class IV); and
- Collective retirement fund management operations (class VII).

An insurance company may not be authorised to exercise both life insurance and non-life insurance activities simultaneously, unless the non-life guarantees are complementary guarantees to a life insurance contract.

The authorisation as reinsurance company is also subject to the provisions in Part II, Title II of the *Law of 2015*. The exercise of reinsurance activities in Luxembourg is subject to the prior authorisation of the Minister of Finance (Article 44 of the *Law of 2015*). There is no distinction between different classes.

Specific insurance/reinsurance related activities in Luxembourg may be performed by professionals of

the insurance sector ("PSA"). These professionals, are defined as natural or legal persons, professionally established in Luxembourg or incorporated under Luxembourg Law, whose regular occupation or business falls into one of the following categories:

- Management companies of captive insurance companies
- Management companies of run-off insurance companies (legal persons whose activity consists in ensuring the daily management of one or more direct insurance companies having ceased all subscription of new contracts)
- Management companies of reinsurance companies
- Management companies of insurance portfolios
- Licensed providers of actuarial services
- Licensed providers of governance-related services for insurance and reinsurance companies
- Claim adjusters (natural or legal person whose activity consists in providing services in relation to compensation of insurance contract beneficiaries)

Are insurance companies subject to taxes beyond the ordinary burden faced by all companies?

In general, insurance companies in Luxembourg are not subject to taxes beyond the ordinary burden faced by all companies. Luxembourg insurance companies are fully-taxable companies that are subject to Luxembourg corporate income tax ("CIT") and municipal business tax ("MBT") at an effective maximum rate (for Luxembourg-city) of 29.22 percent in 2016 (including the surcharge for the employment fund).

Luxembourg insurance companies are liable to net worth tax at the rate of 0.5 percent applied on net assets as determined for net worth tax purposes. Net worth is referred to as the unitary value, as determined at 1st January of each year. As of 2016, a minimum net worth tax applies.

Pursuant to the *Law of 8 December 1994* relating to annual and consolidated annual accounts of Luxembourg insurance and reinsurance companies and relating to the duties of branches of third country insurance companies in respect of the right of establishment and of the publicity of accounting documents, as amended, insurance companies must constitute specific, technical provisions. The allowances to these technical provisions are tax deductible expenses.

Additionally, Luxembourg has a particular regime for reinsurance companies based around the "equalization" or "catastrophe" provision, which is as well a technical, tax deductible provision which allows for a tax deferral.

Furthermore, premiums for non-life insurance policies are subject to a premium tax of 4 percent while premiums related to life insurance policies are exempt. Certain health insurance products are also exempt from the 4 percent premium tax.

According to the *Grand Ducal Regulation of 28 April 2014* on the contribution to personnel and operating costs of the CAA, any insurance company whose registered office is established within the territory of the Grand Duchy of Luxembourg is subject to the payment of an annual contribution the amount of which depends on the total of the premiums written by the insurance company.

The contributions are the following:

- An annual regulatory tax is due by each insurance company, which varies between EUR 10,000 in case the total gross premiums written during the previous year is less than or equal to EUR 5,000,000, to EUR 30,000 where the total gross premiums written by the insurance company during the previous year is more than EUR 150,000,000 and less than EUR 250,000,000
- A supplementary amount of EUR 5,000 is due for each additional tranche of EUR 250,000,000 in case the gross premium written during the previous year is superior to EUR 250,000,000
- A further contribution of EUR 5,000 is due for each branch established outside of Luxembourg
- Additional contributions may be due in case of a partial or total transfer of portfolio, merger, or change of ownership.

What are the approved distribution channels? Are there restrictions?

In Luxembourg, insurance/reinsurance companies are authorised to directly distribute their products. However, they may use an insurance intermediary.

Insurance intermediation is defined by Article 279(1) of the *Law of 2015* as the activity consisting in (i)

presenting or proposing insurance contracts, or (ii) doing other preparatory work for the conclusion of insurance contracts, or (iii) concluding or contributing to the administration and performance of insurance contracts, in particular in case of claims.

An insurance intermediary is the person who, against compensation, carries out an insurance intermediation activity. In practice, such compensation is often composed of a onetime-payment at the time of the conclusion of the insurance contract as well as an ongoing commission for certain life insurance contracts on the basis of the assets under management for the relevant insurance contract.

There are different types of intermediaries in Luxembourg, and in particular, all of them require an authorisation from the Minister of Finance:

- **Agent**, defined by the *Law of 2015* as "*any natural or legal person who is engaged in insurance mediation for and on behalf of an insurance company or several insurance companies, if the insurance products do not compete with each other, who acts under the entire responsibility of such insurance company (s) in relation to their respective products*";
- **Insurance broker**, defined by the *Law of 2015* as "*any natural person managing an insurance brokerage company or established for his own account and any legal person who, without being linked to one or more insurance companies, acts as an intermediary between the policyholders they represent and authorised insurance companies in Luxembourg or abroad*";
- **Insurance sub-broker**, defined by the *Law of 2015* as "*any natural person working under the responsibility of an insurance broker or a brokerage company and who, without being linked to one or more insurance companies, acts as an intermediary between the policyholders represented by the broker and authorised insurance companies in Luxembourg or abroad.*"

Are there any forms of compulsory insurance?

As a matter of principle, the policyholder is free to enter into an insurance contract. However, certain compulsory insurance contracts exist, primarily in the context of risks relating to civil liability. There is, however, no exhaustive list of compulsory insurances in Luxembourg. But, for instance, compulsory insurance concerns risks relating to means of transport, such as motorized land vehicles, air carrier and official travels of government employees. Compulsory insurance also concerns risks relating to specific professions or sports.

What major insurance/reinsurance legislation is on the horizon?

The implementation of *Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009* on the taking-up and the pursuit of insurance and reinsurance (the *"Solvency II Directive"*) had a significant impact on the insurance and reinsurance legislative environment in Luxembourg. In this respect, the *Law of 2015* implemented the *Solvency II Directive* into Luxembourg Law. Certain implementing measures are still expected for 2016.

Moreover, *Directive 2002/92/EC of the European Parliament and of the Council on insurance mediation* is going to be repealed by the Directive of the European Parliament and of the Council on insurance distribution, whose text has been adopted and will soon be published (the *"Insurance Distribution Directive"*).

The Insurance Distribution Directive will have an impact in particular on insurance intermediaries.

Market Entry

What are the requirements/procedures for setting up a new insurance or reinsurance company?

In order to be set up in Luxembourg, an insurance or a reinsurance company must obtain a prior authorisation from the Minister of Finance (Article 44 of the *Law of 2015*).

The application for approval must be sent to the Minister through the CAA, and must enclose certain documents and information including mainly (i) a copy of the company's (draft) articles of association, (ii) detailed information on the directors, the persons in charge of the management of the company as well as the shareholders, (iii) the name of the company's independent auditor and the procedure of its appointment, (iv) a business plan and evidence of the solvency and guaranteed funds requirement. The central administration must be located within Luxembourg.

Moreover, the insurance company must be created in one of the following forms: (i) a public limited company ("*société anonyme*"), (ii) a limited partnership with a share capital ("*société en commandite par actions*"), (iii) a mutual assurance association ("*association d'assurances mutuelles*"), (iv) a cooperative ("*société cooperative*") or (v) a European company.

Is it mandatory that a company be physically present in the market (HQ or branch office) to write insurance/ reinsurance policies?

An insurance company is not required to be physically present in the market. When an insurance company is located within the EEA, the European-passport mechanism allows the insurance company to provide its activity on a cross-border basis in another EU member state to the extent that it has satisfied its regulation authority of its intentions.

When an insurance company is located outside the EEA, the establishment of a branch in Luxembourg is required.

Reinsurance companies within the EEA benefit from the same regime. Upon compliance with certain conditions, non EEA reinsurance companies may also carry out their activity in Luxembourg on a cross border basis.

Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Non-admitted insurers (hence located outside of the EEA) may directly write lines of business such as (i) insurance of goods in international transit and (ii) risks associated with maritime commerce, aviation or the launching and loading of space crafts.

For any other lines of business, non EEA insurance companies must establish a branch in Luxembourg in order to write business in Luxembourg, unless the policyholder has actually taken the initiative to enter into the insurance contract. The policyholder is deemed to have taken the initiative to enter into the insurance contract if he sought to enter into it without being contacted beforehand by the insurance company or by any other person, whether appointed by the insurance company or otherwise.

Is the incorporation of local companies with foreign shareholders permitted?

There are no restrictions under Luxembourg law regarding incorporation of local companies with foreign shareholders. However, pursuant to Article 87, paragraph 4 of the *Law of 2015*, *any natural person or legal person intending to directly or indirectly acquire a qualifying holding in an insurance company must inform the CAA thereof beforehand and indicate the amount of the holding.*

A qualifying holding is defined by the *Law of 2015* as "*the fact of directly or indirectly holding in an insurance company 10 percent or more of the capital or voting rights, or any other potential for exerting significant influence over the company in which a participating interest is held*".

Regulatory

What are the main sources for insurance and reinsurance regulatory law?

The main source for insurance and reinsurance regulatory Law in Luxembourg is the *Law of 2015*, which entered into force on 1 January 2016.

The *Law of 2015* brought substantial changes to the regulation of insurance and reinsurance companies in Luxembourg.

This Law is supplemented by Grand-Ducal regulations as well as regulations and circular letters issued by the CAA.

Please describe the current regulatory environment, including pending or anticipated regulatory reform.

Solvency and capital requirements

Solvency and capital requirements in Luxembourg currently stem from various European directives in relation to life and non-life insurance, as implemented under Luxembourg Law.

As stated previously, the *Solvency II Directive* has now been implemented under Luxembourg Law by the *Law of 2015*. The main objective of the *Solvency II Directive* is to reinforce supervisory controls relating to the financial soundness of insurance and reinsurance companies. This was achieved through:

1. the implementation of qualitative requirements regarding the governance and follow-up of

internal risks by the insurance company and the regulatory authority;

2. the implementation of quantitative rules regarding technical provisions, capital solvency requirements and adequacy of own funds; and

3. disclosure and information requirements regarding prudential reporting in relation to the qualitative and quantitative requirements.

Confidentiality

Article 300 of the *Law of 2015* provides for the protection of confidential information on clients by means of a specific confidentiality duty. This Article provides that "*the directors, members of the management and supervisory bodies, executive and other employees of insurance companies and their agents, as well as insurance brokers, insurance sub-brokers and other employees of insurance brokers, shall be obliged to maintain secrecy regarding any confidential information entrusted to them in connection with their professional activities*." An infringement to such professional secrecy duty constitutes a criminal offense.

Consumer protection

Regarding consumer protection under Luxembourg Law, the *Luxembourg Consumer Code* was implemented in 2011 in order to rationalise the existing texts and is also applicable to insurance contracts. In addition, the *Law of 27 July 1997* on the insurance contract (the "*Law of 1997*") contains a series of provisions aiming at protecting the policyholder.

Broker remuneration

At this date, there is no legal framework in Luxembourg relating to broker remuneration. However, this may change with the implementation of the *Directive on Insurance Distribution*. This directive notably aims at expanding the scope of insurance mediation and at managing and mitigating conflicts of interests, which may have an impact on the disclosure of commission requirement.

Claims

What are the main sources for contract law?

There are various sources of contract law in the Grand Duchy of Luxembourg.

The main source of insurance contract law is the *Law of 1997*. Part 1 of the *Law of 1997* contains provisions relating to insurance contracts in general, Part 2 contains provisions on damage insurance and Part 3 deals with personal insurance.

The provisions that are not contained in the *Law of 1997* are to be found in general principles of contract law, the primary source of which is the *Luxembourg Civil Code* (the "*Civil Code*"). In particular, the main principles contained in the *Civil Code* with regards to insurance law are Article 1134 relating to the principle of good faith, and Article 1964 relating to the randomness of contracts (this Article expressly refers to insurance contracts).

In general, is the substantive law relating to insurance more favorable to insurers or insureds?

The aim of the *Law of 1997* is to create a higher protection for the insured person. During the parliamentary discussions leading to the adoption of the Law, it was stated that the legislator must adapt the law in order to offer a better protection to the consumer[1].

An example of this objective is the prohibition of subsidiarity clauses which used to be authorised under the former Luxembourg insurance regime. Article 55 of the *Law of 1997* provides now that if an identical interest is insured by different insurers, the insured person is entitled to be indemnified by each insurer and, except in case of fraud, none of the insurer's may rely on the existence of other contracts covering the same risk in order to refuse his guarantee.

What is the statute of limitations on claims?

The general rules regarding the statute of limitations are contained in Articles 44 and 45 of the *Law of 1997*. The standard limitation period is three years (Article 44 of the *Law of 1997*). However, with regards to the date on which the limitation period starts to run, the *Law of 1997* distinguishes between direct actions and derivative actions that stem from the Contract.

- **Direct actions**

[1] Rapport de la commission des finances et du budget, 3/07/1997, projet de loi n°4252.

For direct actions, the limitation period starts on the day of the event giving rise to the action. However, if the claimant can prove that he only had knowledge of this event at a later date, the limitation period will only start at that time.

In the context of personal insurance, the limitation period of the beneficiary's action starts on the day that the beneficiary had knowledge of the existence of the contract, the fact that he is a beneficiary and of the event giving rise to the action.

In the context of the personal right that the person suffering the damage against the insurer, the limitation period is five years and starts on the day of the event giving rise to the action, or in the case of a criminal event, on the day of its occurrence.

- **Derivative actions**

  For derivative actions, if the claim is brought by the insured person against the insurer, then the limitation period begins on the date where the person suffering the damage makes a claim. If the claim is brought by the insurer against the insured person, then the limitation period starts to run on the day of the payment by the insurer.

  Article 45 of the *Law of 1997* provides that, in specific cases, the limitation period may be suspended or interrupted.

Can a third party bring direct action against an insurer?

Pursuant to Article 89 of the *Law of 1997*, "*the insurance creates a personal right against the insurer for the person suffering the damage. The indemnity is due by the insurer to the person suffering the damage, to the exclusion of the other creditors of the insured person.*" Thus, a third party suffering damage due to the insured person will be able to bring a direct action against the insurer.

Can an insured bring a direct action against a reinsurer?

Article 4 of the *Law of 1997* expressly excludes the application of the *Law of 1997* to reinsurance contracts. Thus, general contract law applies to the direct action by the insured person against the reinsurer. It is a general principle under Luxembourg Law that a direct action is only possible if it is expressly provided by law. As this is not the case for a direct action by the insured person against a reinsurer, this direct action is not possible.

Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

Assuming that local courts have international jurisdiction over an insurance-related dispute, it will fall under the competence of the common or judicial courts. The procedural rules applicable in this case will be those of the *Nouveau Code de Procédure Civile* ("*NCPC*").

Article 20 of the *NCPC* provides that the *Tribunal d'Arrondissement* is the ordinary court, having jurisdiction for all disputes except where the law provides for another jurisdiction.

The value of the dispute will determine which court will has jurisdiction within the Luxembourg courts. Article 2 of the *NCPC* provides that the *Tribunal de Paix* is competent for all disputes relating to amounts up to EUR 2,000, or, in the appeal against a decision, up to EUR 10,000. The *Tribunal d'Arrondissement* will thus be competent for any dispute for amounts superior to these.

Finally, there is no right to a hearing before a jury in the context of insurance disputes.

What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of a) parties to the action and b) non-parties to the action?

Luxembourg Law does not provide for a pre-trial discovery. However, any documents invoked during the trial must be communicated by the parties (Article 279 of the *NCPC*).

In addition, Articles 284 and ff. of the *NCPC* provide that a party may, in certain cases, require that the judge orders the production of specific documents held by the other party or a third party.

Luxembourg

Are mediation and arbitration common methods for solving insurance disputes in your jurisdiction? Are more disputes resolved in or out of court?

Even though parties to an insurance contract may freely decide to subject a dispute to arbitration, the *Law of 1997* provides that any clause of an insurance contract aiming to subject any future litigation to an arbitration procedure (except in case of large insurance contracts) is forbidden.

The *Law of 1997*, however, provides that, in the case of disagreements relating to legal expenses insurance contracts, the contract must provide the possibility to recourse to arbitration procedures when a difference of opinion exists between the insurer providing the legal expenses coverage and the insured person.

What are the provisions in your jurisdiction regarding timely notice, and what are the legal consequences for non-compliance with the timely notice obligation?

Upon occurrence of the insured event, the *Law of 1997* requires that the insured person must, as soon as possible or in any case within the lapse of time provided for in the contract, inform the insurer of the occurrence of the event giving rise to the claim. The insured person must also, without delay, provide all relevant information to the insurer in order to respond to any of the insurer's queries regarding the circumstances and the extent of the event giving rise to the claim. If the insured person does not comply with these obligations and this causes damage to the insurer, the insurer may reduce the insurance benefit proportionally to the amount of the damage suffered by him.

The insurer may further decline the guarantee if the insured person has not executed its obligations in the context of a claim, with fraudulent intent (Article 28 (2) of the *Law of 1997*).

What are the laws regarding bad faith claims? What damages may be awarded if the insurer is found to have acted in bad faith?

Several provisions of the *Law of 1997* cover bad faith of the policyholder in relation to an insurance contract. Pursuant to Article 12 of the *Law of 1997*, where intentional omission or inaccuracy has misled the insurer in his evaluation of the risk, the insurance contract is void. Premiums earned until the moment when the insurer becomes aware of the intentional omission or inaccuracy remains due to the insurer. Similarly, pursuant to Article 32 of the *Law of 1997* when the risk does not exist or has already materialised and the policyholder has taken out the contract in bad faith or has made an inexcusable mistake, the insurance contract is void and the insurer retains the insurance premium for the period starting on the date on which the relevant contract takes effect until the day he was aware of the inexistence of the risk. Article 34 of the *Law of 1997* foresees that, when a claim arises in a situation where the policyholder acting in bad faith has not previously reported to the insurer that the risk covered under the insurance contract had increased, the insurer may refuse its guarantee.

It is further a general principle under Luxembourg insurance law that, notwithstanding any clause to the contrary, the insurer is not required to pay its guarantee if the event giving rise to a claim was voluntarily caused. The *Law of 1997*, however, provides that, in case of life insurance contract, the insurer must cover suicide committed one year or more after the conclusion or reinstatement of the insurance contract.

Finally, Luxembourg insurance law is governed by the general principle of good faith (the principle of good faith is a standard applied in the interpretation of contracts and parties conduct during their contractual relationship). This general principle is contained in Article 1134 of the *Civil Code*. Thus, the insurer having acted in bad faith may be sanctioned on this basis.

Luxembourg

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Malta

Overview

Which government bodies/agencies regulate insurance and reinsurance companies?

The Malta Financial Services Authority ('MFSA') is the competent authority for the supervision and regulation of the insurance industry in Malta. The MFSA is the single regulator of financial services and was established under the aegis of the *Malta Financial Services Act of 2002*.

What are the categories of insurance licenses that exist?

Category/Licence	Source
Insurance Undertaking (Life)	*Insurance Business Act*
Insurance Undertaking (Non-Life)	*Insurance Business Act*
Reinsurance Undertaking (Life)	*Insurance Business Act*
Reinsurance Undertaking (Non-Life)	*Insurance Business Act*
Insurance Agent	*Insurance Intermediaries Act*
Insurance Broker	*Insurance Intermediaries Act*
Insurance Manager	*Insurance Intermediaries Act*
Tied Insurance Intermediary	*Insurance Intermediaries Act*
Reinsurance Special Purpose Vehicle	*Reinsurance Special Purpose Vehicle Regulations*

Are insurance companies subject to taxes beyond the ordinary burden faced by all companies?

Insurance companies incorporated and resident in Malta are considered to be fiscally resident in Malta and are taxed at the standard flat rate of 35 percent irrespective of their place of management and control.

Malta has a full imputation system of taxation. The shareholders of a Maltese insurer are entitled to a refund of the tax paid in Malta by the insurer only if a dividend is declared by the insurer and distributed to them (unless an exemption applies in relation to the Maltese company's income). The shareholders are entitled to the refund only if they are appropriately registered with the Commissioner of Inland Revenue in Malta. In the case of profits derived from the business and distributed by way of dividend, the shareholders are generally entitled to a refund of $^{6}/_{7}^{th}$ of the tax paid by the Maltese company at the standard rate of 35 percent.

The Duty on Documents and Transfers Act, 1992 imposes duty on policies of insurance where the risk is situated in Malta at varying rates depending on the type of policy. In general terms, document duty is payable on policies relating to risk in Malta at a rate of 10 percent. However, the *Duty on Documents Act* excludes reinsurance contracts and policies covering risks in relation to aviation, marine cargo, marine hull or boat, export credit and suretyship and medical cover. In addition, the *Insurance Business Act* provides that "*no duty shall be chargeable ... on any contract of insurance relating to a risk situated outside Malta.*"

What are the approved distribution channels in your jurisdiction? Are there restrictions?

(a) **Direct Distribution**

The *Insurance Business Act of 1998* applies an activity-based test (and not a risk-based test) to determine whether a (re)insurer is carrying out business of insurance in or from Malta, thus requiring authorization to directly write risks situated in Malta.

There are some exceptions to this rule.

An EU/EEA domiciled (re)insurer may apply with the insurance regulator in its domicile to passport and write insurance business in Malta through the freedom of services or establishment without the need of authorization as a (re)insurer domiciled in Malta. Similarly, a Malta domiciled (re)insurer may passport and write insurance business across the EU/EEA.

A (re)insurer not domiciled in Malta may indirectly write insurance business in Malta through a

fronting arrangement without the need of authorization from the MFSA.

(b) **Insurance Intermediaries**

A (re)insurer may write insurance business in Malta (whether or not it is domiciled in Malta) through an intermediary: either an insurance broker or an insurance agent.

An insurance broker in Malta needs to act with complete freedom as to its choice of insurers. It is common for insurance brokers in Malta to have underwriting arrangements with Lloyds' syndicates. Insurance brokers are bound to provide advice objectively and independently and also to use their skill objectively in the best interest of their clients.

An insurance agent requires authority to bind its principal with insurance commitments, but it can act for more than one principal in Malta even where the representation relates to competing lines of business. It is not bound by these same duties, but it is required to place the interests of those clients before all other consideration.

(c) **Distance Selling**

The Distance Selling (Retail Financial Services) Regulations of 2005 transpose Directive 2002/65/EC concerning the distance marketing of consumer financial services. The Regulations will apply to an insurer domiciled in Malta where it is carrying out a 'distance contract service provision scheme'. A distance contract is a contract of insurance concluded between an insurer (or insurance intermediary) and an individual customer using distance communication (Internet, telephone, mail and so on) up to and including the time at which the contract is concluded.

The Regulations require that the insurer provides a minimum level of information to the individual customer prior to entering into the contract and that the individual customer has the right to cancel the contract during the first 15 days following the conclusion of the contract.

Cold-calling is strictly prohibited under the Regulations unless the customer has agreed to it. Direct-mailing is allowed under the Regulations unless the customer has expressed his 'manifest objection' to it.

Internet

The advertisement and distribution of insurance services via the Internet is permitted.

MFSA Insurance Rule 28 of 2008 specifically regulates the operation of a website by an insurer. The Rule requires a minimum standard of information which needs to be disclosed on that website, including:

- A list of countries in which the insurer is authorized to conduct insurance business;
- Description of the insurer's claims handling procedures and complaints management procedures;
- A statement specifying who is targeted (for example, prospective policyholders habitually resident in Malta, Spain and Italy);
- A statement that the insurer is authorized by the MFSA; and
- Contact details of the insurer.

Social Media

The advertisement (and distribution) of insurance services through social media networks are permitted and widely used in practice, but are not specifically regulated by an insurance rule issued by the MFSA. The principles indicated in section (f) below are generally observed by insurers when marketing their services through social media networks.

Marketing

As a general comment on the marketing of insurance services (whether conducted on traditional media or through modern technologies), *MFSA Insurance Rule 14 of 2008* requires that advertisements contain a statement that the insurer is authorized by the MFSA and that the advertisement:

- Is not misleading;
- Does not make unfair, incorrect or unverifiable comparisons with competitors and competing products; and
- Contains appropriate warnings in relation to risks associated with fluctuating market conditions.

Marketing of linked, long-term insurance products is specifically regulated, especially where statements are made on past performance of a product, where

mention is made of benefits payable, among other requirements.

These rules do not apply to reinsurance and captive insurance.

Are there any forms of compulsory insurance?

Yes, they are listed below:

(a) **General**

- Condominium (property);
- demolition, excavation and construction works (public liability) (minimum cover of EUR 500,000);
- diving services provider (third party liability) (minimum cover of EUR 250,000);
- fireworks (public liability) (minimum cover of EUR 300,000);
- motor vehicle (third party liability); and
- professional indemnity insurance in the case of a number of professions (including, accountants, architects, civil engineers, health care professionals, public notaries, travel agents, trustees and youth workers (professional indemnity).

(b) **Marine**

- Bunker barges operating within the waters of Malta require cover in relation to third party damage, marine environment pollution damage and clearance of pollution liabilities;
- vessels require cover for maritime claims up to the maximum limitation amount allowed per incident in terms of the *Convention on Limitation of Liability for Maritime Claims 1976* as amended by the *Protocol of 1996;*
- vessels carrying passengers and luggage require cover for claims in relation to the death of and personal injury to passengers up to the maximum limitation amount allowed in terms of the Athens Convention relating to the *Carriage of Passengers and their Luggage by Sea, 1974* and the *Protocol of 2002* (minimum SDR 250,000 per passenger per occasion);
- vessels carrying oil and pollutants require cover in case of spillage in terms of the *International Convention on Civil Liability for Oil Pollution Damage 1969; and*
- employers' liability in relation to crew members and masters of a vessel.

(c) **Aviation**

- Aircraft require third-party liability cover (minimum SDR 750,000 per accident) if the aircraft has a maximum takeoff mass of less than 500kg or if the aircraft is a microlight which is used for noncommercial purposes;
- aircraft require third party liability cover (minimum SDR 100,000 per passenger) if the aircraft has a maximum takeoff mass of less than 27,00 kg and it is used for noncommercial purposes; and
- aircraft which are used for commercial purposes, or, which are used for noncommercial purposes but have a maximum takeoff mass of more than 27,000 kg require cover for:
  - liability in relation to passengers, minimum of SDR 250,000 per passenger;
  - liability in relation to baggage, minimum of SDR 1,131 per passenger;
  - liability in relation to cargo, minimum of SDR 19 per kg; and
  - third-party liability, in accordance with the following table.

Category MTOM (kg)	Minimum Insurance (million SDRs)
Less than 500	0.75
Less than 1000	1.5
Less than 2700	3
Less than 6000	7
Less than 12000	18
Less than 25,000	80
Less than 50,000	150
Less than 200,000	300
Less than 500,000	500
More than 500,000	700

Malta

What major insurance/reinsurance legislation is on the horizon?

The Reinsurance Special Purpose Vehicle Regulations (the 'RSPV Regulations') were published in 2014. *The RSPV Regulations* transpose the provisions of the *Reinsurance Directive (Directive 2005/68/EC)* and the *Solvency II Directive on special purpose reinsurance vehicles* and enable the MFSA to accept and process applications for the authorization of reinsurance special purpose vehicles. RSPVs may be used as vehicles for insurance linked securities transactions with an insurance trigger. Non-indemnity deals (such as parametric trigger only deals) may use a vehicle established under the *Securitization Act*. An RSPV under the RSPV Regulations may be established to accept risks from a single (re)insurance undertaking or multiple (re)insurance undertakings forming part of the same group of companies. RSPVs fully fund their obligations assumed in terms of the risk transfer instrument by means of the issuance of financial instruments to qualified investors.

The legislator is currently working on updating the domicile's securitization legislation to enable the establishment of securitization vehicles with cells including cell-RSPVs.

Market Entry

What are the requirements/procedures for setting up a new insurance or reinsurance company?

An application for authorization to act as a (re)insurer will consist of the following elements:

a. A formal application form (or forms if the application is for a Protected Cell Company);

b. Due diligence on all qualifying shareholders (at least a 10 percent direct/indirect interest in the applicant), directors, controllers and senior managers;[1]

c. A business plan or scheme of operations (including financial forecasts, business strategy, and investment strategy);

d. Copies of all material services provider agreements;

e. Copies of proposed reinsurance treaties/policies; and

f. Organogram of the company and summary of control systems to be implemented.

The fees for submission of an insurance application to the MFSA depend upon the classes of business to be written. There is an initial fee upon application and a further fee due on issue of the licence.

The processing of an insurance application by the MFSA is limited to a statutory period of six months (or three months in the case of a captive or reinsurer).

Is it mandatory that a company be physically present in the market (HQ or branch office) to write insurance/reinsurance policies?

If the (re)insurer is domiciled in another state of the European Union, then it may be present in Malta through freedom to provide services and without a physical presence.[2] A total of 435 (re)insurers domiciled in the EU are offering their services in Malta through passporting in terms of the rules on free movement of services in the *Treaty on the Functioning of the European Union.*

Non-EU-domiciled (re)insurers are required to establish a physical presence in Malta to write (re)insurance policies unless they opt for a fronting arrangement with an already-established insurer.

Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

EU insurers can write business directly in Malta on the basis of freedom of services or freedom of establishment.

Non-EU insurers may only write direct business either if authorized or through a fronting arrangement.

The same principles apply within the context of reinsurance.

The *Insurance Intermediaries Act* also provides that a contract of insurance which:

[1] Simplified due diligence will be applied where a qualifying shareholder is a listed entity or an entity regulated by a supervisory authority within the EU/EEA.

[2] The (re)insurer may be required to passport in Malta through the freedom of establishment, rather than through the freedom of services, if the provision of services in Malta is not temporary and it is offered through a quasi-permanent establishment in Malta.

a. relates to a risk situated in Malta or to a commitment where Malta is the country of the commitment; and

b. is negotiated, arranged or procured by an insurance broker on behalf of an insured person or a person to be insured;

c. must be taken out with an insurer authorized by the MFSA, unless the MFSA itself approves in writing that the placement of insurance is made with a foreign insurer. This restriction does not apply in the context of reinsurance and large risks.

A contract of (re)insurance shall not be held void or voidable by a (re)insurer on the basis that it was not authorized to carry on business of (re)insurance in Malta at the time when the policy was issued. However, writing business directly in Malta without authorization may lead to criminal sanctions and/or to an administrative fine (not more than EUR 150,000) imposed by the MFSA.

Is the incorporation of local companies with foreign shareholders permitted?

Yes, no nationality restrictions apply.

Regulatory

What are the main sources for insurance and reinsurance regulatory law in your jurisdiction?

(1) EU Acts and Legislation;

(2) Cases of the Courts of Justice of the European Union;

(3) the *Insurance Business Act* and the *Companies Act; and*

(4) Insurance Rules issued by the MFSA.

Please describe the current regulatory environment, including pending or anticipated regulatory reform.

Solvency and Capital Requirements

Minimum capital requirements for local insurance undertakings are based on EU legislation. Malta shall be adopting the *Solvency II* regime and the MFSA has published guidelines and rules prior to its implementation.

Currently, insurance companies have to satisfy minimum capital criteria upon incorporation, referred to as own funds. The value depends on the class of business being undertaken. We illustrate some of the current values below:

Class of Business	Minimum Capital (EUR)
Affiliated (Captive) Insurance Companies:	
General Business	2.3m (3.5m for liability business)
Long-term Business	3.5m
Pure Reinsurance	3.2m
Captive Reinsurance	1.1m
Long-term Business	3.5m
General Business	3.5m (or 2.3m where only certain classes of insurance are written)
Combined Insurance Business	Between 2.3m and 7m depending on the particular classes of insurance written

The margin of solvency each insurance company is required to keep is currently calculated in accordance with the provisions of the EU Directives, namely the *Non-Life Directive* and the *Life Directives*. The solvency requirement for each insurance undertaking is calculated by taking into account the higher of two standard formulae.

Confidentiality

As the regulator, the MFSA (including the members of its Board of Governors and other organs and its officers and employees) shall treat any information

acquired in the discharge of their duties as confidential and shall not disclose such information to any other person.

The MFSA may disclose this information only if:

a. The person (the applicant or the entity supervised) who had divulged the information gives his or her consent;

b. an overseas regulatory authority requests information in relation to matters of regulation and supervision of financial services and of registration of commercial partnerships;

c. local or overseas enforcement or regulatory authority requests information for the purpose of preventing, detecting, investigating or prosecuting the commission of acts that amount to or are likely to amount to a criminal offense under any law or to an offense or breach of a regulatory nature, whether in Malta or overseas;

d. the European Securities and Markets Authority (ESMA), the European Banking Authority (EBA) and colleges of supervisors, to the European Insurance and Occupational Pensions Authority (EIOPA), or to the European Systemic Risk Board (ESRB) request information in terms of EU law; and

e. College of Supervisors in respect of European insurance groups.

From an internal perspective, employees of (re) insurers and insurance intermediaries are bound by the duty of confidentiality under the *Professional Secrecy Act*. They are bound to keep information relating to clients confidential, unless otherwise ordered by a public authority, such as the Malta Financial Services Authority or the Maltese Courts. Moreover, employees and agents of a (re)insurer and of an insurance intermediary are as a matter of law bound by fiduciary obligations not to disclose confidential information in relation to the affairs and the clients of the company.

Supervision

The MFSA is the single regulator of Financial Services in Malta – regulating Insurance Business, Investment Business, Banking, Trustee Services and Private Pensions.

The MFSA is responsible for prudential and conduct supervision of the insurance industry in Malta. The MFSA is also responsible for consumer education and consumer protection in the financial services sector.

The MFSA's approach is reputed to be 'firm but flexible' – encouraging informal discussion at all levels with insurance company stakeholders, sponsors, managers, applicants and other interested parties. The Insurance & Pensions Supervision Unit of the MFSA recognizes the varying business techniques and numerous accounting conventions applicable in different countries where the parent companies of insurers may be situated and the overall approach is generally aimed at establishing acceptable requisites tailored to meet applicants' specific business requirements.

Corporate Governance

The *Insurance Business Act of 1998* and a number of rules and guidance notes issued by the MFSA provide for a framework of corporate governance including, but not limited to:

a. The submission of a detailed scheme of operations upon application to act as an insurer;

b. Minimum own funds requirements;

c. Fit and proper assessment of the insurer's qualifying shareholders and directors;

d. Minimum internal controls to be adopted by the Board of Directors in relation to entering into of transactions, safeguarding of assets, conducting business in a sound and prudent manner and identifying risks; and

e. Imposition of minimum requirements to outsourcing agreement of key and critical functions.

The imminent implementation of the *Solvency II Directive* will introduce a number of significant measures and requirements in relation to corporate governance across the European Union, in particular the Own Risk and Solvency Assessment (the "ORSA"). The MFSA has reacted to the *Solvency II Directive* with the publication of the System of Governance Guidelines as well as additional guidelines and circulars in January 2012.

Reporting Requirements

Insurers are required to notify and/or report to the MFSA periodically:

a. Quarterly in the case of the operational reports on the (re)insurer's business performance (including management accounts, detailed solvency computation and a summary of asset mix break down); and

b. Annually in the case of notification of the financial years, the submission of the audited financial statements and information on complaints received by the (re)insurer.

Other reporting requirements are triggered upon the occurrence of a specific event such as, effecting any material changes to the insurer's business, or if the margin of solvency falls behind the requirements at law.

Consumer Protection

Policyholders and insureds are protected by a general framework of consumer protection laws in the *Consumer Affairs Act of 1996*, including prohibitions against unfair contract terms and minimum information in relation to distance selling of services.

There are also a number of measures focused on the protection of policyholders and insureds:

a. Obligation of the insurer to provide the policyholder with a minimum standard of information in the policy, including the right of cancellation and information on the insurer's complaints management system;

b. Duty of the insurer to keep an effective and efficient complaints management system;

c. Right of the affected policyholder by a transfer of insurance business to be notified of the transfer and to submit representations in relation to the transfer.

Broker Remuneration

Every insurance intermediary (including an insurance broker) must, before any work involving a charge or fee is undertaken or an agreement to carry out business is concluded, disclose and identify in writing any amount they propose to charge to the client or policyholder which will be in addition to the premium, payable to the insurer. In practice, insurance brokers in Malta state the amount of commission payable to them along with the premium payable to the insurer in the placing slip issued to the client.

There are no regulatory requirements in relation to what are the maximum commission rates which a broker can charge.

The European Parliament is currently considering a draft proposal of the Insurance Mediation Directive II Recast which will replace the *Insurance Mediation Directive* and which aspires to bring significant changes to the selling of insurance (applicable both to insurer and insurance intermediaries) in the EU internal market in particular, in relation to insurance intermediaries' conflicts of interest. In particular, the proposal suggests that prior to concluding a contract of insurance, the insurance intermediary should disclose to the prospective policyholder the source of its remuneration and the amount thereof.

Other

Insurance Undertakings (Life), Insurance Undertakings (Non-Life), Reinsurance Undertakings (Life) and Insurance Managers may be established as a protected cell company or as incorporated cell company, as shall be explained below:

a. The *Companies Act* (Cell Companies Carrying on Business of Insurance), Regulations (the 'PCC Regulations'), provide the legal framework governing the protected cell company ('PCC') structure in Malta. The PCC Regulations allow for insurance business, insurance management business and insurance broking business to be carried out through PCCs;

b. A PCC is a regular trading company constituted as a "Cell Company" which is able to create one or more cells for the purpose of segregating and protecting the cellular assets of the company. No other business sector has this advantage (other than the Investment Fund industry which has a similar facility), and Malta is the only full EU member that allows the use of this type of business vehicle;

c. An incorporate cell company ('ICC') is a company formed and registered, continued (redomiciled), transformed or divided into, an ICC in accordance with the provisions of the *Companies Act* (Incorporated Cell Companies Carrying on Business of Insurance) Regulations, 2011 (the 'ICC Regulations'). ICCs are regular companies that may create incorporated cells (in accordance with the ICC Regulations). Unlike

its PCC counterpart, each incorporated cell established by the ICC is endowed with separate legal personality and is treated as a limited liability company.

Claims

What are the main sources for contract law in your jurisdiction?

(1) European Union Acts & Legislation harmonizing insurance and consumer laws;

(2) Cases of the Courts of Justice of the European Union on harmonization instruments relating to insurance and consumer laws;

(3) Civil Code and Commercial Code;

(4) Judgments of the Maltese courts;

(5) Customary law; and

(6) English common law.

In general, is the substantive law relating to insurance more favorable to insurers or insureds?

The substantive law principles in relation to the contract of insurance, namely, the principle of utmost good faith and duties emanating from such a principle tend to be conservatively interpreted by the Maltese courts in favor of the insurer. For example, the only remedy available to the insurer, in the case that the insured breached the duty of utmost good faith (*e.g.* the duty of disclosure of material facts) is the repudiation of the contract of insurance.

What is the statute of limitations on claims?

Five years. In relation to general insurance the following article applies:

Article 2156 (f) of the Civil Code

The following actions are barred by the lapse of five years:

(a) actions for the payment of any other debt arising from commercial transactions or other causes, unless such debt is, under this or any other law, barred by the lapse of a shorter period or unless it results from a public deed.

In relation to marine insurance the following article applies:

Article 543 of the Commercial Code

Actions arising from contracts of loan on bottomry or from contracts of insurance shall be barred by prescription, by the lapse of five years from the day on which the same could have been exercised.

Can a third party bring direct action against an insurer?

Yes, but only in respect to third party liability motor vehicle insurance.

Article 9A (1) of the Motor Vehicles Insurance (Third Party Risk) Ordinance

An injured party resident in Malta or a designated State and entitled to compensation in respect of any loss or injury resulting from an accident caused by the use of a motor vehicle which is insured by an authorized insurer and normally based in Malta or the territory of a designated state, shall have a direct right of action against the authorized insurer in Malta, if:

(a) The accident occurred in Malta or a designated State; or

(b) the accident occurred in a third country whose foreign bureau has joined the green card system.

Can an insured bring a direct action against a reinsurer?

No.

Malta

Dispute Resolution

Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

The competent courts to hear disputes in relation depend on subject-matter or value.

Generally speaking, if the value is less than approximately EUR 3,500 the claim should be filed before the Small Claims Tribunal, if the value of the claim is less than approximately EUR 10,000 the claim should be filed before the Court of Magistrates (Civil Jurisdiction), if the value of the claim exceeds EUR 10,000 the claim should be filed before the First Hall, Civil Court.

If the policyholder agreed to an arbitration agreement, he must submit his claim to arbitration proceedings (especially if the policyholder in the case of consumer insurance is a habitual resident of Malta).

What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of a) parties to the action and b) non-parties to the action?

Article 377 of the Code of Organization and Civil Procedure does provide for the *actio ad exhibendum* which gives the party of a dispute the right to demand the production of documents which are in the possession of other persons, if:

a. Such documents are the property of the party demanding their production;

b. Such documents belong in common to the party demanding their production and to the party against whom the demand is made;

c. He shows that he has an interest that such documents be produced by the other party to the proceedings;

d. The person possessing the documents and who is a third-party to the proceedings, does not declare on oath that he has special reasons not to produce the documents;

e. Such documents are public acts, or acts intended to constitute evidence in the interest of the public in general.

There is no duty of full and frank disclosure upfront within the context of imminent litigation.

A third-party who is not a 'party' to the proceedings does not have a right to exercise the *actio ad exhibendum* but generally speaking, files in relation to proceedings in court are available for public scrutiny.

Are mediation and arbitration common methods for solving insurance disputes in your jurisdiction? Are more disputes resolved in or out of court?

Formal mediation with the appointment of an independent and certified mediator is rarely used in practice.

Arbitration is very common and usually preferred in the case of large risks.

Out-of-court settlements are preferable for two reasons:

a. Proceedings before our civil courts tend to be lengthy; and

b. Recent cases have held that where the claim in dispute is certain, liquidated and due, the judicial interest on the amount starts running from the date the judicial proceedings were filed and not from the date of the judgment.

What are the provisions in your jurisdiction regarding timely notice, and what are the legal consequences for non-compliance with the timely notice obligation?

There are no provisions regarding timely notice, but it is accepted practice that prior to opening proceedings a letter of claim is sent to the other party and only if the matter is not settled, then the aggrieved party opens proceedings.

Malta

What are the laws regarding bad faith claims? What damages may be awarded if the insurer is found to have acted in bad faith?

The principle of utmost good faith in insurance contracts is not provided for by written law, but it is accepted as customary law. There is no definition of the principle of utmost good faith in jurisprudence, but the Maltese Courts refer to and apply English common law on utmost good faith. The principle of utmost good faith is frequently applied as the insured's duty of disclosure of material facts, or the insurer's obligation to assess and pay claims in good faith.

The remedy given by the Maltese courts in such cases is to order the performance of the insurance contract, and thus, the payment of indemnity to the insured by the insurer.

In theory, the insurer may also be liable for damages in the case of non-performance of the obligations under the contract of insurance, (including actual damages suffered and loss of earnings), but it is not practice for the Maltese courts to award these damages.

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Overview

Which government bodies/agencies regulate insurance and reinsurance companies?

The Financial Supervisory Authority (*Komisja Nadzoru Finansowego*) established in 2006.

What are the categories of insurance licenses that exist?

License for an insurance company or a mutual	Article 6 of *Act on Insurance Activity of 22 May 2003*
License for a main branch of an insurance company or mutual incorporated outside the European Economic Area	Article 104 sec. 3 of *Act on Insurance Activity of 22 May 2003*
License for a reinsurance company or a mutual	Article 223a of *Act on Insurance Activity of 22 May 2003*
License for a main branch of a reinsurance company or mutual incorporated outside the European Economic Area	Article 223zg sec. 2 of *Act on Insurance Activity of 22 May 2003*
License for an insurance agent	Article 7 par. 1 of the *Act on Insurance Mediation of 22 May 2003*
License for an insurance broker	Article 20 of the *Act on Insurance Mediation of 22 May 2003*
License for an insurance actuary	Regulation of the Minister of Finance of 20 November 2003 concerning the scope of current topics of actuarial exams and procedures for conducting these exams

Are insurance companies subject to taxes beyond the ordinary burden faced by all companies?

No.

What are the approved distribution channels in your jurisdiction? Are there restrictions?

- Direct sale of insurance
- Sale of insurance by the agents
- Sale of insurance by brokers
- Bancassurance

Are there any forms of compulsory insurance?

Yes, there are approximately 160 types of compulsory insurance. The compulsory insurance is provided mainly by the *Act on Compulsory Insurance of 22 May 2003*. The most common examples of compulsory insurance are:

- Liability insurance of vehicle owners for damages caused by the use of these vehicles
- Insurance against fire and other perils of buildings belonging to farmers
- Insurance against fire and other perils of goods adopted by storage house
- Farmers liability Insurance connected with conducting of an agricultural holding
- Liability Insurance for lawyers, notaries and solicitors
- Liability Insurance for architects, engineers and urban planners
- Liability Insurance of foreign lawyers
- Liability Insurance of tax advisors
- Liability Insurance of bailiffs
- Liability Insurance of statutory auditors
- Liability Insurance of detectives
- Liability Insurance of entities taking orders for the provision of health
- Liability Insurance of brokers
- Liability Insurance for organizers of mass events
- Liability Insurance of property appraisers, property managers and real estate agents
- Liability Insurance of tourist agents and tour operators

- Liability Insurance of the shipowner
- Liability Insurance of the entrepreneur managing railway lines or making rail transport
- Liability Insurance of qualified certification service provider
- Liability Insurance of patent attorneys
- Liability Insurance of entities exploiting an atomic object
- Liability Insurance of trustee operating the unit under the State System of Emergency Medicine
- Liability Insurance of the entity organizing games of chance and betting
- Liability Insurance of a foreign air carrier
- Liability Insurance of businesses operating in the production, storage or marketing of gaseous fuels, electricity and heat
- Accident Insurance of athletes

What major insurance/reinsurance legislation is on the horizon?

Implementation of *Solvency II Directive* is being prepared

Market Entry

What are the requirements/procedures for setting up a new insurance or reinsurance company?

- Establishment of an insurance/reinsurance company and its registration in the commercial register;
- Satisfaction of minimum capital requirements;
- Approval of board members by the Financial Supervisory Authority;
- License for conducting insurance/reinsurance activity from the Financial Supervisory Authority;

Is it mandatory that a company be physically present in the market (HQ or branch office) to write insurance/ reinsurance policies?

Yes

Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Foreign insurers from the European Union member states and members of the European Economic Area can write insurance directly on the basis of Freedom of Services principle.

Is the incorporation of local companies with foreign shareholders permitted?

Yes

Regulatory

What are the main sources for insurance and reinsurance regulatory law?

- *Civil Code of 23 April 1964*
- *The Act on Insurance Brokerage 22 May 2003*
- *The Act on the Insurance Activity of 22 May 2003*
- *Act on Compulsory Insurance of 22 May 2003*

Please describe the current regulatory environment, including pending or anticipated regulatory reform.

Polish law governing insurance activity is consistent with the relevant EU legislation. *Solvency II* preparatory legislation has been introduced and further implementation of the *Solvency II Directive* is being prepared. There is one supervisory authority (Financial Supervisory Authority *Komisja Nadzoru Finansowego*, the "KNF") for all financial institutions. The KNF, the Consumer Protection Authority (*Urząd Ochrony Konkurencji i Konsumentów*, the "UOKiK") and the Insurance Ombudsman (*Rzecznik Ubezpieczonych*) are active in securing consumers' interest in relations with insurers. In particular, the UOKiK conducts the register of prohibited contractual clauses including those used in insurance contracts. The authorities also tend to regulate the insurance market through their recommendations. These recommendations cover, in particular, rules of bankassurance agreements and some types of insurance products (unit linked life insurance). There are some discussions on the planned reform which should aim to make broker remuneration more transparent and visible to clients. However, it is not sure if this reform will be introduced.

Poland

Claims

What are the main sources for contract law?

- *Civil Code of 23 April 1964*

In general, is the substantive law relating to insurance more favorable to insurers or insureds?

In general, the substantive law relating to insurance is more favorable to insureds than insurers.

(Articles 805 – 820 of the *Civil Code of 23 April 1964*)

What is the statute of limitations on claims?

General statute of limitations is 10 years (*article 118 of the Civil Code of 23 April 1964*). Claims related to commercial activity are subject to three year statute of limitations (*Article 118 of the Civil Code of 23 April 1964*). There are also specific statutes of limitations, *e.g.* three years applicable to some but not all insurance claims (*Article 819 of the Civil Code of 23 April 1964*), 20 years applicable to claims for damages caused by crimes or offenses (*Article 442 1 of the Civil Code of 23 April 1964*).

Can a third party bring direct action against an insurer?

Yes, *Article 822 paragraph 4 of Civil Code.*

Dispute Resolution

Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

Action for claims arising from insurance contracts may be brought either according to the provisions of general jurisdiction or in the court of place of residence or domicile of the policyholder, the insured, the beneficiary or the beneficiary of the insurance contract (*Article 9 of the Act on Insurance Activity*). Competence of appropriate district court (low court) or regional court (high court) depends on the value of the claim. All cases are decided by common courts with professional judges or by an arbitration court if the parties so decide.

What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of a) parties to the action and b) non-parties to the action?

Upon request of a party to the proceedings a court can oblige the other party or a third person to present specified documents or other evidence. These documents or evidence need to be specified, it is not admissible to request access to all documents or evidence relating to the matter (*Article 248 of the Code of Civil Procedure of 17 November 1964*).

Are mediation and arbitration common methods for solving insurance disputes? Are more disputes resolved in or out of court?

Mediation and arbitration are possible methods for solving insurance disputes but they have not been very popular mostly due to insurers reluctance to submit cases to mediation or arbitration. Most disputes are resolved by common courts, or in out of court negotiations directly between insurers and insureds or injured parties.

What are the provisions regarding timely notice, and what are the legal consequences for non-compliance with the timely notice obligation?

Statutory legislation does not provide any specific time limits for notification of insurance claims. Specific or certain insurance contracts or general terms of insurance can impose such specific time limits for notification. In the absence of such regulations neither the insuring party nor insurer may be exposed to the adverse legal consequences. If the insured or injured party does not observe the time limit it can cause some consequences. The insurer can't deny the claim for this reason, even if the terms of insurance contract provide such consequences, they are invalid. The acceptable consequence is proportional reduction of the compensation.

Poland

What are the laws regarding bad faith claims? What damages may be awarded if the insurer is found to have acted in bad faith?

There is no specific statutory legislation covering bad faith claims. If a party is found to act in bad faith it is obliged to redress all damage incurred by the other party in such respect.

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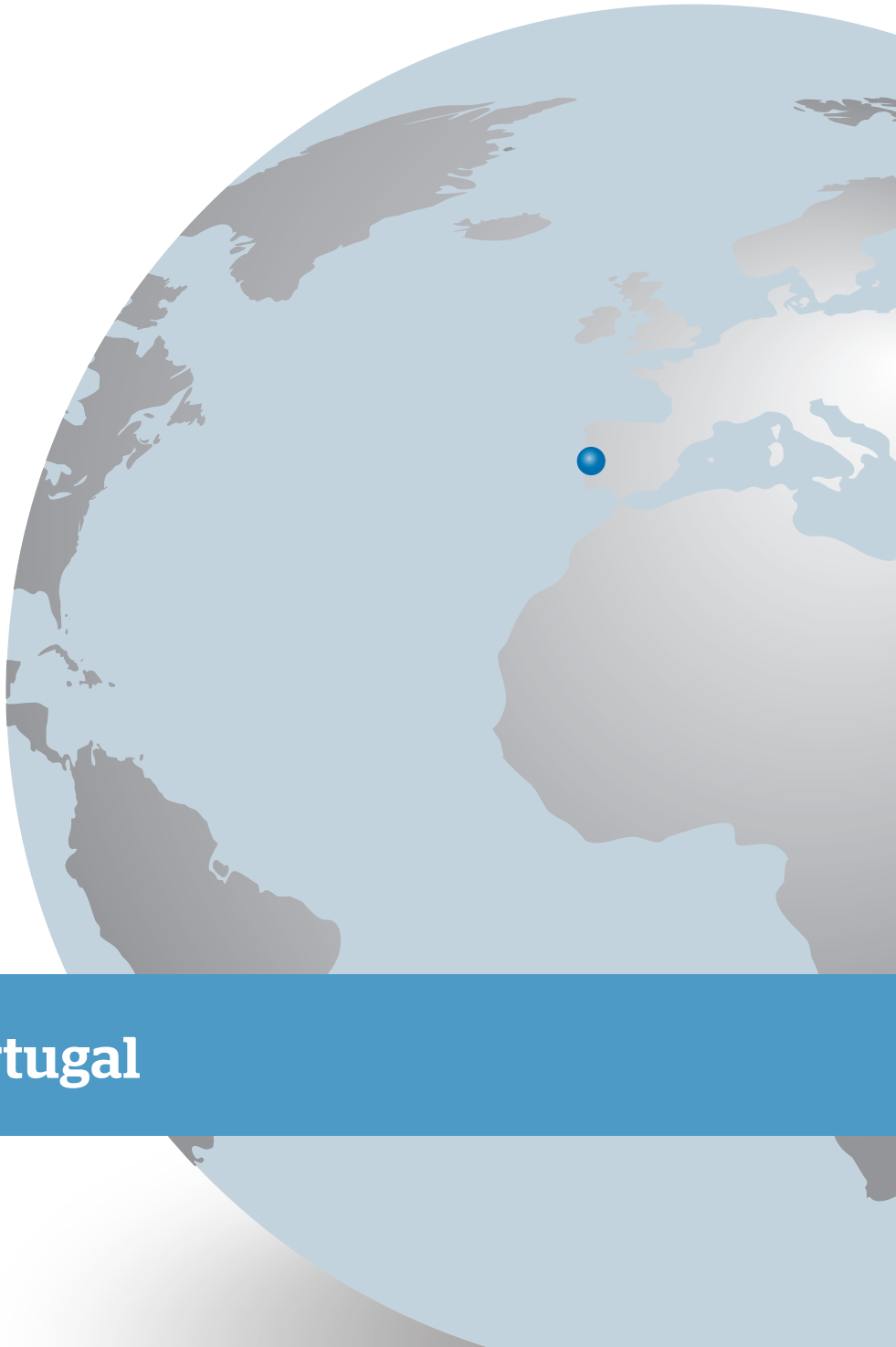

Portugal

Overview

Which government bodies/agencies regulate insurance and reinsurance companies?

In Portugal, the entity in charge of the regulation and supervision of insurance and reinsurance companies is *Autoridade de Supervisão de Seguros e Fundos de Pensões* (the Portuguese Insurance and Pension Funds Supervisory Authority, hereinafter *"ASF"*).

This regulator, which replaced the previous regulator, was created in 1982 by Decree-Law 302/82 of 30 July, under the name *Instituto de Seguros de Portugal* (Portuguese Insurance Institute). In 2015 its name was changed, and a new Statute was approved, by Decree-Law 1/2015 of 6 January (*"ASF's Statute"*).

In accordance with ASF's Statute, its mission is to ensure the proper functioning of the insurance and pension funds markets, through the promotion of the stability and financial strength of the entities under its supervision and the maintenance of high standards of conduct by such entities.

According to ASF's Statute, ASF's main attributions are (i) the supervision and regulation of the insurance, reinsurance, insurance mediation and pension fund management activities; (ii) the participation in the macro-prudential supervision for the prevention and mitigation of systemic risks that may affect the financial system, notably within the competence of the National Council of Financial Supervisors (*Conselho Nacional de Supervisores Financeiros*); (iii) the rendering of technical assistance of the Parliament and the Portuguese Government on matters related to the sector; (iv) collaborating and cooperating with other national and international authorities, especially financial regulators, within subject matters included in their attributions and (v) managing the funds entrusted to it.

On the particular matter of supervision, ASF's activity comprehends:

- Prudential supervision, aimed at enrusing insurance and reinsurance companies' financial soundness, especially through the evaluation of the adequacy of their finsancial guarantees;
- Behavioural supervision, aimed at ensuring that the operators in the insurance and reinsurance market not only comply with the applicable legal framework but also adopt conduct patterns which are in accordance with best practices.

It is also noteworthy that Portuguese Securities Market Commission (*Comissão do Mercado dos Valores Mobiliários*) also supervises certain aspects of insurance contracts linked to investment funds (unit-linked products).

What are the categories of insurance licenses that exist?

In Portugal insurers may be granted two different types of licenses to carry on insurance activities, in the terms provided for in Annex I of Law 147/2015 of 9 September (*"Insurance Regulatory Law"*).

The Insurance Regulatory Law sets out the legal framework for the taking up and pursuit of the business of insurance and reinsurance, which, to a great extent, is the result of the implementation of Directive 2009/138/EC of the European Parliament and of the Council of 25 November, as amended (the *"Solvency II Directive"*).

Such licenses permit the carrying on of insurance activities in the life and/or in the non-life sectors.

A license related to the life insurance business includes the offering of insurance products of the following classes, first introduced by First Council Directive 79/267/EEC of 5 March 1979: life insurance, marriage and birth insurance, insurance linked to investment funds, capitalization operations, operations of management of retirement group pension funds and a few other operations of management of certain investments linked to insurance.

A license related to the non-life insurance business comprehends the following classes of insurance, whose origin can be traced back to First Council Directive 73/239/EEC of 24 July 1973: accidents, sickness; land vehicles, railway rolling stock, aircrafts, ships, goods in transit, fire and natural forces, other damage to property, motor vehicle liability, aircraft liability, liability for ships, general liability, credit, surety, miscellaneous financial loss, legal expenses and assistance.

As a general rule, the initial license of an insurance company is granted subclass by subclass but it extends to the whole subclass unless the applicant only intends to cover some risks within that subclass. Special rules allowing for the grouping of subclasses and the offering of products covering ancillary

products to the ones included in a given subclass are provided in some cases.

Reinsurance companies' initial license is granted for reinsurance activities of the non-life type, of the life type or of both types, in certain circumstances.

It is noteworthy that the direct insurance and reinsurance activities of the life insurance type may only be pursued together with the non-life type provided that – among other conditions – the insurer adopts a separate management of its life and non-life insurance portfolios.

Are insurance companies subject to taxes beyond the ordinary burden faced by all companies?

Insurance companies are subject to indirect taxation and para-fiscal taxes on insurance premiums when the risk is located in the Portuguese territory or Portugal is the member-state of commitment (regardless of the location of the goods or the law applicable to the insurance contract). Stamp duty applies to the total amount of insurance cost, including the insurance premium, policy costs and other amounts that are income of the company, regardless of being charged jointly with the premium or separately, at the general rate of 9%. A reduced rate of 5% applies to the following classes of insurance: accident, sickness, credit, agricultural and livestock, goods in transit, vessels and aircrafts. A special reduced rate of 3% applies to suretyship insurance. Insurance companies are also subject to para-fiscal taxes levied on an annual basis.

A general tax applies for the benefit of ASF. Other taxes may apply to some classes of insurance, for the benefit of the following entities: the National Civil Protection Authority (*Autoridade Nacional de Proteção Civil*), the National Medical Emergency Institute (*Instituto Nacional de Emergência Médica*), the Motor Liability Warranty Fund (*Fundo de Garantia Automóvel*), the Accidents at Work Warranty Fund (*Fundo de Acidentes de Trabalho*) and the Institute for the Financing of Agriculture and Fisheries (*Instituto de Financiamento da Agricultura e Pescas*).

Insurance and reinsurance operations located in Portugal for tax purposes are exempted from Value Added Tax, following Article 135(1)(a) of Council Directive 2006/112/EC of 28 November 2006.

What are the approved distribution channels? Are there restrictions?

In Portugal, insurance distribution may be carried on both directly and indirectly. Direct distribution channels include all media commonly used by insurers to reach out to their customers. In addition to the more traditional insurer-owned physical establishments which are open to the public and are typically located in the main urban areas, insurers resort to an increasing number of means of distance communications, with an emphasis on telemarketing and their internet websites.

The rules governing the distance marketing of insurance have undergone heavy harmonization within the European Union by Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002. In Portugal this directive was implemented by Decree-Law 95/2006 of 29 May, still currently in force, as amended from time to time.

Insurance mediation has also been the object of heavy harmonization within the European Union by Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 (known as *"IMD"*). The IMD was implemented in Portugal by Decree Law 144/2006 of 31 July (*"Insurance Mediation Law"*), still in force, as amended, notably by Law 147/2015 of 9 September. A substantial revision of the Insurance mediation Law is expected to occur soon, as a result of the required implementation of the EU Insurance Distribution Directive (as further described below).

The carrying on of insurance mediation in Portugal requires the prior registration with ASF or with the competent authority of their home member state, if within the European Union. Registration is made subject to the fulfilment of the professional requirements laid down in Article 4 of the IMD.

There are three categories of insurance intermediaries: tied insurance intermediaries, insurance agents and insurance brokers. All those intending to carry on insurance mediation in Portugal must register under one of these categories of insurance intermediaries, including bancassurance operators and other economic agents, unless they fall under the "de minimis" exception set forth in Article 1/2 of the IMD.

Portugal

Are there any forms of compulsory insurance?

There are more than 160 forms of compulsory insurance in Portugal. ASF keeps a list of such forms of insurance at its website *www.asf.com.pt*. Most forms of compulsory insurance fall under the class of liability insurance. The oldest form of compulsory liability insurance is that applicable to the use of motor vehicles, which is the result of the implementation of a succession of Motor Insurance Directives. Many more followed, there being a large number of very different activities which may only be carried on by those carrying liability insurance, such as legal counselling, insurance and reinsurance mediation, the collective transportation of children, travel agencies, industrial activities, private security companies. The reasoning behind the imposition of a duty to insure is in all of these cases an intent to protect the injured third parties.

In addition, the most socially relevant form of compulsory insurance is accidents at work insurance, employers having the duty to insure all their employees and other members of their workforce against accidents happening at work and on the way to and from work. Some categories of persons are also subject to compulsory personal accidents insurance, such as students, sportspersons, blood, tissue and organ donors.

Property insurance is also compulsory in some cases, such as mortgaged or finance-leased assets, deposited or lent cultural assets, real estate under a horizontal property legal framework.

Life assurance is compulsory only in a limited number of situations: in the case of military personnel or members of the police or similar forces working abroad on police, peace or humanitarian missions.

What major insurance/reinsurance legislation is on the horizon?

On 14 December 2015, the European Council approved the EU Insurance Distribution Directive (known a *"IDD"*), which had been approved by the European Parliament on 24 November 2015 and will replace IMD. This new directive shall come into force 20 days after the date of its publication, which has not yet occurred. It is expected to enter into force early in 2016. The implementation of this new directive is expected to introduce significant changes in the Insurance Mediation Law.

The IDD is a "minimum standards directive", which means that national legislation may implement stricter provisions concerning the distribution of insurance. Some of the main changes stemming from the new EU Insurance Distribution Directive are the following:

i. Scope of the EU Insurance Distribution Directive: this Directive applies not only to intermediaries but also to direct sellers, meaning that insurance undertakings that sell directly to their customers are also bound by the EU Insurance Distribution Directive – thus the name Insurance Distribution Directive, as opposed to its predecessor, the Insurance Mediation Directive;

ii. Enhancement of professional requirements: minimum requirements regarding people involved in insurance distribution are now stronger and continuing professional training is required so that such individuals are more prepared to deal with the complexity of the activities pursued;

iii. Customers' best interest principle: introduction of a new general principle stating that distributors must always act in accordance with the best interests of their customers;

iv. Remuneration disclosure: Intermediaries must inform customers of the nature and amounts received or the method of calculation regarding the contracts that they should enter into;

v. New cross-selling rules: new requirements are fixed to apply whenever an insurance product is offered together with a non-insurance product or service as a component of the same package/ agreement.

In view of the above as well as of the very recent entry into force of the new Insurance Regulatory Law, the times ahead are expected to be of adjustment to the new legal framework by all the entities that operate in the insurance and reinsurance market, no major legislation being expected other than the implementation of the IDD.

Portugal

What are the requirements/procedures for setting up a new insurance or reinsurance company?

According to Article 3 of the Insurance Regulatory Law, insurance and reinsurance activities may only be pursued in Portugal by: (a) authorized limited liability companies by shares (*sociedades anónimas*); (b) authorized mutual insurance and reinsurance companies; (c) branches of insurance and reinsurance companies located in other EU Member States, as long as they comply with the appropriate requirements; (d) insurance and reinsurance companies' branches located outside the EU, as long as duly authorized; (e) state-owned insurance or reinsurance companies, created under the terms of Portuguese law, as long as their object comprehends insurance and reinsurance operations under conditions similar to those of private companies; (f) insurance and reinsurance companies that adopt the form of European Company.

The insurance and reinsurance activity may only be pursued in Portugal on a freedom to provide services basis by authorized insurance and reinsurance companies located in another EU Member State as long as they comply with the requirements set forth in Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009, as amended.

Authorized insurance and reinsurance companies mentioned in (a) and (b) above are financial institutions having as their exclusive corporate object the pursuit of insurance or reinsurance activities, being however able to perform some specific ancillary and/or related activities.

In what concerns limited liability companies, besides complying with the general requirements of the Portuguese Companies Code, they should previously apply for a license with ASF. The granting of the license depends mainly upon compliance with the following requirements:

i. Adoption of the limited liability nature;

ii. Having as exclusive corporate object the pursuit of insurance or reinsurance activities;

iii. Provision of the company with certain minimum amount of share capital within the appropriate time limits set out in the law, such amount being fully subscribed and paid-up;

iv. Qualified shareholders' ability to guarantee a sound and prudent management of the company;

v. Location in Portugal of the head office and the company's management center;

vi. Submittal of a scheme of operations;

vii. Holding eligible basic own funds to cover the absolute floor of the Minimum Capital Requirement set forth in the Insurance Regulatory Law, pursuant to the Solvency II Directive;

viii. Evidence that it will be in a position to hold eligible own funds to cover the Solvency Capital Requirement set forth in the Insurance Regulatory Law, pursuant to the Solvency II Directive;

ix. Evidence that it will be in a position to hold eligible basic own funds to cover the Minimum Capital Requirement set forth in the Insurance Regulatory Law, pursuant to the Solvency II Directive;

x. Evidence that it will be in a position to comply with the system of governance set forth in the Insurance Regulatory Law, pursuant to the Solvency II Directive;

xi. Absence of supervision obstacles resulting from proximity relationships, or legal, regulatory or administrative provisions from a third state which are applicable to one or more natural or legal persons with whom the company has proximity relationships;

xii. Insurance companies willing to undertake risks concerning motor vehicle liability shall, in certain circumstances, designate a legal representative as provided for in the Insurance Regulatory Law.

Mutual insurance/reinsurance companies are also permitted under the laws of Portugal.

Portugal

Is it mandatory that a company be physically present in the market (HQ or branch office) to write insurance/ reinsurance policies?

Insurance policies may be written by any entities licensed to carry on insurance activities in Portugal. This includes companies whose seat is in Portugal but also companies headquartered in another EU member state with a branch in Portugal or even without one, under the freedom to provide services principle (implemented on a national level in Articles 3 and Articles 241 to 244 of the Insurance Regulatory Law).

Within the limits of the freedom to provide services principle, it is not mandatory for an insurer to have a physical presence in Portugal in order to be able to write insurance/ reinsurance policies in Portugal.

The companies writing insurance in Portugal through the freedom to provide services principle should bind themselves and contribute in a way similar to authorized companies to any scheme aimed at ensuring the payment of claims to insured persons and any injured third parties, namely, in what concerns occupational accident insurance and motor vehicle liability insurance, contributing to the occupational accident fund ("FAT") and motor vehicle warranty fund ("FGA").

Any insurance companies which intend to write compulsory insurance in Portugal should inform ASF of the name and address of a representative residing in Portugal, who should gather all the data related to claims handling proceedings and be granted with powers to represent the company before any possible claimants, courts or Portuguese authorities in respect of such claims, and before the ASF in respect of the existence and validity of the insurance policies. Further requirements apply to insurance companies providing compulsory motor vehicle insurance by means of the freedom to provide services principle. All compulsory insurance policies must be written in Portuguese, as per Article 36(3) of the Insurance Contract Law.

Reinsurance activities may be pursued by a company located outside the European Union provided that its local supervisory authority has authorised such activity in that jurisdiction, although the provision of security may be required, depending on that jurisdiction's applicable solvency requirements, pursuant to Articles 244 to 247 of the Insurance Regulatory Law.

Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Please refer to our answer to the previous question. As better explained there, some foreign entities, if their seat is in the European Union, may write insurance business directly in Portugal, subject to certain applicable legal requirements. However, it is also common for foreign insurers to write reinsurance of a domestic insurer, especially in the case of compulsory insurance, for instance due to local specificities of insurance contract law in what regards the extent of coverage and the applicable exclusions or due to the need to use wording that is written in Portuguese, as per Article 36/3 of the Insurance Contract Law.

Is the incorporation of local companies with foreign shareholders permitted?

There are no specific restrictions imposed by Portuguese insurance law on the nationality of the shareholders of an insurance company, as long as the insurer complies with the incorporation requirements set out in Portuguese law, in particular in the Insurance Regulatory Law.

Regulatory

What are the main sources for insurance and reinsurance regulatory law?

Portugal being a civil law country, the main source for insurance and reinsurance regulatory law is statutory law, which, in Portugal, may, subject to constitutional requirements, be issued either by the Portuguese Parliament or the Portuguese Government.

The most important statute on insurance regulation is Law 147/2015 of 9 September, which approved the Portuguese legal framework for the taking up and pursuit of insurance and reinsurance activities in Portugal and largely embodies the implementation into Portuguese Law of several European Directives on insurance matters, including Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009, as amended (the Solvency II Directive).

Portugal

In what concerns the business of insurance and reinsurance mediation, Decree-Law 144/2006 of 31 July, as amended, must also be considered, as its implements Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation (the IMD).

The regulatory framework is complemented by Decree-Law 1/2015 of 6 January, which contains ASF's current statute, and by other residual legislation on certain particular aspects.

Also quite relevant for these purposes are the regulations issued by the ASF in order to implement and supplement the legal provisions set out in these and other relevant statutes.

It is additionally noteworthy that Portugal is also bound by legislation issued by the institutions of the EU on insurance matters, namely by the principles and provisions of the EU treaties, regulations, directives, decisions, recommendations, as well as court decisions, to the extent they are deemed to be a source of law in the European Union.

Please describe the current regulatory environment, including pending or anticipated regulatory reform.

Given the very recent significant changes to the regulatory framework, we expect the near future to be a time of adjustment to the new rules, rather than a time for very significant law reforms.

Other than that, the most notable substantial modification shall occur when the new Insurance Distribution Directive is implemented in Portugal, which will most probably take place in 2017/2018.

Claims

What are the main sources for contract law?

In Portugal, the main source of insurance contract law is the Insurance Contract Law approved by Decree-Law 72/2008 of 16 April 2008, as amended (*"Insurance Contract Law"*). This statute sets forth the general rules applicable to all classes of insurance contracts on aspects such as formation, duties of disclosure and information, the payment of premiums, the inception and termination of the insurance coverage, reinsurance and co-insurance, group insurance, claims handling and termination. The Insurance Contract Law contains two special parts, respectively regulating some of the most relevant classes of indemnity and of personal insurance.

Nonetheless, the main source of contract law in Portugal is the Portuguese Civil Code approved by Decree-Law 47344 of 25 November 1966, as amended from time to time ("Civil Code"). Many of the rules contained in the Civil Code are applicable to insurance contracts. For instance, insurance contracts should be construed in accordance with the same general rules applicable to all types of contractual statements.

Such rules are contained in Articles 236 to 238 of the Civil Code, as supplemented by Decree-Law 446/85 of 25 October 1985, as amended, which is the Standard Terms Law. Other statutes should be mentioned, such as Decree-Law 95/2006 of 29 May, on the distance marketing of financial services.

Finally, there is a multitude of statutes regulating specific subtypes of compulsory or voluntary insurance, as is the case of motor insurance, accidents at work insurance or credit and suretyship insurance. ASF has the capacity to enact regulations on matters concerning insurance contracts, for the purpose of clarifying, interpreting and complementing statutory law.

Portugal

In general, is the substantive law relating to insurance more favorable to insurers or insureds?

Portuguese substantive law relating to insurance is the result of an endeavor to reach balanced solutions adequately to protect both insurers and insureds. The outcome of this endeavor may be seen throughout the Insurance Contract Law. For instance, according to Article 24 of the Insurance Contract Law, the policyholder and the insured must disclose, before the conclusion of the contract, all circumstances that they have knowledge of and that they reasonably consider to be able to affect the insurer's evaluation of the risk. The insurer is not under a legal duty to submit a written questionnaire with the prior identification of all potentially relevant circumstances. This rule protects the insurer by placing upon the policyholder and the insured the burden to make an effort to recall all facts that an average person would reasonably consider relevant to the assessment of the risk by an insurer. However, Portuguese law sets out a few limits to this duty.

It is for the insurer to identify those circumstances that the average person might not deem relevant. If the insurer does ask potential customers to fill in a questionnaire, the insurer must then ensure that the questions allow for accurate, clear and complete answers; must review the answers provided before the conclusion of the contract; and must ask for a clarification of the answers provided, in case they are omitted or incomplete, uncertain, inaccurate or contradictory. These limits are set for the protection of policyholders and insured, who are only required to exercise a moderate degree of diligence.

Finally, before the conclusion of the contract, the scope, limits and consequences of breach of the duty of disclosure must be explained by the insurer to its customers. Failure to do so may result in the insurer's liability for the loss arising from the breach of this duty. The policyholder and the insured remain bound to similar duties of disclosure throughout the life of their insurance contracts.

What is the statute of limitations on claims?

According to Article 121 of the Insurance Contract Law, any enforcement rights against the insurer based on an insurance contract shall be time barred five years as from the date on which its holder became aware of their existence. The law also sets forth an ordinary limitation period of 20 years as from the date of occurrence of the relevant facts. Thus, these two limitation periods must be articulated. The insurer's right to the premium shall cease two years as from the date payment became due.

The rights of an injured third party as against the liability insurer shall follow the same statute of limitations as the primary claim as against the insured, as per Article 145 of the Insurance Contract Law.

Can a third party bring direct action against an insurer?

Pursuant to Article 146 of the Insurance Contract Law, an injured third party has a legal right to bring direct action against an insurer in the context of compulsory liability insurance. This legal right shall also apply to voluntary liability insurance, but only if the insured has informed the third party of the existence of the insurance and the insurer has accepted to enter into a process of direct negotiations with the third party, as per Article 140 of the Insurance Contract Law. Until these two requirements are met, there will be no legal right directly to sue the insurer, although the parties are always free to confer such right upon the injured third parties by stipulating it in the insurance contract.

Can an insured bring a direct action against a reinsurer?

According to Article 75 of the Insurance Contract Law, an insured does not have a direct right of action against a reinsurer unless such a right is set for in any applicable law, which it is not, or the parties to the reinsurance agreement have agreed to its existence. However, an insurer is legally permitted to assign its rights as against the reinsurer to any third party, including the insured. Assignment may be effectively barred by a stipulation included in the reinsurance agreement. General rules on the assignment of credit rights set forth in Articles 577 and following of the Civil Code will apply.

Portugal

Dispute Resolution

Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

Assuming that local courts have international jurisdiction over a given insurance-related dispute, it will most probably fall under the competence of common or judicial courts. The procedural rules applied are mainly those contained in the Portuguese Civil Procedure Code approved by Law 41/2013 of 26 June 2013, as amended (*"Civil Procedure Code"*).

According to the Civil Procedure Code, there is no right to a hearing before a jury in commercial insurance disputes.

What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of a) parties to the action and b) non-parties to the action?

For proof of relevant facts, a party may request the court to order the other party of the action or a non-party to disclose a document or documents. For this purpose and in accordance to Articles 429 and 432 of the Civil Procedure Code, the party must indicate the facts that it intends to prove with the document in question and also identify the document, with as much detailed as possible.

Articles 417 and 433 of the Civil Procedure Law determine that if the court orders the other party or a non-party to disclose a document and they refuse, the court may condemn them to pay a fine. Moreover, in case of a refusal of the other party to disclose a document, the court may freely assess the probative value of the refusal, without prejudice to the reversal of the burden of proof.

Refusal to disclose documents is only possible in the following cases: (i) the violation of physical, moral and psychological integrity of a person, (ii) intrusion into a person's private life, residence, correspondence or telecommunications and (iii) breach of professional secrecy or of public officials and state secret. In the latter case, the party who has requested disclosure may ask the court to determine whether refusal on these grounds was valid. A request for an exemption from the duty of confidentiality is also possible.

Finally, the court may also take the initiative to order a party of the action or a non-party to disclose relevant documents.

Are mediation and arbitration common methods for solving insurance disputes? Are more disputes resolved in or out of court?

According to Article 122 of the Insurance Contract Law, disputes over the validity, interpretation, performance and/or breach of an insurance contract may be settled by arbitration. Arbitration is regulated by Law 63/2011 of 14 December 2011. However, arbitration clauses do not bind injured third parties who are recognized a direct right of action in liability insurance, nor do they bind the third party beneficiaries in personal insurance.

Arbitration is not yet a very common method for solving insurance disputes involving large risks and mediation is even less used. However, arbitration is an increasingly popular choice for small insurance claims made by consumers, due to the availability of a specialized institutional arbitration structure, the nonprofit association called CIMPAS (*Centro de Informação, Medição, Provedoria e Arbitragem de Seguros*). This arbitration center hears cases on motor insurance; residential and commercial multi-risk insurance claims not exceeding EUR 50,000 per claim; some types of liability insurance not exceeding EUR 50,000 per claim.

In Portugal, more disputes usually end up in court than are settled out of court, although they often are settled before the final ruling. Typically, a local insurance company still prefers to take the risk to go to court rather than settle the dispute out of court.

What are the provisions regarding timely notice, and what are the legal consequences for non-compliance with the timely notice obligation?

According to Article 100 of the Insurance Contract Law, the policyholder, the insured or the beneficiary must communicate an occurrence to the insurer within eight days as from the date on which they became aware of its taking place, mentioning the causes, circumstances and consequences of the occurrence. The insurance contract may, however, stipulate a different term for the notice.

According to Article 101 of the Insurance Contract Law, the consequences of late notice are: (i) a reduction of the compensation payable by the insurer, taking into consideration the loss caused by late service of the notice; or (ii) preclusion of the right to compensation in the case of an intentionally late service of the notice which caused loss to the insurer. The relevant loss is that which could have been avoided if the notice had been timely served. However, such consequences should not occur if the insurer had knowledge of the claim by other means during the time set for the notice to be served or if the server of the notice is able to demonstrate that earlier notice could not have been served.

In the case of compulsory liability insurance, failure to serve notice may not be invoked as against injured third parties. In such cases, the insurer shall pay up the compensation that may be due, recovering it after from the defaulting policyholder or insured, unless the insurer had previous knowledge of the claim or the former could not have reasonably have served prior notice.

What are the laws regarding bad faith claims? What damages may be awarded if the insurer is found to have acted in bad faith?

Pursuant to Article 542 of the Civil Procedure Law, the party who litigates in bad faith – either the insurer, the insured or the injured third party – shall pay a fine as well as compensation to the other party, if requested.

Someone will be deemed to be a bad faith litigant when it has willfully or with gross negligence: (a) filed an unfounded claim or presented an unfounded defense; (b) omitted relevant facts or alleged facts known not to be truth; (c) committed a serious breach of the duty to cooperate; (d) made a manifestly reprehensible use of the proceedings, in order to achieve an illegal purpose, to prevent discovery of the truth, stalling the action or delay justice, without serious arguments.

Substantive law also condemns fraudulent claims. Thus a fraudulent claimant will be prevented from enforcing its rights under the insurance policy, pursuant to Articles 24(3), 25(5), 94(1)(c) of the Insurance Contract Law. Under some circumstances insurance fraud also constitutes a crime, pursuant to Article 219 of the Portuguese Penal Code.

Portugal

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Overview

Which government bodies/agencies regulate insurance and reinsurance companies?

According to *Federal Law No. 86-FZ, dated July 10, 2002*, "On the Central Bank of the Russian Federation" (the "Central Bank"), the Central Bank is the authority that regulates, controls and supervises non-credit financial institutions (including insurance and reinsurance companies) in the area of financial markets and (or) in connection with their compliance with federal laws. The Central Bank was established on July 13, 1990.

Since September 1, 2013, the Central Bank regulates, controls and supervises the activities of insurance and reinsurance companies in the financial markets.

Prior to September 1, 2013, the power to control and regulate the activities of insurance and reinsurance companies belonged to other state bodies; namely, the Federal Insurance Supervisory Authority (Rosstrakhnadzor) and the Federal Service for Financial Markets. For this reason a number of legislative instruments and official interpretations of Rosstrakhnadzor and the Federal Service for Financial Markets are still in effect until they are replaced by updated pronouncements of the Central Bank.

What are the categories of insurance licenses that exist?

The principal law regulating the activity of insurance and reinsurance companies is *Federal Law No. 4015-1, dated November 27, 1992*, "On Organization of the Insurance Business in the Russian Federation" (as amended) (the "Insurance Law").

According to *Article 32* of the *Insurance Law*, a license is issued:

1. To an insurance organization for the provision of:
    - Voluntary life insurance;
    - voluntary personal insurance except for voluntary life insurance;
    - voluntary property insurance;
    - insurance required by federal law on particular types of compulsory insurance;
    - reinsurance in cases of assumption of liability for an insurance payment under a contract of reinsurance;
2. To a reinsurance organization for the provision of reinsurance cover;
3. To a mutual insurance company for the provision of voluntary insurance and if according to the federal law on a particular type of compulsory insurance the company has the right to carry out compulsory insurance – in the form of compulsory insurance; and
4. To an insurance broker for acting as intermediary in an insurance broker capacity.

According to Article 32.9 of the *Insurance Law*, the following types of insurance can be provided:

1. Life insurance in the event of death, survival until a specified age or date or the occurrence of another event;
2. pension insurance;
3. life insurance subject to periodic insurance disbursements (rent, annuity) and/or participation of the insured in the insurer's investment income;
4. accident and disease insurance;
5. medical insurance;
6. insurance of land vehicles (except for by rail transport);
7. railway insurance;
8. air transport insurance;
9. water transport insurance;
10. cargo insurance;
11. agricultural insurance (crop, perennial plants, livestock);
12. insurance of the property belonging to legal entities, except for motor vehicles and agricultural insurance;
13. insurance of the property belonging to citizens, except for motor vehicles;
14. insurance of the civil liability of owners of motor vehicles;
15. insurance of the civil liability of owners of aircraft;

16. insurance of the civil liability of owners of water vehicles;
17. insurance of the civil liability of owners of railway transport facilities;
18. insurance of the civil liability of organizations operating hazardous facilities;
19. insurance of civil liability for infliction of harm due to defects in goods, works and services;
20. insurance of civil liability for infliction of harm on third persons;
21. insurance of civil liability for default on or improper performance of obligations under a contract;
22. insurance of entrepreneurial risks;
23. insurance of financial risks; and
24. other types of compulsory insurance provided for by Federal laws.

An insurance organization must notify the insurance supervisory body (i.e., the Central Bank) in writing of the types of insurance coverage stipulated in *Article 32.9* of the *Insurance Law* it intends to provide.

Are insurance companies subject to taxes beyond the ordinary burden faced by all companies?

In general, insurance and reinsurance companies are not taxed beyond the ordinary burden faced by all companies. Nevertheless, there is a certain specificity in the taxation of insurance companies. For example, according to *Article 149* of the *Tax Code* of the Russian Federation (the "*RF Tax Code*"), providing insurance cover, coinsurance and reinsurance is not subject to value added tax (is exempt from value added tax) on the territory of the Russian Federation.

Another exception is that in accordance with Article 346.12 of the *RF Tax*, insurers are not entitled to use the simplified taxation system available under Russian law to certain types of taxpayers.

What are the approved distribution channels? Are there restrictions?

In Russia insurance and mutual insurance companies are permitted to distribute insurance products directly as well as indirectly through insurance agents and insurance brokers.

Insurance companies that are subsidiaries of foreign organizations or more than 49 percent of whose capital is held by foreign investors cannot provide life, health or property insurance in the Russian Federation that is paid for by funds allocated for these purposes from the relevant federal budget. They also cannot provide insurance connected to the purchase of goods, works and services to be provided for state and municipal needs, or insure the property interests of state and municipal organizations.

Insurance companies that are subsidiaries of foreign organizations or more than 51 percent of whose capital is held by foreign investors also cannot provide the types of insurance referred to in the previous paragraph or endowment insurance, life insurance or compulsory insurance of the civil liabilities of the owners of transportation facilities in the Russian Federation (this provision is in force until August 22, 2017).

The activities of insurance agents and insurance brokers include activities in the interests of insurers or insureds and are connected with delivering services for vetting the insured and (or) selecting the insurer (reinsurer), the terms of insurance (reinsurance), the preparation of documents, supporting the entering into and performance of insurance (reinsurance) contracts, the preparation of documents necessary for regulating insurance claims and for interacting with the insurer (reinsurer), and consulting services.

Foreign insurance brokers may not conduct their activities in the territory of the Russian Federation except for the insurance broker on reinsurance and in other cases contemplated by the laws of the Russian Federation.

Are there any forms of compulsory insurance?

1. In Russia there are several types of compulsory insurance:
    - Compulsory social insurance
    - Old age pensions
    - Disability
    - Widowhood
    - Illness
    - Injury
    - Accident

- Occupational disease
- Pregnancy
- Childbirth
- Birth of child(ren)
- Child care prior to the age of 1 ½ years
- The cost of medical care in the event of hospitalization

2. Compulsory state insurance (compulsory life, health and property insurance required by law, the funds in payment of which are provided from the corresponding state budget);
3. Examples of other types of compulsory insurance include:
    - Insurance relating to the risk of vehicle owners causing injury to life, health or property of persons when operating the vehicle in the Russian Federation
    - Carrier's insurance relating to its risk of causing damage to the life, health or property of its passengers
    - Insurance against adverse consequences for investors in case of a default by a bank on its obligations
    - Builder insurance covering its responsibility to participants in shared construction in connection with the transfer of residential premises under the contract, etc.

Detailed provisions on each type of compulsory insurance are contained in applicable Federal laws.

Article 3(4) of the *Insurance Law* specifies that the conditions and procedures for exercising compulsory insurance are determined by federal laws, depending on the specific type of compulsory insurance at issue. The federal law on the specific form of compulsory insurance shall contain the following provisions:

a. Persons subject to insurance;
b. objects to be insured;
c. a list of insured risks;
d. the minimum amount of insurance coverage or the manner in which it is to be determined;
e. the terms and manner of payment of insurance premiums;
f. the term of the insurance contract;
g. the procedure for determining the amount of the insurance payments;
h. the consequences of failure or improper performance of the obligation to insure; and
i. other provisions.

Market Entry

What are the requirements/procedures for setting up a new insurance or reinsurance company?

Russian legislation provides a two-step process for creating insurance and reinsurance companies. Unlike most European countries, licenses can only be issued to insurers that are organized in the Russian Federation and registered in accordance with Federal Law No. 129-FZ, dated August 8, 2001, "On the State Registration of Legal Entities and Individual Entrepreneurs" (as amended) before documents can be filed to obtain an insurance license.

Neither the Insurance Law nor any other legal acts mandate a required legal form for insurance companies. This means that insurance companies can be created in any legal form under the laws of the Russian Federation. At the same time please note that in practice most insurance companies are organized in the form of joint-stock companies or limited liability companies, i.e., as a commercial organization. On the other hand, mutual insurance companies are generally organized as non-profit organizations.

According to *Article 25(3)* of the *Insurance Law*, insurers (except for mutual insurance societies) must have fully paid up authorized capital in an amount not less than the minimum authorized capital established by the law.

The minimum amount of authorized capital of an insurer engaged in providing medical insurance is 60 million rubles. This is due to limited possibilities of the insurer with regard to the insurance risks that are covered by its activities. The minimum amount of authorized capital of any other insurer is determined on the basis of its minimum authorized capital, which is equal to 120 million rubles, and in applicable cases multiplied by the coefficients stipulated in the law.

According to the *Insurance Law*, the activities of insurance and reinsurance companies are conducted

on the basis of the license issued for providing that particular type of insurance.

Please note that the heads of an insurance or reinsurance company (those persons performing the functions of a chief executive officer/general director and/or the head of a collective executive body, such as a management committee), the chief accountant, the internal auditor and/or the head of the internal audit service must satisfy the qualification requirements contained in *Article 32.1* of the *Insurance Law*. In particular, these heads (and especially the chief executive officer/general director) and the chief accountant of an insurance concern must permanently reside in the Russian Federation, and comply with the requirements on education and work experience.

Is it mandatory that a company be physically present in the market (HQ or branch office) to write insurance/ reinsurance policies?

According to Russian law, insurers are insurance organizations and mutual insurance companies created in conformity with the laws of the Russian Federation for the purpose of providing insurance, reinsurance and mutual insurance coverage and that have obtained licenses required for the conduct of their specific type of insurance activity. In other words, each insurance company must be incorporated under the laws of the Russian Federation. In addition, insurance licenses can only be issued to companies incorporated under Russian law. Reinsurance activities can however be carried out on the territory of the Russian Federation by foreign insurance companies.

Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

According to current Russian law, insurance companies must be incorporated under the laws of the Russian Federation. Licenses can only be issued to a company incorporated under Russian law.

Is the incorporation of local companies with foreign shareholders permitted?

Insurance companies that are subsidiaries of foreign companies or more than 49 percent of whose authorized capital is held by foreign investors cannot provide life, health or property insurance in the Russian Federation that is paid for by funds allocated for these purposes from the relevant federal budget. They also cannot provide insurance connected to the purchase of goods, works and services to be provided for state and municipal needs or insure the property interests of state and municipal organizations.

Insurance companies that are subsidiaries of foreign organizations or more than 51 percent of whose authorized capital is held by foreign investors also cannot provide the types of insurance referred to in the previous paragraph, endowment, life insurance policies or compulsory insurance required for the owners of transportation facilities in the Russian Federation (this provision is in force until August 22, 2017).

Regulatory

What are the main sources for insurance and reinsurance regulatory law?

The main sources of insurance and reinsurance regulatory laws are *Chapter 48 the Civil Code* (entitled "Insurance"), the Insurance Law and numerous regulations of the Central Bank, the Ministry of Finance of the Russian Federation, the Federal Service for Financial Markets (FSFM) and the Federal Insurance Supervisory Authority (Rosstrakhnadzor), which, along with the FSFM primarily regulated the insurance industry in the Russian Federation until that function was given over to the Central Bank on September 1, 2013.

Please describe the current regulatory environment, including pending or anticipated regulatory reform.

Solvency and capital requirements

The *Insurance Law* contains requirements for the minimum authorized capital of insurance companies and the establishment of a reserve fund.

Confidentiality

Under *Article 946 of the Civil Code*, an insurer may not disclose information it has received as a result of its professional activity about the insured, the identity of the insured party and the beneficiary, their health status, as well as any information regarding the financial situation of these persons. The insurer is liable for violations of insurance secrecy in accordance with the laws of the Russian Federation.

Supervision

The activities of insurance and reinsurance companies are supervised by the Central Bank in accordance with laws that are currently in effect.

The activities of insurance and reinsurance companies are supervised to ensure that these entities comply with all applicable insurance laws, to prevent and terminate violations of insurance laws, to ensure the protection of the rights and lawful interests of insurers, other concerned persons and the state, and to assist with the effective development of the insurance business in the Russian Federation.

Corporate governance

The *Civil Code* contains general requirements on the structure of corporate entities (Chapter 4 of the *Civil Code* entitled "*Legal entities*"). *Article 32.1* of the *Insurance Law* contains corporate governance requirements that must be met in order for companies to qualify as insurance companies. Detailed provisions regarding corporate governance are contained in the articles of association and other internal documents of each insurance company.

Reporting requirements

According to *Article 28* of the *Insurance Law*, insurers must maintain their own bookkeeping and prepare periodic accounting (financial) reports/statements and statistical reports/statements, as well as other reports/statements that are necessary for exercising control and supervision over their insurance activities. The reporting procedure and content of the reports established by legal acts. Annual accounting (financial) statements, annual consolidated financial statements.

Auditors' reports are posted on the official website of insurer. The supervisory body also posts on its website the summary regarding the activity of insurance entities.

Consumer protection

Consumer protection in the Russian Federation is regulated by *Federal Law No. 2300-I, dated February 7, 1992*, "On the Protection of Consumers' Rights" (as amended). Please note that this law applies to citizens intending to order or purchase or who have ordered, bought or used goods, works and services exclusively for personal, family, household and other purposes that are not related to business activities.

Broker remuneration

Russian law currently in effect does not regulate questions of broker remuneration.

Claims

What are the main sources for contract law?

As in other civil law jurisdictions, the fundamental legal act is the *Civil Code*. The *Civil Code* regulates general issues of civil liability under insurance contracts exhaustively. Consequently, such liabilities are not regulated under the *Insurance Law*.

In general, is the substantive law relating to insurance more favorable to insurers or insureds?

Russian legislation tends to maintain a balance of interests between the insured and the insurer. However, given that the insurance company is considered to be a professional market participant, it is regarded as the economically stronger party. For example, in accordance with the *Resolution of the Plenum of the Higher Arbitrazh Court of the Russian Federation, dated March 14, 2014, No. 16 "On Freedom of contract and its limits"* in cases where it is determined that at the time the agreement is entered into a draft of which was proposed by one of the parties and contain conditions that are clearly burdensome for its counterparty and substantially disrupts the balance of interests of the parties (unfair contractual terms), and the counterparty has been put in the position of it being difficult to agree the terms of the contract (i.e., found itself as the weak party to the contract), the court may apply the provisions of Article *428(2)* of the *Civil Code* regarding contracts of adhesion to such agreement by changing or terminating the agreement upon an appropriate request from the counterparty.

At the same time, in accordance with *Article 1(4)* of the *Civil Code*, no one has the right to benefit from their abusive behavior and the weak contracting party is entitled to assert the use of unfair contract terms against the strong contracting party under Article *10 of the Civil Code* or the nullity of such conditions under *Article 169* of the *Civil Code*.

Despite the recognition of the insured's relative weakness in relation to the insurer, Russian law

does not permit insureds to abuse their rights in this regard.

What is the statute of limitations on claims?

According to Articles 196 and 200 of the *Civil Code*, the general statute of limitations for actions is three years from the date on which the person learned or should have learned about the violation of his rights and the identity of the competent defendant in respect of his claim. The statute of limitation may not exceed ten years from the date the right was violated. The law may provide for special statutes of limitations. For example, according to Article 966 of the *Civil Code*, the statute of limitations for claims arising from contracts in respect of property insurance (except for liability insurance contracts for obligations arising from injury to life, health or property of other persons) is two years.

Can a third party bring direct action against an insurer?

A third party can bring a direct action against an insurer in the following cases:

1. If such insurance is compulsory;
2. if the possibility for a direct claim by the victim (the beneficiary) to the insurer is specifically provided for by law; or
3. if this possibility is provided under the insurance contract.

For example, according to *Article 13 of the Federal Law on Compulsory Insurance of the Carrier's Civil Liability for the Infliction of Harm Upon Passengers' Life, Health and Property, as well as The Procedure for Compensation for Harm Inflicted in Passenger Carriage by the Metropolitan Railway*, the insurer must pay the insurance proceeds to the beneficiary in the manner and on the terms established by this federal law and the beneficiary is entitled to demand payment of the insurance proceeds from the insurer.

Can an insured bring a direct action against a reinsurer?

Russian law currently in effect does not allow the insured to bring a direct action against a reinsurer. The insured has a contractual relationship with the insurer only.

Dispute Resolution

Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

According to *Article 27* of the *Arbitration Procedural Code of the Russian Federation No. 95-FZ, dated July 24, 2002* (the "APC"), economic disputes and other matters connected with the conduct of business and other economic activities are subject to adjudication in the arbitration courts. The trial of an action in an arbitration court does not depend on the value of the dispute. Russian laws currently in effect do not provide for the possibility of hearing such cases before a jury.

What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of a) parties to the action and b) non-parties to the action?

Russian law does not provide a procedure for disclosing evidence; however, the court may request particular documents to be delivered to it for review. According to *Article 66 the APC*, an arbitration court is entitled to suggest that persons participating in a case present additional evidence for purposes clarifying issues that are important in order for the court to consider the case correctly and render a reasonable and just decision. A person participating in a case and lacking the opportunity to obtain necessary evidence from a person in possession of it is entitled to file a petition with the arbitration court demanding its disclosure.

Are mediation and arbitration common methods for solving insurance disputes? Are more disputes resolved in or out of court?

Despite the relatively recent adoption of *Federal Law No. 193-FZ, dated July 27, 2010, "On Alternative Procedures for Settling Disputes with the Participation of an Intermediary (Mediation Procedure)",* mediation is not a common method for solving insurance disputes in Russia. Mediation in the Russian Federation is in the process of formation.

Due to the fact that insurance companies are reluctant to pay proceeds and frequently deny payment, substantially all insurance-related disputes are resolved in the courts.

Arbitration is most commonly used in marine insurance cases. For example, the Maritime Arbitration Commission at the Chamber of Commerce of the Russian Federation is one of the oldest and most well known permanent arbitration courts that specializes in disputes arising from contractual and other civil legal relationships connected to merchant shipping.

The London Court of International Arbitration (LCIA) is also frequently specified in marine insurance policies as an institution authorized to resolve disputes arising from merchant shipping.

What are the provisions regarding timely notice, and what are the legal consequences for non-compliance with the timely notice obligation?

According to *Article 961 of the Civil Code*, upon learning of an incident covered by its policy, an insured beneficiary under a property insurance contract must notify the insurer immediately of the occurrence of an insured event. If the contract provides for a time and (or) manner of notification, the provisions of the contract must be followed expressly. Otherwise, the insurer is entitled to refuse payment of the insurance proceeds, unless it can be proven that the insurer promptly learned about the incident or that the insurer's lack of information could not affect its obligation to pay the insurance proceeds. These provisions also apply to contracts of personal insurance if the insured event is the death of the insured or harm to his well-being. In this case the notice period established by the insurance contract may not be less than thirty days.

In other cases issues regarding timely notice may be regulated by regulations of the insurance company or by the insurance agreement (policy) and the insurer is not entitled to refuse payment of insurance compensation if these regulations or the agreement is followed.

What are the laws regarding bad faith claims? What damages may be awarded if the insurer is found to have acted in bad faith?

Insurance fraud is a criminal offense under the *Criminal Code of the Russian Federation No. 63-FZ, dated June 13, 1996* (the "Criminal Code"). *Article 159.5 of the Criminal Code* provides that insurance fraud constitutes a theft of property of another person by way of false pretenses regarding the occurrence of an insured event or regarding the amount of the insurance proceeds and results in criminal liability in the form of a fine, correctional labor, compulsory community service, deprivation of liberty or arrest depending on the gravity of offense.

If insurance proceeds were paid out on the basis of fraudulent misrepresentations, the insurer is entitled to demand the return of the proceeds and compensatory interest for wrongful use or retention of funds according to *Article 395* of the *Civil Code*. If losses exceed such amount, the insurer is entitled to recover all losses.

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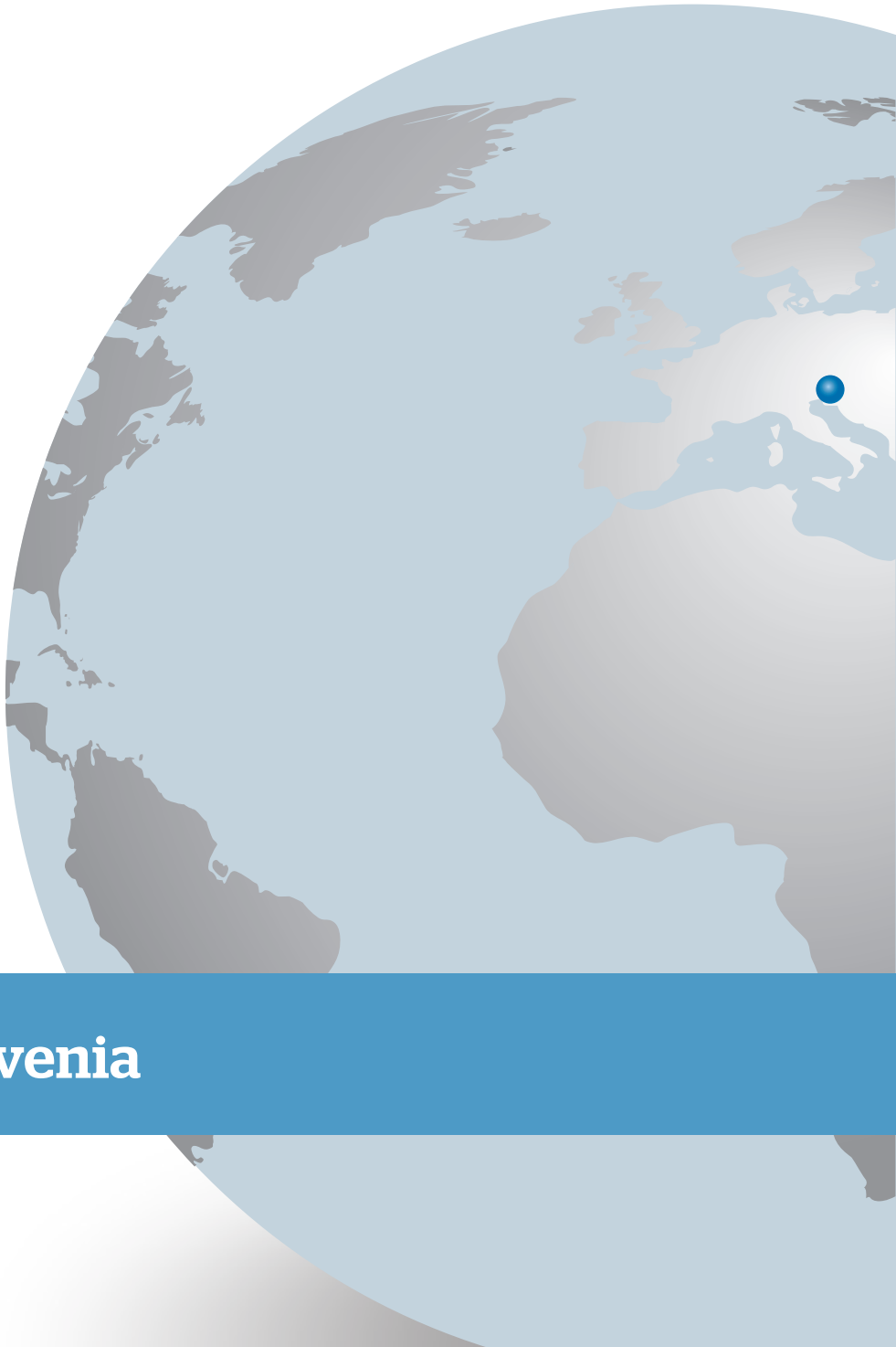

Slovenia

Overview

Which government bodies/agencies regulate insurance and reinsurance companies?

The principal body that governs and supervises insurance and reinsurance companies in Slovenia is the *Insurance Supervision Agency* (*Agencija za zavarovalni nadzor*; hereinafter the "Agency"). The Agency is operational since 1 June 2000, when the Government of the Republic of Slovenia appointed the Council of Experts and the Director of the Agency pursuant to article 352 of the then applicable *Insurance Act* (*Official Gazette RS no. 13/2000*). Pursuant to the *Financial Conglomerates Act* (*Official Gazette RS no. 43/2006*, as amended) the Agency is also performing supplementary supervision over supervised subjects that are part of financial conglomerates.

In 1992, Slovenian insurance companies founded the Slovenian Insurance Bureau (renamed into Slovenian Insurance Association in 1997), which is a commercial interest association and represents collective and individual interests of insurance companies that are its members. The association's activities are prescribed by the *Insurance Act* and the *Statute*, as are the terms and conditions for insurance companies' and other organizations' membership in the association. Membership in the association is voluntary and has increased steadily since its foundation. The association currently includes 20 members comprised of 17 insurance companies, two reinsurance companies and one other member.

What are the categories of insurance licenses that exist?

Pursuant to the *Insurance Act* (*Official Gazette RS no. 93/15;* hereinafter the "Insurance Act"), each insurance company must obtain an appropriate license issued by the Agency to carry out insurance transactions. The Agency grants reinsurance and insurance licenses. With respect to insurance companies, an insurance license shall be granted for individual types (groups) of insurance transactions that are exhaustively listed in the *Insurance Act*. Although composite insurance companies still exist in Slovenia on the basis of previously valid legislation, new insurance licenses can generally only be granted either for life insurance or for non-life insurance.

The following types of insurance transactions exist:

1. Non-life insurance:
    a. Accident insurance and health insurance
    b. Vehicle insurance, rail insurance, maritime insurance and aircraft insurance
    c. Freight insurance
    d. Insurance against fire and elementary accidents and insurance against other damaging acts
    e. Vehicle liability insurance, aircraft liability insurance and maritime liability insurance
    f. General liability insurance
    g. Credit and suretyship insurance
    h. Insurance against different financial loses
    i. Costs of proceedings insurance
    j. Help insurance
2. Life insurance:
    a. Survival insurance, death insurance, mixed life insurance, annuity insurance, life assurance with return of premiums, additional insurance (covering especially disability insurance, death insurance and injury insurance when such insurance is concluded in addition to any other life insurance)
    b. Wedding and birth insurance
    c. Life insurance structured in a way that the investment risk related to change in reference value is borne by the insured person
    d. Tontine insurance
    e. Insurance with capitalization of payouts
    f. Insurance against loss of income due to accident or illness that cannot be canceled by the insurance company.

Some of the above groups may be combined into one license: *e.g.*, if an insurance company is licensed to perform indemnity and accident insurance, it may perform accident insurance, vehicle insurance, rail insurance, maritime insurance, aircraft insurance, freight insurance, insurance against fire and

elementary accidents, insurance against other damaging acts, vehicle liability insurance, aircraft liability insurance, maritime liability insurance, general liability insurance and insurance against different financial loses.

The Agency also licenses insurance brokers and insurance brokerage companies, insurance agents and insurance agency companies, as well as other persons who may conclude insurance contracts.

Finally, the Agency also issues other types of approvals, such as approval for acquisition of a qualifying holding in an insurance company, approval for a management board member of an insurance company, approval for merging or dividing insurance companies, approval for establishment of a branch office abroad, approval for transfer of insurance contracts and approval for transfer of substantial part of business.

The Insurance Act and its implementing regulations contain rules on all of the above mentioned licenses and approvals.

Are insurance companies subject to taxes beyond the ordinary burden faced by all companies?

Generally, with respect to the income tax levied on legal entities, insurance companies are faced with the ordinary burden pursuant to the *Corporate Income Tax Act (Official Gazette RS no. 117/2006, as amended).*

In addition, insurance companies are also subject to a special tax payable from the performed insurance transactions, i.e. the conclusion and enforcement of non-life and life insurance contracts. The obligation to withhold the tax is established upon payment of the premium in cases of life and accident insurance or upon the issuance of receipt in cases of other insurances respectively. The basis for calculation of the tax amount is the premium as determined in the insurance contract, and the tax rate is 8.5 percent. The following types of insurances are exempted from the tax, i.e.:

a. compulsory pension, disability and health insurances;

b. non-life and life insurances, where the insured period exceeds ten years,

c. insurances covering risks outside of the Republic of Slovenia; and

d. reinsurances.

What are the approved distribution channels in your jurisdiction? Are there restrictions?

In addition to direct sales by insurance companies, the approved distribution channels are: a) insurance agents and insurance agencies; b) insurance brokers and insurance brokerage companies; and c) banks, provided they obtain an appropriate license from the Bank of Slovenia whereby such license is only issued upon prior opinion of the Agency. Further, other persons may also conclude insurance contracts, provided that they are appropriately licensed and that such insurance contracts are in direct connection with the main services that such persons provide (*e.g.* persons carrying out roadworthiness tests with respect to motor third party liability insurance, and travel agencies with respect to travel insurance).

An insurance agent is a person who is authorized for conclusion of insurance contracts in the name and on behalf of the insurance company. The authorization is based on an employment relationship or another legal relationship between the insurance company and the insurance agent. The authorization may be restricted to a specific geographic area and/or to certain legal transactions, but such restriction is applicable against the insured only if the insured was aware of it or should have been aware of it.

Conversely, an insurance broker acts as intermediary between the insurance buyer and one or more insurance companies.

Before being registered with the court/business register insurance agencies and insurance brokerage companies must obtain a license from the Agency in order to perform their respective activities. In addition, persons actually executing agency or brokerage transactions must also obtain a special license which can generally be issued if the following requirements are fulfilled:

a. Passed test of professional knowledge;

b. at least three months of experience in the insurance field;

c. sufficient proficiency in Slovenian language;

d. absence of criminal convictions; and

e. absence of license revocation within the past five years.

Slovenia

In addition to their core activity i.e. insurance agency or brokerage as applicable, insurance agencies and brokerage companies may only perform certain additional activities related to insurance. Banks and insurance brokerage companies must also have professional indemnity insurance in place.

Does your jurisdiction have any forms of compulsory insurance?

Yes, there are several types of compulsory insurance, including:

- compulsory social insurances (such as pension insurance, disability insurance, unemployment insurance, etc.);
- several compulsory transport insurances (motor third party liability insurance, air carrier liability insurance, insurance of vessel owners and insurance of passengers in the public transport against the consequences arising from accidents);
- compulsory professional indemnity insurance for certain professions, such as lawyers, notaries public, bailiffs, insurance brokers, doctors, land surveyors, civil engineers, mountain guides, shooting range managers, tourist agencies, travel organizers);
- compulsory insurance of liability for medicinal products and certain pharmaceuticals prepared on non-routine basis, and indemnity insurance for medical testing on humans and animals;
- compulsory environmental impairment liability insurance (nuclear damage, pollution of the sea with oil, fire, etc.); and
- compulsory accident and life insurance for certain professions, such as foreign divers, firefighters and police officers.

What major insurance/reinsurance legislation is on the horizon?

Practice and guidance with respect to *Solvency II* are being developed. Further, it is debated whether or not to combine the Agency and some other supervisory bodies (such as the Securities Market Agency and the Bank of Slovenia) into a single supervisory body.

Market Entry

What are the requirements/procedures for setting up a new insurance or reinsurance company?

An insurance company may be organized as a joint-stock company, a European joint-stock company or a mutual insurance company, while a reinsurance company may be organized as a joint-stock company or a European joint-stock company. The shares must be registered (bearer shares are not allowed), and must be paid in full with cash before the company can be registered with the court/business register. The Insurance Act contains elaborate and rather detailed provisions on the minimal capital requirements, share capital and similar (depending on the type of insurance business).

The following shall accompany any application for an insurance or reinsurance license:

a. Scheme of operations (business plan) and a description of the management system;

b. bylaws of the insurance company in the form of a notary deed;

c. a list of shareholders holding a qualifying holding or, if there are no such shareholders, a list of 20 biggest shareholders;

d. other proof showing that the requirements for issuing the license have been met;

e. proof showing that the insurance company meets certain capital requirements prescribed by the Insurance Act in view of the type and scope of insurance transactions.

Insurance and reinsurance companies must set up an actuarial function and appoint a person who holds the actuarial function.

When deciding on the issuance of an insurance license, the Agency also decides on the issuance of licenses to all holders of qualified shares, as well as licenses to management board members.

A person holding at least 10 percent of voting rights or share capital in an insurance company will be considered the holder of a qualifying share, whereby even less than 10 percent of voting rights and share capital can suffice if it enables the exercise of important influence on the management. The *Insurance Act* contains further thresholds when a new

license becomes required: these are 20 percent, 50 percent and 1/3rd.

If qualified holders and / or management board members subsequently change, then new licenses to holders of qualified shares and / or management board members are required.

Is it mandatory that a company be physically present in the market (HQ or branch office) to write insurance/ reinsurance policies?

If the respective insurance company has a registered office in an EU member state, then physical presence is not a requirement. Pursuant to *Article 21 of the Insurance Act*, insurance transactions may namely be carried out by:

a. An insurance company with its registered office in the Republic of Slovenia upon obtaining an appropriate license from the Agency;

b. a foreign insurance company which establishes a branch office in the Republic of Slovenia upon obtaining an appropriate license from the Agency or which is entitled to carry out insurance transactions directly in the territory of the Republic of Slovenia (whereby certain requirements are milder in case of branch offices of Swiss insurance companies performing non-life insurance, and there are certain exceptions with respect to vehicle, maritime, transport and aircraft insurance, as well as reinsurance, as described in the following response); and

c. an insurance company with its registered office in an EU Member State, which establishes a branch office in the Republic of Slovenia or is entitled to carry out insurance transactions directly in the territory of the Republic of Slovenia.

d. In this respect, it is important to note that the *Insurance Act* contains a rather broad definition of a branch office: any representative office or permanent presence of an insurance company in Slovenia will be considered as a branch office, also if it does not have the form of a branch office, but is only composed of an office managed by the respective insurance company's employees or an independent person having a permanent authorization to act for the insurance company as in the same manner as a representative office would act.

Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

When allowed to perform business in Slovenia (as explained in the response above) foreign insurers are able to write business directly. An insurance company with a registered office in another EU member state may start directly concluding insurance contracts in the Republic of Slovenia when the Agency receives the required documentation from the competent supervisory authority of the respective member state, among others

a. A statement of the supervisory authority of the home member state confirming that therespective insurance company fulfills the solvency capital requirements and the minimum capital requirements;

b. a description of insurance transactions which the insurance company is authorized to underwrite; and

c. a description of insurance transactions the insurance company will be underwriting in the territory of the Republic of Slovenia.

An insurance company with a registered office outside of the EU may generally only perform business in Slovenia through a branch office. Notwithstanding the above, a foreign insurance company with a license to write reinsurance or with a license to carry out insurance transactions with respect to vehicle, maritime, transport or aircraft insurance may perform such operations, if a) the Agency (on the basis of an application of the foreign insurance company or its competent supervisory authority) assesses that the regulatory requirements in the respective foreign country are at least equal to the requirements applicable in the EU; or b) the respective competent supervisory authority undertakes, by means of an agreement, to cooperate in an appropriate manner with the Agency. This exception does not, however, apply to insurance of passengers in public transport against the consequences of accidents and motor third party liability insurance.

Also, a foreign insurance company licensed to underwrite reinsurance, may carry out reinsurance transactions in the territory of the Republic of Slovenia and such transactions shall be deemed appropriate risk-mitigating instruments, if: a) the European Commission decides that the requirements related to reinsurance activities in the respective foreign country

are equivalent to those applicable in the EU; or b) the Agency decides that the requirements related to reinsurance activities in the respective foreign country are equivalent to those applicable in the EU (in the absence of the European Commission's decision) based on the delegated acts adopted by the European Commission; and c) such reinsurance is deemed an appropriate risk-mitigating instrument based on the delegated acts adopted by the European Commission.

Is the incorporation of local companies with foreign shareholders permitted?

The *Insurance Act* does not provide for any specific rules concerning the nationality of the shareholders: incorporation of Slovenian insurance companies with foreign shareholders is permitted and also happens in practice. However, when deciding on the issuance of an insurance license to such an entity, the Agency may be required to consult with the competent supervisory authorities of other member states.

Regulatory

What are the main sources for insurance and reinsurance regulatory law?

The main source for insurance and reinsurance regulatory law is the *Insurance Act* with its implementing regulations. The regulatory provisions are also incorporated in other laws, *e.g. Pension and Disability Insurance Act* (Official Gazette RS no. 96/2012, as amended), *Financial Conglomerates Act, Investment Funds and Management Companies Act* (Official Gazette RS no. 31/2015, as amended) and *Banking Act* (Official Gazette RS no. 25/15). In addition, general laws, *e.g. Companies Act* (Official Gazette RS no. 65/2009, as amended), *Financial Operations, Insolvency Proceedings and Compulsory Dissolution Act* (Official Gazette RS no. 126/2007, as amended), *Prevention of Restriction of Competition Act* (Official Gazette RS no. 36/2008, as amended), *Consumer Protection Act* (Official Gazette RS no. 20/1998, as amended), *Consumer Protection against Unfair Commercial Practices Act* (Official Gazette RS no. 53/2007) and others, apply to the insurance. The tax obligations are governed by the *Insurance Contracts Tax Act* (Official Gazette RS no. 57/1999, as amended).

The Republic of Slovenia as a European Union member state is also obliged to respect and enforce the European legislation.

Please discuss the current regulatory climate for your jurisdiction, as well as any pending or anticipated regulatory reform, in the following areas:

Solvency and Capital Requirements

Slovenian legislation is following the applicable EU directives in this respect. Practice and guidance with respect to *Solvency II* are being developed.

Confidentiality

We are not aware of any regulatory reform in this respect.

Each insurance company must keep as confidential all information, facts and circumstances relating to individual policyholder, insured person or other beneficiary of which it became aware during doing business with such person or in any other way. The respective information may not be used or abused by the management, other personnel, shareholders or any other person who comes in contact with such information. Confidentiality obligation may be lifted to a certain extent, in cases provided by the *Insurance Act* (*e.g.* upon consent of the policyholder, if the information is necessary to assert facts in criminal procedures, etc.).

It should be noted that the Slovenian Information Commissioner is enforcing Slovenian personal data protection laws rather stringently; insurance companies should use the necessary measures to safeguard personal data and comply with other personal data protection requirements pursuant to the generally applicable personal data protection legislation, as modified by special personal data protection provisions of the *Insurance Act*.

Supervision

It is currently debated whether or not to combine the Agency and some other supervisory bodies such as the Securities Market Agency and the Bank of Slovenia into a single supervisory body. We are not yet aware of any concrete legislative proposals in this respect, but certain political parties have this issue on their respective agendas.

Corporate Governance

Corporate governance in mutual insurance companies is regulated in a rather detailed manner by the *Insurance Act* and its implementing regulations.

The *Insurance Act* also contains certain corporate governance rules for joint stock companies that apply in addition to the generally applicable corporate governance rules. It sets forth additional tasks of supervisory board members and management members of insurance companies, as well as additional conditions to their appointment. It is mandatory to establish an audit committee in supervisory boards of insurance companies. The *Insurance Act* also requires insurance companies to have internal audit as an independent organizational unit to be directly subordinated to the management and separated from other internal bodies, functionally as well as organizationally). Employees of insurance companies are entitled – through the works' council – to appoint their representatives to the supervisory board: contrary to *Banking Act* that contains an exception to the general rules in this respect with respect to banks, the *Insurance Act* does not alter the generally applicable rules.

We are not aware of any upcoming regulatory reforms in this respect.

Reporting Requirements

Among others, insurance companies are obliged to report the following data to the Agency:

a. Entry and changes of any data in the court/ business register;

b. convening of any shareholders' meeting and all resolutions adopted;

c. information on shareholders holding a qualifying share and any changes with respect to these shares;

d. appointment and dismissal of the members of the management;

e. appointment and dismissal of the persons holding key functions;

f. adoption of the business strategy and the financial plan and any changes thereof;

g. adoption of rules on management system, risk management, compliance monitoring, internal control, internal audit and outsourced activities;

h. performance of insurance transactions within certain insurance types and its cessation

i. intended opening, transfer, winding up or temporary cessation of a branch office, or changes in the types of operations performed by the branch;

j. all facts and circumstances relevant to the assessment of whether the insurance company is part of an insurance group, as well as information on all entities within the group and the manner in which the entities are connected;

k. risk and solvency assessment;

l. all facts and circumstances relevant to the assessment of whether the insurance company complies with risk-management rules;

m. all matters relevant to the Agency when exercising control or executing other tasks.

In addition to the above, insurance companies are obliged to report on a) any endangerment of their liquidity or fulfilment of capital requirements, b) reasons for which its license could expire or be revoked, c) changes to the insurance company's financial situation causing it to no longer fulfil the solvency capital requirements, minimum capital requirements or the requirements regarding technical provisions or the assets covering technical provisions, d) certain changes to the information technology used by the insurance company, and d) other events that could material influence the operations of the insurance company in accordance with the rules on risk-management.

Consumer protection

General provisions of the *Consumer Protection Act* and *Consumer Protection against Unfair Commercial Practices Act* apply to insurance companies. The *Consumer Protection Act* includes general provisions for protection of consumer and specific provisions concerning the consumer right of withdrawal from the insurance contract concluded from distance.

Furthermore, consumers are protected by mandatory provisions of the *Code of Obligations* and prohibition of derogation from the respective provisions (please see below). In addition, consumers are also protected by various provisions of the *Insurance Act*, including the requirement imposed on insurance companies and insurance brokers to establish a scheme of out-of-court resolution of disputes with consumers. It should be noted that the *Insurance Act* governs mandatory contents of insurance agreements and general conditions, as well as mandatory provision of information to policyholders: these provisions of the *Insurance Act*, as well as general consumer protection

legislation, are also applicable to EU member state and foreign insurance companies.

Broker remuneration

Insurance brokers are entitled to remuneration as determined in their respective contracts with insurance companies. This is intended to compensate them for the effort to get a policy holder in contact with the insurance company and to negotiate the conclusion of an insurance contract, as well as for the activities linked to preparatory work and assistance in the exercise of rights arising under the respective insurance contract, particularly settlement of damage claims. A broker may also be entitled to a success fee or a higher remuneration for certain types of insurance transactions. In any event, an insurance broker may not request payment of commission from the policy holder unless otherwise specified in the contract specifically concluded between the policy holder and the broker (*Article 554* of the *Insurance Act*). The right to remuneration is established when the insurance contract enters into force.

Please note that no regulatory reforms are currently pending or anticipated with respect to this issue.

Claims

What are the main sources for contract law in your jurisdiction?

The main source for contract law in the Republic of Slovenia is the *Code of Obligations (Official Gazette RS no. 83/2001*, as amended), which also specifically governs insurance contracts (articles 921 to 989). Specific insurance related provisions of the *Code of Obligations* do not apply for reinsurance, only the general part of the Code of Obligations is applicable to the latter. Otherwise, specific laws are also regulating specific types of insurance contracts, *e.g. Maritime Code* (*Official Gazette RS no. 120/2006*, as amended), *Obligations and Real Rights in Air Navigation Act* (*Official Gazette RS no. 27/2011*, as amended), *Health Care and Health Insurance Act* (*Official Gazette RS no. 72/2006*, as amended), *Compulsory Motor Third-Party Liability Insurance Act* (*Official Gazette RS no. 93/2007*, as amended), *Pension and Disability Insurance Act*, among others. In addition, the sources for contract law in the Republic of Slovenia are also general and specific insurance terms and conditions or typical contracts, clauses, customary practices, case law and legal theory.

In general, is the substantive law relating to insurance more favorable to insurers or insured?

The substantive law is generally more favorable to insured as the presumed weaker party of the insurance contract. The presumed situation is namely as follows: Insurance companies operate on the basis of general terms and conditions, and the insured only has the possibility of choice whether or not to conclude the insurance contract, whereby in the case of compulsory insurance the insured does not even have this choice.

Substantive law is therefore trying to make the interests of insurers and insured more balanced. Consequently, pursuant to *Article 924 of the Code of Obligations*, parties may only derogate from the provisions of the respective act governing insurance contracts that expressly foresee a possible derogation, or expressly allow the parties to act freely. Derogation from other provisions is allowed only for the benefit of the insured, provided that derogation is not prohibited by *Code of Obligations* or other law.

Further, according to *Article 121 of the Code of Obligations*, any provisions of an insurance company's general terms and conditions that are in violation of good business practices or contrary to the purpose of the contract shall be deemed null and void. The court may also refuse to apply provisions that deny a party's right to appeal, deprive a party of its right or deadlines or are otherwise to strict or unfair.

Moreover, the *Consumer Protection Act* envisages that a consumer shall only be bound by the general terms and conditions if the consumer was informed of the whole wording of the general terms and conditions before entering into an agreement, whereby it shall suffice that the insurance company alerts the consumer on their existence and makes them available without any restrictions. The general terms and conditions shall be clear and understandable; unclear terms shall be interpreted to the consumer's benefit. In addition, the *Consumer Protection Act* provides some guidance on which terms and conditions shall be deemed unfair and consequently null and void.

Slovenia

What is the statute of limitations on claims in your jurisdiction?

The statute of limitations is determined in the *Code of Obligations, Article 357*, and applies specifically to claims deriving from insurance contracts.

Any claim of the insured or a third person against the insurance company becomes statute barred in five years in case of life insurances, and in three years in case of non-life insurances. In both cases, the statute of limitations starts running the first day after the expiry of calendar year in which the claim was established. If the interested party proves that it was not aware that the insured event occurred, the statute of limitation starts running from the day the interested party became aware of the occurrence of the insured event. In any event, any claim from life insurance contracts becomes statute barred in 10 years, while any claim from non-life insurance contracts becomes statute barred in five years. Direct claims of third persons become statute barred in the same time as their respective claims against the insured.

Any claim of the insurance company becomes statute barred in three years.

Can a third party bring direct action against an insurer?

This is possible in case of indemnity insurance, where the insurance company is liable to pay the damage only if so requested by a third person. The injured third party has its own right to request damage compensation pursuant to the *Code of Obligations* (*Articles 964 and 965*); if rights of the insured are amended after the occurrence of insured event, then such change does not affect the rights of the injured third party.

Can an insured bring a direct action against a reinsurer?

Generally, such a direct action is not possible. The above mentioned provisions of the *Code of Obligations* regulating a direct claim in case of indemnity insurances do namely not apply to reinsurance contracts. Pursuant to general rules of the *Code of Obligations (Article 280)*, each obligation must be fulfilled by the respective debtor to the respective creditor or to a third person determined by law, contract or creditor. As the parties to the reinsurance contract are an insurance company and a reinsurance company, and in the absence of any provisions to the contrary in law or contract, the reinsurance company could only validly fulfill its obligations arising from the reinsurance contract to the respective insurance company, and the respective insurance company is the only entity entitled to request fulfillment of the respective provisions.

Dispute Resolution

Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

Generally, if the value of the dispute does not exceed EUR 20,000, the local court will have jurisdiction for the dispute. A district court will generally have jurisdiction if the value of the dispute exceeds EUR 20,000 and in case of business to business disputes.

Territorial jurisdiction within the Republic of Slovenia generally depends on the defendant's permanent place of residence if the defendant is a natural person. If the defendant is a legal entity, territorial jurisdiction depends on its registered office. However, some specific rules concerning territorial jurisdiction in indemnity disputes between insurance companies and injured third persons apply: in addition to generally territorially competent court, a claim may also be brought before a court (i) In the place where the damaging act was performed, or where the damaging consequence occurred; and (ii) in case of death or severe bodily injuries, in the place where the claimant has its permanent or temporary residence.

Juries as such do not exist in the Slovenian court system; disputes are solved by a single career judge or by a panel of judges that may be composed of career judges and lay judges, or solely of career judges (*e.g.*, in appellate panels). Thus there is no right to a hearing before a jury.

What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of a) parties to the action and b) non-parties to the action?

A party shall submit to the court all relevant original documents adduced as evidence to support the party's statements up to the end of the opening

hearing session. If a party asserts that a document is kept with the opposite party, the court shall order the latter to submit such a document within a specified period. If a party who has been ordered to submit a document, claims that it is not in possession thereof, the court may, generally upon proposal of the other party, produce evidence to determine the truth of these claims. If a party that has the document in its possession does not comply with the decision to submit it or against the court's belief negates that it possesses it, then the fact that the opposite party wished to prove with that document is considered proven (*Article 227* of the *Civil Procedure Act*).

The court may order a third party to submit a relevant document only if a third party's obligation to produce the document exists under the statute, or if the contents of the document relate to the third party and the litigating party referring to such document. If a third party who has been ordered to submit a document asserts that it is not in possession thereof, the court may, generally upon proposal of a litigating party, produce evidence to determine the truth of this assertion. A final decision of the court ordering the submission of documents shall be enforced in enforcement procedure (Article 228 of the *Civil Procedure Act*).

Are mediation and arbitration common methods for solving insurance disputes? Are more disputes resolved in or out of court?

Pursuant to the *Insurance Act* (*Articles 557* and *579*) insurance companies, insurance agents and insurance brokers must set up internal proceedings for solving insurance disputes with the insurers, the insured or other insurance beneficiaries. In addition, insurance companies must also establish a scheme of out of court resolution of such disputes, and insurance brokers must establish a scheme of out of court resolution of disputes with consumers. The entity performing such out of court dispute resolution proceedings must be independent and must comply with certain conditions set forth by the *Out-of-Court Resolution of Consumer Disputes Act (Official Gazette RS no. 81/15)*. In case a claim is not granted or decided upon in 30 days under the insurance company's (or insurance broker's) internal proceedings for solving insurance disputes, the insurer (the insured, or other beneficiary) may file a petition under the out of court dispute resolution scheme.

Information on the scheme of out of court resolution of disputes as well as the internal proceedings for solving insurance disputes must be described in the insurance company's general terms and conditions.

Such schemes of out of court resolution of disputes are well established in Slovenia. For example, the largest Slovenian insurance company, Zavarovalnica Triglav d.d., established a permanent arbitration court in 1982. The number of cases submitted to the respective arbitration increased over the years, whereby most of arbitrated disputes related to motor third party liability insurance and general indemnity insurance.

Two additional bodies deciding on disputes between insurance companies and consumers exist within the *Slovenian Insurance Association*: i) Guardian of good insurance practices, who decides on disputes concerning infringements of the *Insurance Code* and other good insurance practices, but does not solve disputes falling within court jurisdiction; and ii) mediation center, which helps the parties solve their disputes informally, however, cannot issue a binding decision.

Alternative dispute resolution ("ADR") is encouraged in Slovenia predominantly to decrease judicial backlogs. While confidentiality and proficiency of selected arbitrators/mediators is certainly a big advantage of ADRs, in particular for corporations, shorter proceedings are also an important advantage. Slovenian courts are obliged to propose alternative dispute resolution in every case, except when the judge decides that this would not be appropriate. Mediation is therefore an increasingly popular way of alternative dispute resolution in Slovenia, arbitration is also used, particularly in business to business disputes, and the use of other ADR methods is becoming known. Nevertheless, many insurance claims are still resolved in court.

What are the provisions regarding timely notice, and what are the legal consequences for non-compliance with the timely notice obligation?

Pursuant to *Article 941 of the Code of Obligations*, the insured person must inform the insurance company on the insured event within three days from the day when the insured person becomes aware of it. If the insured person does not fulfill this notifying obligation in time, he/she does not loose the claim against the insurance company, but may be liable to it for damages due to the failure to notify in time.

Slovenia

The respective deadline is determined due to the fact that the facts of the matter are best assessed immediately; however general terms and conditions of insurance companies may determine a longer deadline. The respective article does not apply to life and health insurances.

A warning on forfeiture of claims arising from insurance contracts in case of untimely notice has to be included in insurance contracts (*Article 521 of the Insurance Act*).

What are the laws regarding bad faith claims? What damages may be awarded if the insurer is found to have acted in bad faith?

No punitive damages are foreseen if the insurer is found to have acted in bad faith. The type of damages that can be awarded is the same irrespective of whether a claim is based on contract or on tort: *Article 246* of the *Code of Obligations* namely determines that in case of contractual liability the damages shall be assessed in accordance with the rules on damages arising from tort. Ordinary damage (reduced assets) and lost profits (prevented increase of assets) are payable as compensation for pecuniary loss.

Non-pecuniary damages may be claimed only with respect to the following:

- Bodily injuries (with respect to bodily injuries case law also recognizes inconveniences occurred with respect to treatment);
- mental pain due to decrease of life activity;
- malformation;
- defamation of the good name and honor;
- curtailment of freedom or other personal right;
- death of a close person or especially grave disability of a close person;
- violation of the dignity;
- fear; and
- defamation of a good name or reputation of a legal entity. In general, Slovenian courts tend to be rather restrictive when determining the amount of non-pecuniary damages.

On the contrary, if the insured acts in a bad faith when concluding a contract (i.e. the insured gives false information to the insurance company or retains important information, concludes prohibited double insurance, or concludes an insurance contract after the occurrence of insured case) or falsely presents the insured case, this may constitute a criminal offense, punishable with imprisonment of up to one year.

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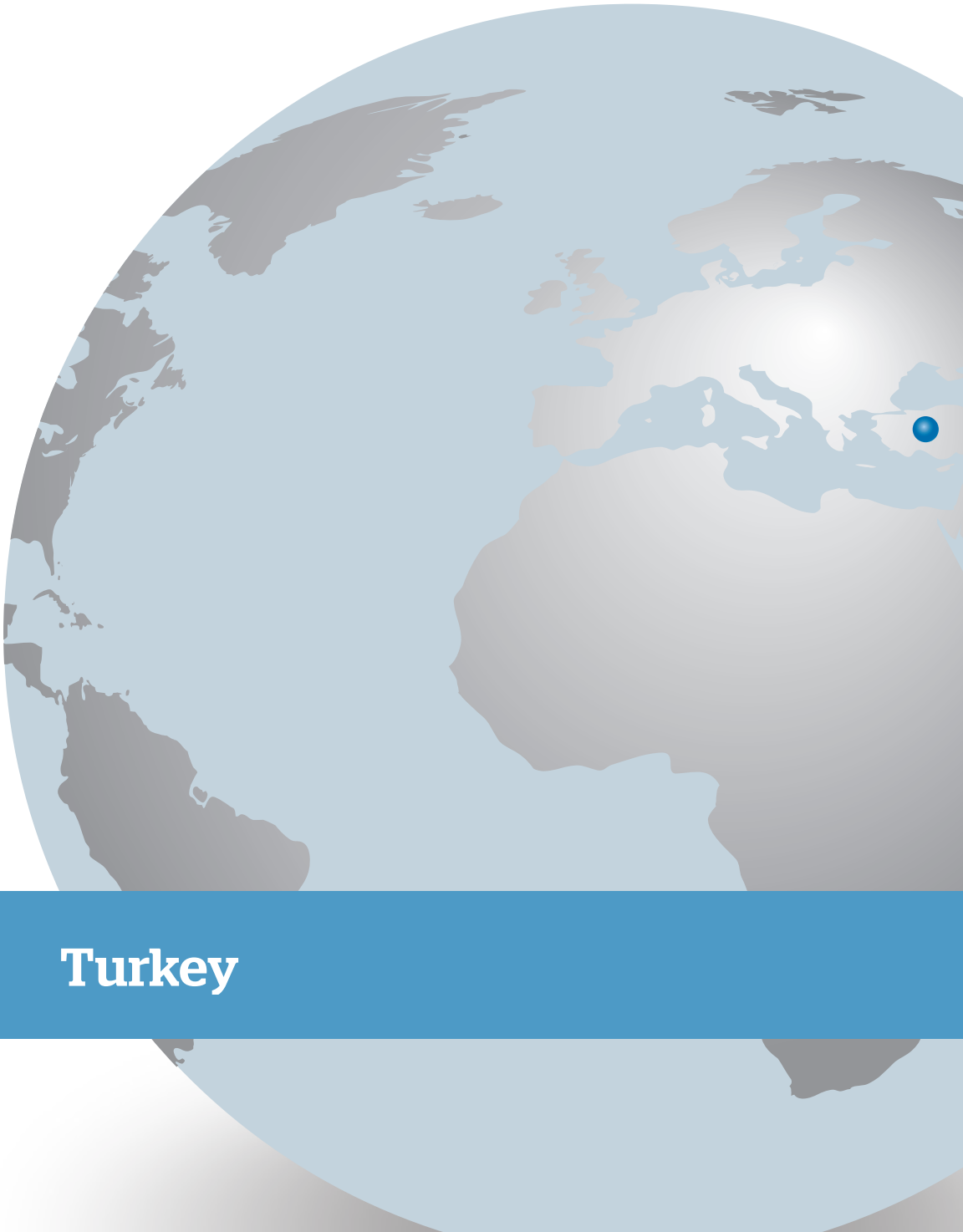

Turkey

Turkey

Prepared by Pekin & Pekin
Lex Mundi Member Firm for Turkey

Overview

Which government bodies/agencies regulate insurance and reinsurance companies?

The body which is authorized and responsible to regulate insurance and reinsurance sector in the Republic of Turkey is the Undersecretariat of Treasury which is linked to the Prime Ministry of the Republic of Turkey.

What are the categories of insurance licenses that exist?

As per *Article 5 of the Insurance Law (Law No. 5684, published in the Official Gazette dated June 14, 2007 and numbered 26552*), the insurance companies may only engage in either life and non-life insurance groups. The Undersecretariat of Treasury is authorized to determine the branches under the foregoing life and non-life insurance groups. Accordingly, the Undersecretariat of Treasury has issued the *Communiqué on Insurance Branches (No. 2007/1, published in the Official Gazette dated July 11, 2007 and numbered 26579*) according to which the insurance branches in non-life insurance group are accident, health, motor vehicles, railroad vehicles, air vehicles, water vehicles, transportation, fire and natural disasters, general damages, motor vehicles liability, air vehicles liability, water vehicles liability, general liability, loan, breach of trust, financial loss whereas the insurance branches in life insurance group are life insurance, marriage insurance, birth insurance, accident insurance and illness/ health insurance.

Are insurance companies subject to taxes beyond the ordinary burden faced by all companies?

Please be advised that pursuant to *Article 28 of the Expenditure Tax Law (Law No: 6802) (published in the Official Gazette dated July 23,1956, numbered 9362)* ("Expenditure Tax Law") the money gained by the banks and insurance companies as a result of any operations performed in Turkey are subject to "banking and insurance operations tax". Besides, pursuant to *Article 30* of the *Expenditure Tax Law*, the tax relating to banking and insurance operations shall be paid by the banks, banker and insurance companies. However, please note that pursuant to *Article 29* of the *Expenditure Tax Law*, the payment received as life insurance policy premium is exempt from the aforementioned tax. On the other side, pursuant to *Article 63 of the Income Tax Law (No: 193) (published in the Official Gazette dated January 6, 1961 and numbered 10700)* ("Income Tax Law"), premiums paid by the policy holder are deductible from income tax provided that the premium paid at a certain month does not exceed 5 percent the monthly income. If the policy holder is subject to annual tax, then the premiums are deductible to the extent the yearly paid premium does not exceed 5 percent of the annual income.

What are the approved distribution channels in your jurisdiction? Are there restrictions?

According to the *Insurance Law*, insurance mediation activities shall be conducted by insurance intermediaries. Pursuant to *Article 2* of the *Insurance Law*, insurance intermediaries are specified as *"insurance agents"* and *"brokers"*. The insurance agent is defined as *"the person who constantly acts as intermediary for the execution of insurance contracts in the name and account of the insurance companies in a specific area or region under an agreement without having any title such as trade representative, trade officer, sales executive or an employee, or carries out such works in the name of the insurance companies, performs the preliminary works before the execution of the insurance contract, and assists the execution of the contract and payment of the insurance proceedings"*. The broker is defined as *"the person who acts in the name and account of the persons who wish to enter into an insurance contract, by conducting the preliminary work before the execution of the contract and assisting the performance of the contract and collection of the reimbursement, in an independent and impartial manner"*. Pursuant to *Article 23* of the *Insurance Law*, other than insurance companies holding an insurance license, only insurance agents, banks and establishments which have been established by virtue of a special law to carry out insurance activities may carry out insurance policy selling activities. Furthermore, pursuant to the foregoing Article, the insurance agents shall only perform insurance intermediary activities and shall not engage in any other activity.

Turkey

Are there any forms of compulsory insurance?

Under Turkish insurance legislation, there are certain forms of compulsory insurance including Passenger Transportation Accident Insurance, Earthquake Insurance, Compulsory Motorway Transportation Financial Liability Insurance, Motor Vehicle Financial Liability Insurance, Bottled LPG Insurance, Hazardous Materials Liability Insurance and Electronic Certificate Liability Insurance.

What major insurance/reinsurance legislation is on the horizon?

Current insurance legislation in the Republic of Turkey is based on the *Insurance Law* dated 2007, the *Turkish Commercial Code dated 2011* and the *Turkish Code of Obligations dated 2011* which can be deemed as relatively new. Even though the Undersecretariat of Treasury regularly issues secondary legislations such as communiqués and regulations in line with the foregoing laws, there is not any law in relation to insurance which is expected to enter into force in the near future.

Market Entry

What are the requirements/procedures for setting up a new insurance or reinsurance company?

It is mandatory that the insurance and reinsurance activities are carried out either by way of incorporating a joint stock company or establishing a branch. In addition, as per the same Article 5, the share capital of insurance companies operating in Turkey shall not be less than 5 million Turkish Lira (approximately USD 2.2 million). In order to carry out insurance or reinsurance activities in the Republic of Turkey, a license shall be obtained from the Undersecretariat of Treasury for each branch of insurance. Furthermore, as per Article 5 of the *Insurance Law*, an insurance company may only operate in life or non-life insurance group.

Is it mandatory that a company be physically present in the market (HQ or branch office) to write insurance/ reinsurance policies?

The real persons or legal entities residing in the Republic of Turkey are obliged to have their insurable benefits insured in Turkey by an insurance company operating in Turkey. However, the life insurance is exempted from this aforementioned general rule and listed as one of the insurance policies which may be executed abroad in accordance with paragraph 2(ç) of *Article 15*. With respect to non-life insurance group, in order to carry out insurance activities in Turkey, it is mandatory to incorporate a joint stock company under Turkish laws or establish a branch office in Turkey of the company operating abroad.

Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

As stated above, it is not possible to carry out any insurance and reinsurance activities in Turkey without obtaining a license from the Undersecretariat of Treasury which is only granted to joint stock companies incorporated as per the Turkish laws or branch offices of foreign companies. However, as stated above, the life insurance group is exempted from the foregoing restriction and insurance companies incorporated abroad shall be entitled to directly write insurance policies for Turkish residents.

Is the incorporation of local companies with foreign shareholders permitted?

As per the *Direct Foreign Investment Law (Law No. 4875, published in the Official Gazette dated June 17, 2003 and numbered 25141*), foreign investors shall be deemed as equal to domestic investors unless provided contrary by an international treaty or special law. Furthermore, there are no restrictions with respect to foreign shareholding in an insurance company operating in Turkey.

Regulatory

What are the main sources for insurance and reinsurance regulatory law?

The main sources for insurance and reinsurance regulatory law in Turkey are the *Insurance Law*, the *Turkish Commercial Code* and *Turkish Code of Obligations*. Furthermore, the Undersecretariat of Treasury is entitled to promulgate regulations and communiqués to enhance the implementation of the insurance legislation.

Turkey

Please describe the current regulatory environment, including pending or anticipated regulatory reform.

Solvency and Capital Requirements

Article 16 of the *Insurance Law* stipulates that the insurance and reinsurance companies shall set aside a sufficient amount of reserve against the risk payments and *Article 5* of the *Insurance Law* stipulates that the share capital of insurance and reinsurance companies shall not be less than 5 million Turkish Liras.

Confidentiality

Article 31/A of the *Insurance Law* stipulates that the employees of the Undersecretariat of Treasury who obtain any confidential information within the scope of an insurance relationship shall not disclose any confidential information to anyone except those who are authorized by virtue of the laws.

Supervision

Article 28 of the *Insurance Law* stipulates that the insurance companies and reinsurance companies operating in Turkey shall be supervised by the Insurance Supervision Board.

Corporate Governance

The Turkish Commercial Code, the Capital Markets Law (Law No. 6362, published in the Official Gazette dated December 30, 2012 and numbered 28513) and the secondary legislation thereof set forth the provisions with respect to corporate governance principles. However, such corporate governance principles are currently applied only to public companies. Since there is not any obligation that an insurance or reinsurance company shall be public, the corporate governance provisions only apply to insurance and reinsurance companies the shares of which are quoted in Istanbul Stock Market.

Reporting Requirements

Article 29 of the *Insurance Law* stipulates that insurance and reinsurance companies operating in Turkey shall provide all information requested by the Undersecretariat of Ministry, regardless of such information being confidential.

Consumer Protection

The Consumer Protection Law (Law No. 28835, published in the Official Gazette dated November 28, 2013 and numbered 28835) defines insurance as a consumer activity and accordingly the provisions of the foregoing law with respect to consumer protection shall be applicable to insurance policies.

Broker remuneration

Article 13 of the *Regulation on Insurance and Reinsurance Brokers (published in the Official Gazette dated June 21, 2008 and numbered 26913)* stipulates that insurance brokers shall not have interest other than receipt of insurance brokerage remuneration fee from its respective customer.

Claims

What are the main sources for contract law?

The main sources for contract law in Turkey are the *Code of Obligations* and the *Turkish Commercial Code*.

In general, is the substantive law relating to insurance more favorable to insurers or insureds?

Pursuant to *Article 23* of the *Turkish Code of Obligations*, in case a provision of general terms of contract is ambiguous, it shall be interpreted in favor of the counterparty (i.e. the insured party). Furthermore, pursuant to *Article 1452* of the *Turkish Commercial Code*, the insurance agreements containing provisions exceeding the provisions under the law to the detriment of the insured party shall be void. In light of the foregoing, it could be argued that the substantive law relating to insurance is more favorable to insureds.

What is the statute of limitations on claims?

Pursuant to *Article 1420* of the *Turkish Commercial Code*, all claims arising from an insurance contract shall be prescribed after two years from the date the receivable becomes due and in any event, six years as of the date of the incident.

Can a third party bring direct action against an insurer?

Under Turkish law, the parties to an insurance policy are (i) the insurer, (ii) the insurant and, if any, (iii) the beneficiary. Accordingly, no party other than the foregoing parties shall be entitled to bring direct action against an insurer. However, pursuant to Article

1495 of the *Turkish Commercial Code*, in the event of death of the beneficiary, the inheritors of such beneficiary shall be entitled to receive the relevant compensation and accordingly are entitled to bring direct action against the insurer.

Can an insured bring a direct action against a reinsurer?

Since the parties of a reinsurance agreement are the reinsurance company and the insurance company, the insured party shall not bring direct action against a reinsurer and shall claim any sort of compensation against the relevant insurance company. Furthermore, *Article 1403* of the *Turkish Commercial Code* explicitly states that a reinsurance agreement does not grant the insured party the right to bring direct action against the reinsurer.

Dispute Resolution

Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

Pursuant to *Article 15* of the *Civil Procedural Law (Law No. 6100, published in the Official Gazette dated February 4, 2011 and numbered 27836)*, the venue for lawsuits regarding damage insurances shall be the location of the relevant immovable or movable or the location of occurrence of the risk. Furthermore, the concept of jury does not exist in Turkey and the judge is the sole authority to resolve on a case.

What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of a) parties to the action and b) non-parties to the action?

Pursuant to *Article 31/A* of the *Insurance Law*, those who are in charge of implementation of the foregoing law shall not disclose any information obtained by virtue of their duty to anyone except those who are empowered by the law. The courts in the Republic of Turkey are authorized to request any type of information from the insurance companies, any confidential information shall be provided to the relevant court upon request.

Are mediation and arbitration common methods for solving insurance disputes? Are more disputes resolved in or out of court?

The *Law on Mediation Regarding Legal Disputes (Law No. 6325, published in the Official Gazette dated June 22, 2012 and numbered 28331)* has recently entered into effect and even though this law has introduced the mediation system, in practice the mediation implementations are relatively low. With respect to arbitration, pursuant to *Article 30* of the *Insurance Law*, an Insurance Arbitration Commission has been established to resolve the disputes arising from insurance matters. In order to utilize such a system, both parties shall have registered as the members of the foregoing commission. The Insurance Arbitration Commission consists of five arbitrators, namely one representative of the Undersecretariat of Treasury, two representatives of the Turkish Insurance and Reinsurance Companies Union, one representative of the Consumer Association and one professor/lawyer to be designated by the Undersecretaries of Treasury. The decisions of the Insurance Arbitration Commission shall be binding on parties. Further to the foregoing, it is also possible to apply to Consumer Problems Arbitration Committee for issues arising from an insurance policy. Pursuant to *Article 30(14)* of the *Insurance Law*, it is not possible to apply to the Insurance Arbitration Commission for the matters pending before the Consumer Problems Arbitration Committee.

What are the provisions regarding timely notice, and what are the legal consequences for non-compliance with the timely notice obligation?

Pursuant to *Article 1446* of the *Turkish Commercial Code*, the insured party shall duly notify the insurer of the occurrence of the risk as soon as it becomes aware thereof. According to the same article, in event that the insured party fails to promptly notify the insurer of the occurrence of the event and such delay causes an increase in the compensation amount to be paid by the insurer, a discount shall be made on the compensation amount. However, if the insurer has found out about the same incident without being notified by the insured party, the foregoing provision regarding discount in the compensation amount shall not be applicable.

Turkey

What are the laws regarding bad faith claims? What damages may be awarded if the insurer is found to have acted in bad faith?

Pursuant to *Article 1439* of the *Turkish Commercial Code*, in case the insured party has not informed the insurer of a material issue (*e.g.* an issue which may increase the premium amount or cause the insurer if known by the insurer beforehand), the insurer shall be entitled to request an increase in the premium amount. If such request is rejected by the insured party, the insurer shall be entitled to terminate the insurance policy without having to pay any compensation.

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Argentina

Overview

Which government bodies/agencies regulate insurance and reinsurance companies?

In Argentina insurance and reinsurance companies are regulated mainly by the National Superintendence of Insurance (Superintendencia de Seguros de la Nación – SSN), which was established in 1938 and reformulated by the *Insurance Undertakings Law 20,091 (IUL) of 1973*, currently in force.

Also the Superintendence of Labor Risk (*Superintendencia de Riesgos del Trabajo – SRT*), established in 1995, oversees labor risks insurers jointly with the SSN.

What are the categories of insurance licenses that exist?

Resolution 38,708 of the SSN has two main categories of insurance licenses: (i) property insurance which includes fire, liability, transport, vehicles, motor vehicles, agriculture and livestock insurance, etc.; and (ii) life insurance, which includes life, personal accidents, retirement, funeral and group life insurance, etc.

There are other types of insurance products in other regulations, such as: (i) mandatory group life insurance for employees (*decree 1567/74*); (ii) mandatory environmental insurance (*article 22, law 25,675*); (iii) marine insurance, including hull and machinery, cargo, freight and liability insurance (*Navigation Act 20,094*); and (iv) labor risk insurance (*law 24,557*).

Other products may be approved by specific resolutions of the SSN, such as technical insurance, automated teller machine (ATM) insurance, bankers blanket bonds, commercial property insurance, theft insurance, homeowners insurance and surety bonds.

Are insurance companies subject to taxes beyond the ordinary burden faced by all companies?

In addition to taxes born by other companies, insurance entities are subject to the following taxes: (i) SSN fee (tasa uniforme) of 0.6 percent on premiums paid by insureds, (ii) excise tax (impuestos internos) – general rate is 8.5 percent of the premium, labor risks contracts are subject to a 2.5 percent rate and life and personal accident insurance contracts, and the ones related with agricultural activities are exempted; and (iii) the firemen tax of 0.32 percent of non-life insurance premiums.

What are the approved distribution channels? Are there restrictions?

Insurers can sell their products through their own employees, through insurance agents (agentes institorios) or through insurance brokers (productores de seguros).

Insurance brokers

Insurance brokers are independent from the insurance companies and the insureds they assist. Insurance broking activities are regulated by the *Insurance Brokers Law 22,400* and implementing regulations issued by the SSN. In order to engage in insurance broking activities individuals or companies need to obtain the corresponding license from the SSN. Insurance broker companies must be incorporated in Argentina as commercial companies – usually a limited liability company (Sociedad de Responsabilidad Limitada – SRL) or a corporation (Sociedad Anónima – SA) – with exclusive corporate purpose.

Insurance agents

Insurance agents act on behalf of insurance companies. Until recently, they were subject to little regulation. However, through *resolution 38,052 of December 20, 2013*, the SSN established a new regulatory framework for insurance agents. Under the new regime, insurance agents need to register with the SSN and submit a certified copy of the power of attorney granted by the relevant insurer which must meet certain requirements. Only legal entities with no less than two years of experience in their field are permitted to register as insurance agents. Also the new regime imposed certain duties on the records to be kept by agents, as well as certain marketing restrictions and procedures.

Are there any forms of compulsory insurance?

In Argentina there are different forms of compulsory insurance, such as:

- Compulsory fire and liability insurance for apartment buildings (*Horizontal Property Act 13,512, article 11 and article 2067.h, Civil and Commercial code*).

- Motor vehicle liability insurance (*Traffic Act 24,449*).
- Compulsory life insurance for employees (*decree 1,567/1974*).
- Compulsory insurance for rural employees (*law 16,600, which replaces decree 1,567*).
- Compulsory labor risks insurance (*law 24,557*).
- Compulsory environmental insurance for collective environmental damage (*Environmental General Act 25,675*).
- Compulsory liability insurance for damages caused by assets transferred in trust to a trustee (*article 1685, Civil and Commercial code*).
- Compulsory liability insurance for damages caused to pupils, to be taken out by schools (*article 1767, Civil and Commercial code*).

Also in the city of Buenos Aires there are other forms of compulsory insurance:

- Compulsory liability insurance for lifts or elevators (*decree 578/2001*)
- Compulsory liability insurance for the use of boilers (*Municipal Liability No. 27,708 of 06/06/1973, No. 33,677 of 08/04/1977 and No. 39,025 of 13/06/1983, Building Code, Decree 977/1974 and Decree 88/1979*)

What major insurance/reinsurance legislation is on the horizon?

The year 2015 has been of particular importance from a legislative perspective.

Resolution 38,708, which approved a new *Reglamento General de la Actividad Aseguradora* (i.e., the regulatory framework of the insurance and reinsurance industry) came into force on 1 December 2014.

The Argentine Congress also passed a *Unified Civil and Commercial Code*, which came into force on August 1 2015 and has had an impact on the insurance and reinsurance business, as well as in any other commercial area. The new code introduces changes in the statute of limitations, conclusion of contracts provisions (e.g., regulation of distance contracts, contracts concluded electronically), and generally provides more protection to insurance customers. It has also introduced some new compulsory insurance protections.

A new government took office in December, 2015. It remains to be seen if it will amend the *Insurance Contract Law*, the *Insurance Undertakings Law* and the *Insurance Brokers Law* as the previous administration had anticipated.

Market Entry

What are the requirements/procedures for setting up a new insurance or reinsurance company?

In order to obtain insurance or reinsurance license in Argentina, a company must: (i) be registered with the relevant Public Registry of Commerce (typically as a sociedad anónima or corporation or as a local branch of a foreign company); (ii) have exclusive corporate purpose; and (iii) maintain minimum capital requirements as set forth by the SSN.

It is also a condition to granting an insurance or reinsurance licenses, that the new entity is associated to the development of a production project which allocates resources to a clear and specific capital investment plan that follows the country's economic evolution and promotes employment and reinvestment of revenues within the national territory. The SSN will thus assess the proposed project and market conditions. The SSN will also evaluate the integrity, experience and solvency of the applicant's shareholders and the suitability, conduct and experience of the applicant's directors, officers and members of the supervisory committee.

In addition, insurers must submit their insurance plans for the approval of the SSN. Insurance plans include, among others, proposal forms, questionnaires, policy wording, bases for premiums and reserves.

Is it mandatory that a company be physically present in the market (HQ or branch office) to write insurance/reinsurance policies?

Yes.

Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Persons residing in Argentina or goods or any other insurable interest of Argentine Jurisdiction (as per *law 12,988*) may only be insured with Argentine insurers. A foreign insurer can write business directly only if it

sets up a local branch and obtains the relevant license from the SSN.

Argentine insurers can only reinsure their risks with local reinsurers, and in some exceptional cases, with foreign reinsurers registered with the SSN (known as "admitted reinsurers"). Admitted reinsurers can only enter into reinsurance contracts with Argentine cedants when there is no local capacity due to the importance and type of risk to be ceded and subject to the prior approval of the SSN, which is granted on a case-by-case basis.

This prior approval is not necessary for risks exceeding USD 50 million, but only in respect of amount exceeding such figure.

Is the incorporation of local companies with foreign shareholders permitted?

Yes.

Regulatory

What are the main sources for insurance and reinsurance regulatory law?

Currently, the main sources for insurance and reinsurance regulatory law in Argentina are:

- *Insurance Law 17,418*, which regulates the insurance contract
- *Insurance Undertakings Law 20,091 (IUL)*
- *General Regulation of the Insurance Activity* (Reglamento General de la Actividad Aseguradora – RGAA), *resolution 38,708 of the SSN*, as amended and supplemented
- Reinsurance Regulatory Framework, *Annex to Article 2 of resolution 38,708 of the SSN*, as amended and supplemented
- *Insurance Brokers Law 22,400*
- *Insurance Agents Regulatory Framework, resolution 38,052 of the SSN*
- *Navigation Act 20,094,* dealing with marine insurance
- *Labor Risks Law 24,557,* as amended by *Law 26,773 of October 2012*
- *Labor Risks Law 24,557,* as amended by *Law 26,773 of October 2012*

Please describe the current regulatory environment, including pending or anticipated regulatory reform.

In recent years the Argentine insurance and reinsurance business has experienced increased regulatory activity from the government bodies or agencies, particularly from the SSN.

In 2012, after consultations with different sectors of the insurance market, the federal administration produced a strategic plan for the insurance market named The National Strategic Insurance Plan or "PlaNes." The main purpose of this strategic plan is to increase the percentage that the insurance industry represents in the Argentine gross domestic product. After the announcement, made in October 2012 by the President, new regulations have been implemented to enhance consumer protection, provide for new mandatory insurance products and to promote public awareness of insurance and its benefits.

Significant changes have operated in connection with the regulations dealing with the licensing requirements for new insurance and reinsurance companies. Most notably, the insurance regulator is now afforded significant discretion in assessing the proposed impact of new insurance applicants in the real economy. The regulations on transfer of shares and capital contributions in insurance companies have also been revised.

A new reinsurance framework has been put in place to strongly promote local reinsurance. And most recently, a more demanding regime has replaced the previous loosely regulated activity of insurance agents.

With a larger staff and the opening of offices throughout the country, the insurance regulator has increased its supervisory capabilities both in terms of number and scope of its investigations.

Insurance companies are also required to adopt certain corporate governance structures and policies to minimize insolvency risks and abide by anti-money laundering regulations. Also they must comply with strict reporting requirements and implement specific customer service guidelines to protect and assists insureds.

Argentina

Claims

What are the main sources for contract law?

The main sources for contract law in Argentina are the *Civil* and *Commercial Code*, and, specifically in respect of the insurance contract, the *Insurance Law*. Certain risks have their own specific statutes, such as the *Labor Risks Law* and the *Navigation Act*, governing marine insurance.

In general, is the substantive law relating to insurance more favorable to insurers or insureds?

The substantive law relating to insurance in general is more favorable to insureds.

Insurers are required by law to provide insureds with a clear and legible policy (*Article 11* of the *Insurance Law*). Argentine courts have thus construed ambiguities in the policy wording against the insurer. In the context of marine insurance, the *Navigation Act* expressly provides that any ambiguities in the policy wording will be construed against the party who inserted such wording – usually the insurer – (*Article 414* of the *Navigation Act*). In certain types of insurance contracts the insured has been deemed a consumer and afforded special protection in the construction of the contract (*Article 37* of the *Consumer Protection Act 24,240* and consumer contract provisions in the *Civil and Commercial code*).

Certain provisions of the *Insurance Law* cannot be modified by the parties or may only be modified to benefit the insured (*Article 158* of the *Insurance Law*). For instance, in respect of notices and declarations to be given between the parties, which may be imposed either by law or by the contract, the *Insurance Law* provides that the insurer cannot invoke the failure or delay of the insured in giving such notices or declarations if the insurer was aware of the relevant circumstances to which they refer at the time when the notice or declaration were required to be given (*Article 15* of the *Insurance Law*).

What is the statute of limitations on claims?

In principle, the limitation period for claims based on the insurance contract is one year from the date the relevant obligation becomes enforceable (Article 58 of the *Insurance Law*).

In life insurance, the one-year limitation period starts to run when the beneficiary becomes aware of the insurance benefit, but in no case shall this term exceed three years from the decease (*Article 58* of the *Insurance Law*).

The limitation period for labor insurance claims is of two years from the date when the benefit should have been paid or provided, up to a maximum of two years from termination of the employment.

Finally, there is no specific provision regarding reinsurance contracts. Based on conflicting constructions of the law, courts have applied one, five or 10 years (predominantly one year).

Can a third party bring direct action against an insurer?

To enforce a non-life insurance contract made for the benefit of a third party, the third party will be required to produce the insurance policy.

The third party beneficiary under a life insurance can bring a direct action against an insurer (*Article 143* of the *Insurance Law*).

In civil liability insurance, the third party victim cannot bring a direct action against the insurer. Instead, the third party needs to file proceedings against the insured and bring the insurer to such proceedings (citación en garantía) (*Article 118* of the *Insurance Law*). The action must be filed either in the place where the loss occurred or in the jurisdiction where the insurer is domiciled. The joinder of the insurer can be requested by the third party or the insured.

Can an insured bring a direct action against a reinsurer?

In principle, the insured cannot bring a direct action against a reinsurer (*Article 160* of the *Insurance Law*). In case of voluntary or forced liquidation of the cedant company, all of the insureds will have a special insureds in the context of the liquidation or insolvency of the cedant company).

Argentina

Dispute Resolution

Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

In Argentina there are no special courts for insurance disputes. Depending on the subject matter of the dispute, they will be heard by commercial, civil or labor courts.

Other venues may also be available, such as:

- The Department of Guidance and Assistance to the Insured, within the SSN
- The Insured Customer Service (Servicio de Atención al Asegurado) within each insurer (*SSN, resolution 35,840*)
- Consumer protection agencies, where consumers can file their claims and obtain redress for direct damage (daño directo)
- The Previous Mediation in Consumer Relations System (COPREC), where consumers can file their claims and settle disputes for up to a certain amount
- Insured Ombudsman (Defensor del Asegurado), who operates within the Argentine Association of Insurance Companies (Asociación Argentina de Compañías de Seguro) and may hear claims between ARS 2,000 and ARS 60,000

Although jury trials are contemplated in the Argentine Constitution since 1853 (*Article 118*), they have not been actually implemented although some provinces have commenced to consider their feasibility – particularly for criminal matters (e.g., partially in Cordoba, since 2005; the province of Buenos Aires approved in 2013 a draft on jury trials; and Neuquén is actually working on a draft to implement jury trials).

What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of a) parties to the action and b) non-parties to the action?

Procedural rules vary depending on the court hearing a case (i.e., provincial courts, national courts sitting in Buenos Aires or federal courts). In any case, discovery of documents is alien to the Argentine legal practice. Parties are under no obligation to produce documents other than those upon which they wish to rely. However, a party may request that its opponent (or a third party) produce one or more specifically identified documents which are relevant to the resolution of the dispute. Judges may draw a negative inference, if the request is not fulfilled by a litigant.

Additionally, experts may demand access to the parties' files and documents, through the court. If such access is not granted, the court may draw a negative inference.

In case of an insurance loss, pursuant to *Article 46* of the *Insurance Law* the insured has to give to the insurer all the information and answer all the questions that are necessary to verify the loss. Also, the insurer can request all reasonable documentary evidence.

Are mediation and arbitration common methods for solving insurance disputes? Are more disputes resolved in or out of court?

Mediation has proved a useful method for solving certain insurance disputes. In the city of Buenos Aires (since 1996) and in certain other jurisdictions, pretrial mediation is compulsory.

Insurance and reinsurance contracts must be subject to Argentine jurisdiction (*Article 16* of the *Insurance Law and Annex to article 2 of SSN resolution 38,708*). Arbitration clauses cannot be included in insurance policies (*Article 57* of the *Insurance Law*), but the parties could agree to arbitration after a conflict has arisen. Arbitration clauses are valid in reinsurance contracts provided the seat of the arbitration is Argentina and governed by Argentina law. Arbitration is generally not a common method for solving insurance disputes. That is not the case regarding reinsurance disputes, which have typically been solved in arbitration.

Argentina

There are no reliable statistics to answer whether more disputes are solved in or out of court. The main factors to bear in mind are:

a. The merits and complexity of the case

b. The anticipated court costs, given that Argentina is a losing-party-pays jurisdiction and legal costs may roughly be estimated between 40 to 50 percent of the amount of the claim

c. The amount of reserves that an insurer must maintain in connection with each claim, which can be significant under current regulations

d. The time that it will take to reach a final decision in court

What are the provisions regarding timely notice, and what are the legal consequences for non-compliance with the timely notice obligation?

According to *Article 46* of the *Insurance Law*, the insured must give notice of the loss within three days after the loss has come to the insured's knowledge. This three-day term can be extended but not shortened by the parties (e.g., E&O policies typically extend the time to give notice of a loss to 15 days).

If the insured failed to give timely notice of the loss, the insurer will be entitled to reject coverage.

What are the laws regarding bad faith claims? What damages may be awarded if the insurer is found to have acted in bad faith?

Under certain circumstances, a bad faith claim by an insured could result in criminal prosecution (*Article 174* of the *Criminal Code*).

There are no specific sanctions provided for in the *Insurance Law* in respect of an insurer found to have acted in bad faith. However, based on common civil law provisions, the insurer would be required to pay damages (*Article 724* of the *Civil and Commercial code*), which would include in addition to the insured amount, any direct or indirect damages that the insured or third party may have suffered as a result of the insurer's bad faith (*Article 1726* of the *Civil and Commercial code*).

Punitive damages could also be awarded if the insured or third party were found to be a consumer.

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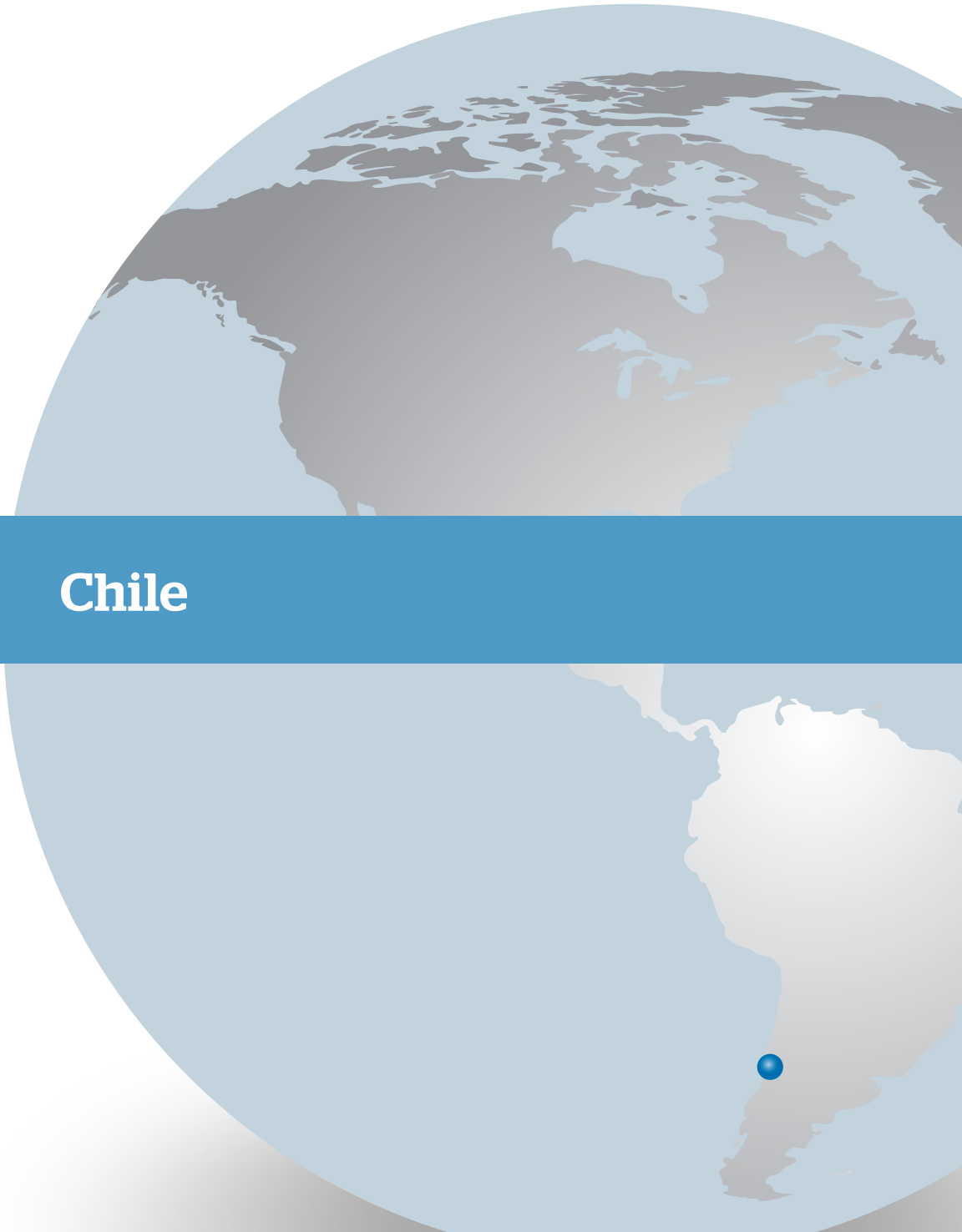

Chile

Overview

Which government bodies/agencies regulate insurance and reinsurance companies?

Insurance and reinsurance companies in Chile are regulated by the Superintendency of Securities and Insurance (the Superintendencia de Valores y Seguros, the "SVS"), which was established in 1931 as the "Superintendencia de Sociedades Anónimas, Compañías de Seguros y Bolsas de Comercio" and in 1980, the SVS is created as a legal successor of the agency created in 1931.

What are the categories of insurance licenses that exist?

There are two types of insurance groups in Chile. The first group comprises companies insuring risk of loss or detriment of things or assets in general and the second group, covers risks of people or guarantees the same, within or at the end of certain term, a capital, a paid-up policy or a rent for the insured or its beneficiaries (*Article 8* of DFL No. 251 the "*Insurance Companies Act*").

Besides the above, *Article 544* of the *Chilean Commercial Code* ("*Commercial Code*") classifies insurance as damage insurance (seguros de daños[1]) and individuals insurance (seguro de personas[2]).

Are insurance companies subject to taxes beyond the ordinary burden faced by all companies?

Beyond the ordinary burden faced by all companies, note that premiums paid for insurance contracts entered into with foreign insurance companies covering any risk related to:

i. property located permanently in Chile; or

ii. in land material loss over merchandise subject to temporary admission regime or in transit through Chilean territory; or

iii. life insurance premiums or others from the second group of insurance coverage, in respect to people domiciled or resident in Chile,

will be subject to a 22 percent withholding tax applicable on the amount of the premium or each installment to which the premium has been divided, with no deduction.

Regarding reinsurance agreements hired with the referred foreign insurance companies, a 2 percent withholding tax shall apply to the total amount of the premium assigned, with no deduction.

What are the approved distribution channels? Are there restrictions?

A. Insurance in Chile may be hired either (*Article 57* of the *Insurance Companies Act*):

   i. directly with the insurance company;

   ii. through their sales agents; or

   iii. through insurance brokers.

   In connection with the foregoing:

   i. The *Insurance Companies Act* refers to the "*business of insuring risks on the base of premiums*", and restricts this activity in Chile to special purpose local corporations or branches of foreign corporations, in each case, authorized to engage in this business by the SVS.

   ii. Sales agents commercialize and sell insurance on behalf of an insurance company and they must be registered in a special registry held by the SVS or the insurance company, as applicable.

   iii. Insurance brokers shall advise any individual that intends to hire insurance and the insurance company, as required by law. In order to act as an insurance broker, they shall be registered in a special registry held by the SVS and comply with certain requirements contained in the *Insurance Companies Act*.

B. Any foreign insurer may offer and commercialize or market in Chile (acting directly, as opposed to acting through an intermediary) insurance related to international maritime transport, international

[1] The purpose of this kind of insurance is to indemnify damages suffered by the insured and may be referred to tangible assets, rights or properties.

[2] The purpose of this kind of insurance is to cover the risks that might affect the existence, physical or intellectual integrity, people's health and those who guarantee the same, within or at the end of a term, a capital, a temporary or life pension annuity.

commercial aviation, goods in international transit, satellite and the load they do transport. Also, foreign insurers may offer in Chile all kind of insurance, to the extent they have obtained a license in Chile by registering a branch. In these cases, no treaty or free trade agreement is required.

Notwithstanding the above, when foreign insurers act through an intermediary, a free trade agreement is required and such intermediary needs a license to perform its activities in Chile. The free trade agreements with Europe and the United States include provisions incorporated in the *Insurance Companies Act* and ancillary regulations:

i. Authorizing foreign insurers to offer in Chile international marine, aviation, transport and satellite insurance. For this purpose, the foreign insurer shall (a) submit to the SVS a certification from its country as to its incorporation, compliance with applicable rules and authorization to conduct the insurance business, and (b) appoint a representative in Chile; and

ii. Allowing foreign insurers to obtain a license in Chile to offer either life, general or credit default insurance by registering a branch. For this purpose, the Foreign Insurer shall (a) request prior authorization to the SVS, (b) submit evidence that it complies with the insurance rules of its country of origin, (c) capitalize the branch as if incorporating a local insurance company, and (d) appoint an agent in Chile.

For clarity purposes, below you will find a table that summarizes how the insurance market works in our country:

Insurance market in Chile	Coverage	Registration in Chile	Country with treaty with Chile	Activities that may be performed in Chile
a. Companies registered in Chile	All kinds.	Required	N/A	They may commercialize, do marketing activities, etc.
b. Foreign Insurers acting in Chile directly (as opposed to through an intermediary)	International maritime transport, international commercial aviation, goods in international transit, satellite and the load they do transport.	Not required	Not required	They can do almost the same as Chilean companies ((a) above), including positive marketing activities (e.g. sales agents could come to Chile, make presentations, commercialize and offer insurance, etc).
c. Foreign Insurers acting in Chile through intermediaries	International maritime transport, international commercial aviation, goods in international transit, satellite and the load they do transport.	Required	Required	Same as b) above.
d. Foreign Insurers abroad	All kinds (except for compulsory lines of businesses local insurers).	Not required	Not required	None (all activities should be performed abroad).

Are there any forms of compulsory insurance?

The compulsory insurance lines of business in Chile (mandatory legal insurance) are (i) motor vehicles third party liability (seguro obligatorio de accidentes personales), (ii) unemployment insurance (seguro de desempleo), (iii) on-the-job injury and occupational diseases (accidentes del trabajo y enfermedades profesionales), which also extends to accidents suffered by pupils at schools, and (iv) a survival and disability insurance (seguro de invalidez y sobrevivencia) regulated by Decree Law 3,500 of 1980 (the "*Pension Funds Act*"). Number (iii) and (iv) pertain to a person's life or health and are of the obligation of the employer.

Note also that the *Navigation Act* regulates the guaranties that shall be posted by the owner or operator of a ship to limit their joint and several liability for oil pollution related damages. This guaranty shall be materialized in the form of a financial guarantee or an insurance policy. Similarly, the *Commercial Aviation Act* imposes the airlines an obligation to carry liability insurance. This obligation applies to all airplanes not used for private purposes, whether registered in Chile or abroad. Note that the private aviation is not required by law to carry insurance (e.g. aviation hull, aviation liability). Finally, certain regulated activities, specifically the stockbrokers, the broker dealers, the insurance brokers and the claims adjusters shall post a guaranty to obtain their respective licenses. This guaranty may be materialized in the form of an insurance policy.

These mandatory legal insurances (but excluding the insurance required by the *Navigation Act* and the *Commercial Aviation Act*) and also the life pension annuities (rentas vitalicias previsionales) regulated by the *Pension Funds Act* may not be provided by a foreign insurer. Conversely, pursuant to the *Insurance Companies Act*, any individual or entity resident in Chile may freely contract abroad any other kind of insurance (including, for the avoidance of doubt, insurance required by the *Navigation Act* and the *Commercial Aviation Act*).

Finally, note that all workers/employees shall make contributions to a health care system (7 percent of their monthly salary) whether state or privately operated. Although similar, that this is not a form of insurance governed by the insurance laws.

What major insurance/reinsurance legislation is on the horizon?

In 2013 there was a major amendment to the main insurance regulations in effect in Chile as from 1865, due to the enactment of *Law 20,667* which regulates the insurance agreement (the "*Insurance Agreement Law*"). The *Insurance Agreement Law* updated the insurance legislation to the current insurance market practices and requirements.

Since the enactment of the *Insurance Agreement Law*, the SVS has been, and is expected to continue, enacting regulations to update current special regulations and rules to this new legislation.

There is one bill of law that might have significant impact on the industry that is currently being discussed in the Chilean Congress and which deals with changing the equity requirements in order to evolve to a system of capital based on risk (Supervisión Basada en Riesgo – SBR), by amending current regulations referred to capital and solvency to adequate them to risk sensitivity (distinguishing different risk profiles and minimal capital requirements).

Market Entry

What are the requirements/procedures for setting up a new insurance or reinsurance company?

A. **Insurance company:** Regulated by the *Insurance Companies Act*, the Corporations Act (Ley de Sociedades Anónimas) and the General Rule (Norma de Carácter General) No. 251 ("NCG 251").

   General requirements:

   i. to be a Chilean corporation;

   ii. incorporated by public deed;

   iii. obtain an authorization of existence issued by the SVS[3]; and

   iv. once the SVS authorization has been granted, the SVS will issue a certificate,

[3] For this purposes, the NCG 251 indicates what information should be filed with the SVS, besides the information required for the insurance company itself (e.g. complete information on its shareholders, controllers, individuals holding certain officers' positions, etc.)

which should be registered in the Commerce Registry and published in the *Official Gazette*.

The minimum equity of an insurance company is UF 90.000[4] at the time of its incorporation and must be completely subscribed and paid before the authorization of existence is issued.

An insurance company cannot be incorporated to cover both groups of insurance (please refer to answer on types of insurance above).

B. **Local reinsurance company:** Regulated by the *Insurance Companies Act*, the *Corporations Act (Ley de Sociedades Anónimas)*, *NCG 251* and the *General Rule (Norma de Carácter General) No. 139 ("NCG 139")*.

General requirements:

i. to be a Chilean corporation;

ii. incorporated by public deed;

iii. obtain an authorization for existence issued by the SVS[5]; and

iv. once the SVS authorization has been granted, the SVS will issue a certificate, which should be registered in the Commerce Registry and published in the *Official Gazette*.

The minimum equity of an insurance company is UF 120,000[6] for each insurance group they reinsure.

A reinsurance company may cover both groups of insurance, to the extent equity requirements are fulfilled independently for each group.

C. **Foreign reinsurance company:** Regulated by the *Insurance Companies Act* and *NCG 139*.

Foreign reinsurers are authorized to act in our jurisdiction:

i. By incorporating a reinsurance company in Chile (letter (B) above);

ii. Acting directly from abroad; and

iii. Acting through a foreign reinsurance broker duly registered with the SVS.

In case of (i) above, the existence of the reinsurance company to be incorporated in Chile should be authorized by the SVS.

NCG 139 provides that in case foreign reinsurers decide to act directly from abroad (number (ii) above), an international rating equal or higher than BBB or its equivalent by two different rating agencies will be required. The ratings and rating agencies acceptable for these purposes are only the following:

Rating Agency	Minimum Acceptable Rating
S&P	BBB
FITCH	BBB
MOODY'S	Baa3
A.M. BEST	B+

NCG 139 also provides that foreign reinsurers who act directly from abroad must appoint and maintain a representative in Chile, which should have residence in Chile and which should be allowed to represent the reinsurer with broad powers, including for purposes of service of process. On the other hand, if the foreign reinsurer acts through a foreign reinsurance broker duly registered, it shall be represented in Chile by such broker. Therefore, any dealing with inquiries from potential policyholders in Chile should be done through its registered representative and/or the fronting company.

Is it mandatory that a company be physically present in the market (HQ or branch office) to write insurance/ reinsurance policies?

No, based on how Chilean insurance market operates (i.e. any individual may contract insurance abroad and reinsurance may be provided from a foreign reinsurer).

[4] Chilean indexation unit. 90,000 UF are USD 3.2 million approximately.

[5] For this purposes, the NCG 251 indicates what information should be filed with the SVS, besides the information required for the reinsurance company itself (e.g. complete information on its shareholders, controllers, individuals holding certain officers' positions, etc.)

[6] USD 4.3 million, approximately.

Chile

Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

No.

For the avoidance of doubt, what the *Insurance Companies Act* prohibits is that a foreign insurer engages in the offering of insurance policies in Chile or contracting the same in the country (save for the exception on insurances related to international maritime transport, international commercial aviation, goods in international transit, satellite and the load they do transport mentioned above). Besides the foregoing, the *Insurance Companies Act* expressly authorizes an individual or entity resident in Chile to contract insurance abroad with a foreign insurer. In other words, any local entity may contract any kind of insurance with foreign insurers abroad (save for compulsory lines of businesses for local insurers).

Is the incorporation of local companies with foreign shareholders permitted?

Yes.

Regulatory

What are the main sources for insurance and reinsurance regulatory law?

A. *Commercial Code* (which contains the *Insurance Agreement Law* provisions)

B. *Insurance Companies Act*, as amended (*DFL 251 of 1931*)

C. *Legislation on insurance mutualidades* (*Insurance Companies Act*, *Law 18,660 of 1987* and *Decree Law No. 1,092 of 1975*)

D. *Motor vehicles third party liability Law* (*Ley de seguro obligatorio de accidentes personales causados por vehículos motorizados. Law No. 18,490 of 1986*)

E. *Supreme Decree 1,055 of 2013* (*Insurance Commerce Auxiliaries' Regulations – Reglamento de Auxiliares del Comercio de Seguros*)

F. Specific regulations enacted by the SVS (e.g. *NCG 251 and NCG 139*)

Please describe the current regulatory environment, including pending or anticipated regulatory reform.

As explained above, the *Insurance Agreement Law* was enacted in 2013, being a major amendment to the insurance legislation in Chile made to update it to the current insurance market practices and requirements. As a result, the SVS has been, and is expected to continue, enacting regulations to update current special regulations and rules to this new legislation.

Regarding consumer protection, *Insurance Agreement Law* contains a group of provisions that can be considered directly consumer-oriented. Therefore, we cannot anticipate that other rules in that regard will be enacted in the near future.

A rule issued by the SVS regarding premium received but not earned have created some controversy. The rule refers to the company's obligation to return unearned premium in case of early termination of the insurance agreement. Such rule prevents the company from making any deduction when returning the relevant proportion of the unearned premium.

In respect to pending or anticipated regulatory reforms, other that the law project currently under discussion which refers to changing capital requirements in order to evolve to a system of capital based on risk (Supervisión Basada en Riesgo – SBR), by amending current regulations referred to capital and solvency to adequate them to risk sensitivity (distinguishing different risk profiles and minimal capital requirements), we are not aware of any other anticipated major regulatory reform related to the matters you refer above (provided our comment on the regulations enacted by the SVS on a continuous basis to update the insurance market to current practices).

We do not see any other regulatory worth commenting on other issues.

Claims

What are the main sources for contract law?

The main sources are our *Civil* and *Commercial Code*s and specific laws or regulations depending on the subject matter. Regarding insurance, the *Insurance Agreement Law* and the *Insurance Companies Act*

together with special regulations enacted on a continuous basis by the SVS.

In general, is the substantive law relating to insurance more favorable to insurers or insureds?

Due to the recent amendments referred above, especially the *Insurance Agreement Law*, our legislation is more favorable to insureds, as in several provisions, the law treats the insured in a similar fashion as a consumer in the *Consumer Protection Act*, i.e., as the "weak" party of the relationship that may be subject to abuses by the insurance company. As explained, the *Insurance Agreement Law* amended the *Commercial Code*, which together with the *Insurance Companies Act* are (as of this date) the main sources of regulations to the insurance activity in Chile.

What is the statute of limitations on claims?

The statute of limitations of claims related to insurance contracts, is four years as from the date the relevant obligation is enforceable, according to the provisions of *Article 541* of the *Commercial Code*.

The statute of limitations running against the insured will be interrupted by the report of the incident by the latter, and the new deadline shall run as from the date the insurer communicates his decision in that sense.

In life insurance, the statute of limitation for the beneficiary shall be four years as from the date he becomes aware of the existence of his right, but in no event, it shall exceed ten years as from the incident.

The statute of limitation cannot be shortened under any form of revocation or estoppel, and in respect to civil liability insurance, the period shall not be less than the statute of limitation the affected third party has against the insured.

Can a third party bring direct action against an insurer?

Yes. *Article 2314* of the *Civil Code*.

Can an insured bring a direct action against a reinsurer?

Strictly speaking no, since Article 586 of the *Commercial Code* specifically provides that reinsurance does not provide direct action from the insured against the reinsurer.

Notwithstanding that, the same *Article 586* provides that such direct action may proceed if:

i. the reinsurance contract provides that payments due to the insured shall be made directly from the reinsurer to the insured; or

ii. that once the incident occurs, the insurer assigns its rights under the reinsurance agreement to the insured to collect from the reinsurer. These agreements, though, do not relieve the insurer from its obligation to pay the incident to the insured.

Dispute Resolution

Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

Any difficulty that may arise between the insured, the contracting party or beneficiary, as applicable, and the insurer, whether in relation to the legal effect or ineffectiveness of the insurance contract, or in connection to the interpretation or application of its general or particular conditions, its fulfillment or infringement, or in connection with the validity or the amount of a compensation claimed under it, shall be solved, according to *Article 543* of the *Commercial Code*, by an arbitrator ex aequo et bono, appointed by agreement of the parties after the dispute arises.

If the interested parties do not agree on the person of the arbitrator, he shall be appointed by the ordinary courts and, if so, the arbitrator shall be arbitrator-at-law with regard to the substance of the dispute and ex aequo et bono with regard to the procedures.

In no case the arbitrator may be appointed in advance by means of the insurance contract.

Notwithstanding the above, in disputes between the insured and the insurer that may arise due to a loss in amounts less than UF 10,000 the insured may choose to exercise its action before the regular courts.

"In cases where the disputed amount is reduced (i.e. when the indemnification amount does not exceed UF120 (approximately USD4,300) or UF500, (approximately USD18,000).) This limit applies in

connection to compulsory insurance as applicable), the SVS may also act as arbitrator."

Note that Chilean courts do not have a jury system.

What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of a) parties to the action and b) non-parties to the action?

Unlike other jurisdictions, in Chile there are no special regulations in respect to protective orders and/or protection of confidential information or in respect to restrictions on access to judicial records. Even though you may make your best efforts, there are few chances that a court would issue an order to protect briefs or evidence containing confidential information and most likely they would not refrain from requesting disclosure of confidential information if pertaining the relevant litigation in course, even with a non disclosure agreement ("NDA") in place. Therefore, a court might issue an order for disclosure of documents against a) a party to the action or b) not a party to the action, provided the Court considers that documentation to pertain the relevant action. The party against whom the order is issued, would be compelled to its disclosure.

Are mediation and arbitration common methods for solving insurance disputes? Are more disputes resolved in or out of court?

Before the *Insurance Agreement Law* was enacted, almost all insurance disputes were resolved by means of arbitration. According to the *Insurance Agreement Law*, if the incident amount is less than UF 10,000[7], the insured may choose to exercise its action before the regular courts.

For the above, we should expect more disputes to be solved by courts, which will certainly constitute a challenge for the same, since arbitrators have more experience on the matter and Chilean courts are in the process of adjusting to this new system.

In terms of preference, since courts do not have much experience on the matter (which should not be an issue in simple cases), whenever there is a dispute in a case that may be complicated or too technical, arbitration would be preferable.

[7] Approximately USD 360,000.

In addition, please note that there is not too much case law related to insurance matters, since judgments used to be private (i.e. they were not published), which changed with the *Insurance Agreement Law*, since now insurance companies are compelled to remit to the SVS a copy of any judgment or award related to matters referred in the *Insurance Agreement Law*, making them available for the public.

What are the provisions regarding timely notice, and what are the legal consequences for non-compliance with the timely notice obligation?

i. It is an obligation of the insurer to deliver the policy or a coverage certificate, as applicable, to the contracting party or the insurance broker, as applicable, within five business days as from the date insurance contract is perfected and the broker shall deliver it to the insured within five business days as from the date he received it from the insurer. Failure of this obligation, entitles the insured to claim damages to the insurer or the broker, as applicable (*Article 519 Commercial Code*).

ii. It is an obligation of the insured to notify the insurer as soon as possible upon becoming aware of the occurrence of any fact that may constitute or that constitutes an incident (*Article 524 No.7* of the *Commercial Code*). Should the insurer fail to give notice of the incident as agreed in the insurance contract or as required by law, the insurer might be relieved of its indemnity or might terminate the insurance contract, as applicable.

iii. The insured or contracting party, as applicable, shall inform the insurer the facts and circumstances that may increase the risk originally stated for purposes of agreeing the insurance contract. He shall give notice to the insurer within five days upon becoming aware of them, unless if, due to its nature, they should have been known by the insurer (*Article 526* of the *Commercial Code*).

    If this is the case, and:

    a. the incident has not occurred: (x) the insurer has 30 days upon become aware of the increase of the risk, to inform the insured whether it has decided to rescind

the contract or propose an amendment to adjust the premium or coverage conditions of the policy; and (y) If the insured rejects the proposition or does not answer within 10 days as from the date the proposal was sent, the insurer might terminate the contract (upon the termination of the term of 30 days as from the date the relevant notice was sent);

b. the incident has occurred without the insured of contracting party, as applicable, having made the statement of risk increase: (x) the insurer shall be relieved of its obligation to pay indemnity in respect to insurance coverage affected by the risk increase; but (y) in case the increase of the risk would have lead the insurer to agree the contract in conditions more onerous for the insured, the indemnity shall be reduced proportionally to the difference between the agreed premium and the premium that would have been applicable if the extent of the risk would have been known by the insurer. The above sanctions will not apply if the insurer should have known the risks, due to its nature and accepted them, expressly or implicitly.

c. Unless there is increase of the risk with willful misconduct, in the above referred situations where the contract is terminated, the insurer shall return the insured the proportion of the premium for the period that, as a consequence of the termination, the insurer is respectively relieved from the risks.

d. These regulations do not apply to individual insurance (seguros de personas), except in respect to individual's accidents insurance (seguro de accidentes personales).

iv. Civil liability insurance: the insured must give notice to the insurer of the following circumstances, in a reasonable period (*Article 571* of the *Commercial Code*):

a. any news he receives, whether in connection to the intention of the affected third party to claim indemnity or of any threaten to commence legal actions against the insurer;

b. any judicial notices he receives; and

c. the occurrence of any fact or circumstance that may lead to a claim against the insurer.

What are the laws regarding bad faith claims? What damages may be awarded if the insurer is found to have acted in bad faith?

Should the insurer act in bath faith, it might be compelled to indemnify damages and loss of profits and damages would not be limited to expected damages, but it might also be compelled to pay all damages that were an immediate and direct consequence of not fulfilling an obligation (*Article 1558* of the *Civil Code*).

In Chile, all contracts must be executed in good faith under *Article 1546* of our *Civil Code* and therefore, the parties are obligated to fulfill not only the obligations specifically provided therein, but also to do everything that might be understood to be of the nature of an obligation or that may be applicable pursuant to the law or costumes.

In addition, since one of the principles of the insurance activity is the principle of utmost good faith (uberrima bona fides), which basically bounds the parties involved in the insurance contract to act with absolute veracity, for purposes of the insurer, it means that it should provide complete and thorough information on the terms the insurance contract is being executed, indemnify an incident according to the terms agreed, etc. Note that principle has been reaffirmed by the SVS, since it has specifically stated that the insurance contract is an agreement of utmost good faith according to the *Oficio Ordinario No. 22813 dated September 26, 2012.*

Chile

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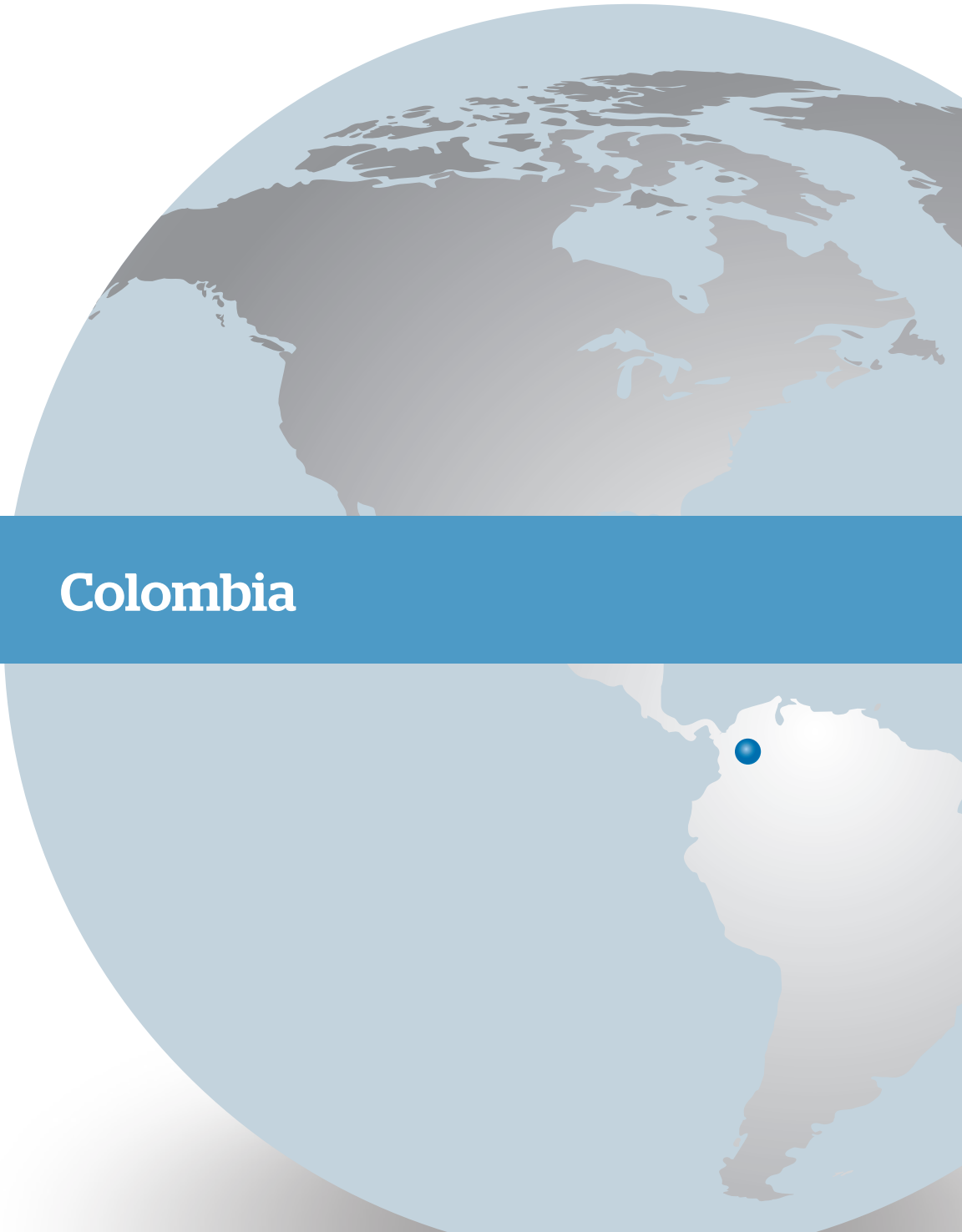

Colombia

Colombia

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Overview

Which government bodies/agencies regulate insurance and reinsurance companies?

The government agency that regulates the insurance and reinsurance companies is the Superintendence of Finance of Colombia ("SFC" for its acronym in Spanish). The SFC was created in 1923 under the name of Banking Superintendence of Colombia (Superintendencia Bancaria de Colombia "SBC") by means of *Law No. 45 of 1923*.

What are the categories of insurance licenses that exist?

There are two categories of insurance licenses in our jurisdiction: an insurer may be licensed as non-life or as life insurance company.

Only life insurance companies may offer individual life insurance lines and professional risks insurances (a line originated from the Social Security System). Non-life insurance companies may offer all other lines of insurances. The SFC may grant said licenses to insurance companies or cooperatives duly incorporated in Colombia, including branches and subsidiaries of foreign insurance companies.

In connection with the incorporation of branches of foreign insurance companies, it is worth saying that such branches have the following characteristics: (a) the branch is subject to supervision of the SFC, (b) the branch must comply with the same incorporation requirements for the establishment of a local insurer and (c) the foreign insurance company is at all times liable for the obligations assumed by the branch in Colombia.

A Locally incorporated insurer, whether it is a life or non-life insurance company, is also granted with the reinsurance license if it meets with the capital requirements for reinsurance operations.

Although not considered to be licenses in the strict sense, the SFC may grant authorization to foreign insurance companies not established or duly incorporated in the Colombian territory to offer, in the Colombian territory, insurance related products. These registries are: (i) the "Registry Intended for Foreign Insurers That Want to Offer Insurance Associated with International Shipping, International Commercial Aviation and Space Launch and Transportation (including satellites)" ("RAIMAT" for its acronym in Spanish) and (ii) the "Registry of Foreign Insurance Entities and Foreign Insurance Intermediaries of Agricultural Insurance" ("RAISAX" for its acronym in Spanish).

In relation to foreign reinsurance companies, the law establishes the possibility to offer reinsurance products in Colombia by means of registering in the "Registry of Foreign Reinsurers and Reinsurance Brokers" ("REACOEX" for its acronym in Spanish) without being physically present in Colombia. In addition, foreign reinsurance companies are also allowed to offer reinsurance products by means of a representative office located in Colombia. Different to the registration in the REACOEX, this option implies that the reinsurance company would be physically present in the market.

Are insurance companies subject to taxes beyond the ordinary burden faced by all companies?

Insurance companies are not subject to taxes beyond the ordinary burden faced by all companies; however, they are subject to special treatments, as we explain bellow:

Special gross income for income tax purposes

According to *Section 12 of the Colombian Tax Code* ("CTC"), Colombian companies are taxed on their worldwide source income and Capital Gains.

Therefore, all income received for Colombian companies, except for those expressly excluded, will be subject to Income Tax in Colombia, at a general rate of 25 percent.

It is important to bear in mind that income resultant from the provision of insurance services are not exempt or excluded from Income tax and, to that extent, the income received by a Colombian company for such concepts are taxable in Colombia no matter where they are rendered.

Nevertheless, *Section 97 of the CTC* sets that for income tax purposes, insurances companies must calculated their gross income under special rules, as follows:

The total net earnings during the taxable year or period plus the amount of the technical provision or reserve from the taxable year or period. From the resulting sum must be deducted the following amounts:

1. Claims paid or credited
2. Claims notified, to the extent of the non-reinsured amount, duly certified by the Auditor
3. Reinsurance premiums ceded in Colombia or abroad
4. Expenses due to adjusted claims
5. Technical provisions or reserves at the end of the taxable year or period

Withholding tax exemption

Income tax withholdings are established by law as early tax collection mechanisms. It consists in withholding a percentage determined by law from the gross payments or accruals made to the suppliers of goods and services (or employees).

Income withholding taxes apply provided that any given payment or accrual is deemed as taxable income for its beneficiary.

Nevertheless, according to *Section 17 of Decree 2509 of 1985*, insurance premiums are not subject to withholding tax.

In this sense, although the payment received by the insurance company is taxable income, no withholding should be practiced over the health insurance premiums.

Income tax for equity – CREE income tax

By means of Law 1607 of 2012 income tax for equity (hereinafter "CREE") was enacted. This new corporate equity tax is levied in addition to basic income tax. Income derived from the insurance services is subject to CREE, and as from 2016 the rate is 8%.

It is important to take into account that companies subject to CREE are exempt from some payroll fees imposed for employees that earn ten minimum wages or less per month (Colombian minimum wage for 2016 is COP $$689.455. – approx. US$230).

Please note that a self-withholding mechanism regarding the income tax for equity is applicable. However, it is important to consider that the established rate will depend exclusively on the Colombian Company activity code ("CIIU" by its acronym in Spanish).

VAT exemption

Section 420 of the CTC establishes that the Value Added Tax (hereinafter "VAT") is a national tax levied on the provision of services, sale and import of movable tangible goods within the Colombian territory. As a general rule, the VAT is triggered at a 16% rate; however, such rate may vary depending on the specific type of good or service. As well, the law provides for particular goods and services that are VAT exempted or excluded.

The above mentioned Section also determines that as a general rule, the service is understood to be provided in the place where the provider is located.

According to the above, the insurance services provided by Colombian companies shall be subject to VAT even when the service is not provided within Colombian territory.

As from 2013, the applicable tax rate is 5% as provided by article 468-3 of the tax code. The VAT applicable shall be paid by the insured, but the insurance company must calculate, liquidate, collect and bill the tax.

Nevertheless, it is important to point out as per *section 427 of the CTC*, life insurance policies are not subject to VAT. Additionally, insurance brokerage services have been expressly excluded from VAT by *section 476 of the CTC*.

Industry and Commerce special tax base

The industry and commerce tax is a local tax which applies to individuals or companies, from the exercise of industrial, commercial or service activities within the territory of a Municipality. The taxable base is the average monthly gross income after the permitted deductions. The rate is defined by each municipality and currently for the provision of services the rate varies form 0.2 percent to 1 percent.

However, some municipalities have established a special tax base for insurance companies. For example, *Section 46 of Bogota's Tax Code,* Decree 352 of 2002 states that for life insurance companies, general insurance companies and reinsurance companies, the basis for the calculation of the applicable tax is constituted by the operating revenues in two months represented on the amount of premiums retained.

Colombia

What are the approved distribution channels? Are there restrictions?

There are five distributions channels approved in our jurisdiction:

1. Insurance companies may distribute, by their own means, their insurance products. There are no limitations with respect to this distribution channel.
2. Insurance companies may distribute their insurance products with the collaboration of regular insurance intermediaries: (i) insurance brokers, (ii) insurance agencies and (iii) insurance agents. There are no limitations with respect to this distribution channel.
3. Insurance companies may distribute their insurance products by using the network of financial entities. Some of the insurance products that may be distributed through the network of financial entities are the following: (i) vehicle insurance, (ii) personal accidents, (iii) unemployment insurance, (iv) health insurance, (v) life insurance, and (vi) home insurance, among others.

   As a prerequisite to operate via this distribution channel, there must be a commercial agreement executed between the insurance company and the financial entity. The agreements, in addition, must be delivered to the SFC. The insurance company must train those individuals involved in the offering of the insurance products, and both entities must guarantee that the public in general is capable of differentiate between the insurance company and the financial entity.
4. Financial entities, somehow, serve as distribution channels of insurance products by means of collective insurance policies taken out by the entity on account of the debtors. In order to perform said activities, the financial entity must undertake a bidding process.
5. In a same manner, as financial entities, any company from the real sector may serve, somehow, as distribution channels of insurance products by means of collective insurance policies taken out on account of its clients, employees, etc. There are no limitations with respect to this "distribution channel".

Are there any forms of compulsory insurance?

The following is a list of the most important compulsory insurances in our jurisdiction:

1. Personal accident coverage for victims of motor accidents (SOAT, as per its Spanish acronym).
2. Third party and contractual liability insurance for public transportation companies to cover the liability that may arise for the use of inter-city buses, for the use of public transportation buses within the cities, for the use of special purpose public buses (v. gr. Tourism buses), for the use of taxis, for the use of school buses, for the use of public mass vehicles (v. gr. Transmilenio (*http://www.transmilenio.gov.co*) and Megabus (*http://www.megabus.gov.co*).
3. Third party and contractual liability insurance for public transportation companies to cover the liability that may arise for the use cable-supported vehicles (Gondola lifts, funiculars, cable car, etc.)
4. Third party liability insurance taken out by carriers or dispatchers of dangerous goods to cover the damages to individuals, property, environmental pollution and any other damage that the dangerous goods may cause.
5. Third party and contractual liability insurance for public transportation companies to cover the liability that may arise for the use of train for transportation of cargo and passengers.
6. Third party and contractual liability insurance for public transportation companies to cover the liability that may arise from the use of marine vessels for passenger transportation.
7. Pollution insurance to cover the liability for environmental pollution caused by marine vessels.
8. Third party, contractual and pollution liability insurance for public transportation companies that provide river transport for passengers and cargo.
9. Third party liability insurance for air public transportation companies to cover the liability that may arise from passenger transportation.
10. Third party liability insurance for the international ground cargo carrier within the Andean Community.

11. Third party liability insurance for the international ground passenger carrier within the Andean Community.
12. Contractual liability insurance for the multi-mode international transport operator, within the Andean Community, to cover the contractual liability under the transport agreement.
13. Third party liability insurance for companies which transport (by any mode), store and distribute petroleum-derived liquid fuels, to cover the damages to third parties that said transport, storage or distribution may cause.
14. Third party liability insurance for companies that provide security services or have their own security departments.
15. Fire and earthquake insurance to cover the common parts of apartment blocks, the real estate owned by banks, which are used by lessee under financial lease agreements, the real estate mortgaged in favor of financial institutions and the real estate owned by entities supervised by the SFC.
16. Professional indemnity insurance for reinsurance brokers.
17. Fidelity insurance for reinsurance brokers.
18. Accident insurance taken out by the Ministry of the Interior to cover all members of the National System for the Prevention and Assistance of Disasters.
19. Health insurance to cover the councilors of various Colombian cities.
20. Clinical trials liability to cover medical institutions that undertake clinical trials.
21. Third party liability insurance for amusement parks to cover the damages to third parties, including visitors.
22. Workers compensation.
23. Surety bond for the constructor of social purpose homes in order to covert the stability of the works.
24. Third party liability for governmental contractors.
25. Surety bond for governmental contractors.
26. Finally it must be noted that several proceedings before state entities require the purchase of a surety bond to cover the compliance of legal provisions.

What major insurance/reinsurance legislation is on the horizon?

We understand that there are changes being discussed on regulation regarding the following matters within the SFC; however, such information has not been made public at the moment: (i) micro insurance, and (ii) alternative distribution channels (or massive marketing).

Market Entry

What are the requirements/procedures for setting up a new insurance or reinsurance company?

The process for setting up a new insurance or reinsurance company involves two steps: (i) the company must obtain an incorporation authorization from the SFC and, (ii) once the company is incorporated, the company may obtain the authorization to launch the insurance operations (certificate of authorization).

Incorporation authorization

1. Interested parties in incorporating the insurance company (shareholders) must file a request to obtain the license before the SFC. This request must have enclosed all the documents set forth by the SFC.
2. Within the five days following the receipt of all the documentation, the SFC will authorize the publication of a notice in a major newspaper in Colombia. The notice will state the name of the parties interested in incorporating the insurance company, the company's name, its capital and domicile. Such notice must be published twice with intervals no greater than seven days.
3. Within the ten days following the last publication, any party may raise objections, before the SFC, to the incorporation of the insurance company.
4. The SFC must answer the request for authorization to incorporate the company within the four months following the date in which the interested parties submitted the required documentation. If the SFC requests additional information, such term will be paused until the information is submitted.

5. The SFC will not grant the permit until the legal requirements have been completed or in the event the future shareholders of the insurance company have not submitted satisfactory evidenced as to their character, responsibility, competence or solvency of the founding shareholders of the company.

Once the permit is granted, the company must be incorporated within the term provided in the permit, and registered before the Chamber of Commerce.

Until this point, the insurance company is only allowed to be incorporated before the Chamber of Commerce. The company is not allowed to perform insurance related activities.

Certificate of authorization to launch the insurance operations

The SFC will issue the certificate (license) authorizing the performance of insurance activities when the following requirements have been properly evidenced:

1. The due incorporation of the company;
2. The payment of 50 percent of the company's subscribed capital; and
3. Arrangements have been made to put in place the technical and operative infrastructure necessary to operate regularly in accordance with the feasibility study.

Such certificate will be issued within the five days following the date when the SFC received of the above requirements.

After this point the insurance company will be allowed to perform insurance related activities.

Is it mandatory that a company be physically present in the market (HQ or branch office) to write insurance/ reinsurance policies?

The general rule is that insurance companies must be physically present and be duly authorized and incorporated in Colombia.

However, in relation to foreign insurance companies, Colombian law established the possibility to offer insurance products by means of special registries managed by the SFC. The special registries are: (i) the RAIMAT and (ii) the RAISAX. Enrollment in the above registries allows foreign insurance companies to offer their products in Colombian territory without incorporation or being physically present.

In relation to foreign reinsurance companies, the law establishes the possibility to offer reinsurance products by means of the REACOEX. Enrollment in the REACOEX allows foreign insurance companies to offer their products in Colombian territory without being physically present. In addition, foreign reinsurance companies area also allowed to offer reinsurance products by means of a representative office located in Colombia. Different to the registration in the REACOEX, this option implies that the reinsurance company would be physically present in the market.

Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

A foreign insurance company is able to write business directly provided that it is registered in any of the special registries (RAIMAT and RAISAX).

If the foreign insurer is not registered into the RAIMAT or RAISAX but it is registered in the REACOEX, it is allowed to write reinsurance of a domestic insurer.

Is the incorporation of local companies with foreign shareholders permitted?

Yes. The incorporation of local companies with foreign shareholders is permitted. Pursuant to *Article 91 of the Organic Statute of the Financial System* ("EOSF" for its acronym in Spanish) foreign investors may take part in the equity of the financial institutions by subscribing or acquiring shares.

Regulatory

What are the main sources for insurance and reinsurance regulatory law?

The main sources for insurance and reinsurance regulatory law in our jurisdiction are: (i) the *Code of Commerce*, (ii) *the EOSF*, (iii) *Law No.1328 of 2009*, (iv) *Decree 2555 of 2010* and (v) the *Basic Legal Circular (C.E. 007 of 1996)* issued by the SFC.

As secondary source of law, it is important to bear in mind the rulings from the Constitutional Court, the Supreme Court of Justice and the Council of State. In addition, the SFC issues opinions which are also an important source of law.

Colombia

Please describe the current regulatory environment, including pending or anticipated regulatory reform.

Solvency and capital requirements

According to Colombian law, insurance and reinsurance companies, as well as insurance and reinsurance brokers must comply with the solvency and capital requirements at all times. These requirements are set forth by law and are updated every year. The capital requirements were set forth by *Article 80 the EOSF in 1993* but are updated every year. Minimum capital requirements as of 2016 are the following:

1. Insurance companies: COP 9,727,000,000 (c. USD 2,881,391 at an exchange rate of 1USD = COP 3,375,80) (to this amount it must be added the required capital for each line of business),
2. Reinsurance companies: COP 38,880,000,000 (c. USD 11,517,269),
3. Insurance brokers: COP 385,000,000 (c. USD 114,047) and
4. Reinsurance brokers: COP 153,000,000 (c. USD 45,322)

Confidentiality

In accordance with *Article 15 of the Constitution* and *chapter 9 of title 1 of the Basic Legal Circular*, insurance companies, as all other financial entities, are subject to the banking reserve. Information subject to the banking reserve is deemed to be confidential.

On the other side, consumer data protection and limitations regarding the transfer of consumer information are regulated in *Law No. 1581 of 2012 (Article 26)* and *Decree 1377 of 2013 (Article 24)*. We have no knowledge of any pending or anticipated regulatory reform.

Supervision

Article 325 of the EOSF in light of *article 335 of the Colombian Constitution* established that the SFC is responsible of the supervision of financial entities, including insurance companies. The supervision is permanent and entails all the different aspects of the insurance industry: launching of operations, operations, etc. For some examples relating to the supervision of financial entities, please refer to the response about the "reporting requirements".

Corporate governance

Financial entities, like insurance companies, are required to have a strong corporate governance system. In this sense, insurance companies are required to have a manual of internal control that includes information about (i) the committees that shall support the control of the board, its composition and operation; (ii) the information mechanisms used to provide information to the groups of interests; (iii) the regulation that the company uses to prevent the conflicts of interest, among other provisions.

We have no knowledge of any pending or anticipated reforms.

Consumer protection

Rules regarding the consumer protection are provided in *Laws 1328 of 2009 and 1480 of 2011*. In light of *Law 1328 of 2009*, the SFC issued *Legal Circular 038 and 039 of 2011*.

Law 1328 of 2009 established certain provision regarding financial consumer protection. The purpose of said legislation is to provide the principles and rules governing financial consumer protection, as well as the interactions between financial entities supervised by the SFC and their customers.

Some of the developments of *Law 1328* are (i) the giving of information to financial consumers, (ii) the establishment of prohibitions regarding unfair clauses and practices by financial entities, and (iii) the newly established *Sistema de Atención al Consumidor Financiero* (SAC), which is a system intended to attend any consumer related proceedings within the financial entities' organizational structure. This last development benefits consumers and financial entities alike, since their consumer care related issues will be handled promptly and directly by the companies themselves.

By means of *Legal Circular 038 of 2011* the SFC established the rules pertaining to the information given to financial consumers. According to said regulation, financial entities must give minimum, true, sufficient, clear, and timely information to financial consumers in order to facilitate informed decision-making.

On the other hand, *Legal Circular 039 of 2011* established that financial entities must refrain from engaging in conduct involving the use of unfair and abusive contractual clauses and practices that may affect the consumer or give rise to an abuse

of dominant position within the contract. Both of these developments give additional rights to financial consumers, as well as administrative measures and proceedings against a possible infringement of consumer protection regulations.

Broker remuneration

The remuneration of insurance brokers, as well as other insurances intermediaries, is not subject to a particular regulatory provision. In this sense, the parties are free to agree the remuneration, fees, payment method, etc. Unless otherwise agreed by the parties, the insurance company is responsible for the payment of the remuneration of the insurance broker.

On February 12, 2014, the SFC issued *Legal Circular No. 3*. By means of this *Legal Circular*, the SFC regulated in connection with the remuneration of insurance brokers in the labor risks line of business.

We have no knowledge of any other pending or anticipated reforms.

Reporting requirements

Insurance companies are subject to permanent supervision and control from the SFC. Accordingly, insurers are subject to several duties in connection with the report of information to the SFC. As an example, some of the reporting requirements are the following:

1. On a quarterly basis, insurers must provide information in connection with the first and second level of shareholders.
2. On an annual basis, insurers must inform about contingencies derived from legal proceedings before judiciary courts.
3. On a quarterly basis, insurers must provide a report of claims raised before the financial consumer ombudsman.
4. On a quarterly basis, insurers must provide a report of claims raised before entity.
5. On an annual basis, insurers must provide information in connection with their actuarial calculations.
6. On a quarterly basis, insurers must provide information in connection with the premiums to be collected.
7. On a quarterly basis, insurers must provide information in connection with the reserves of notified losses and damages.
8. Insurers must provide information about their reinsurance agreements.

Claims

What are the main sources for contract law?

The main sources of contract law in Colombian jurisdiction are: (i) the *Colombian Constitution of 1991*, (ii) the *Law (Civil Code and Code of Commerce)*, (iii) contractual clauses, (iv) customary law and (v) case law from the Supreme Court of Justice and the Constitutional Court.

In general, is the substantive law relating to insurance more favorable to insurers or insureds?

In general, the substantive law relating insurance is more favorable to insureds. We base our conclusion on the following considerations:

1. We have two statutes that protect the financial consumer: *Law 1480 of 2011* and *Law 1328 of 2009*. Therein there is a list of rights for the financial consumer and duties and prohibitions for financial institutions.
2. Based on *Law 1328 of 2009*, the SFC issued *Legal Circular 039 and 038 of 2011* that set forth the rules regarding the information to be provided to the financial consumer and the clauses and practices which are considered to be abusive and restricted for financial entities.
3. The *Code of Commerce* has a special provision indicating that a reasonable number of insurance norms cannot be agreed on the contrary and some others can only be modified in favor of the insured.

What is the statute of limitations on claims?

Pursuant to *Article 1081 of the Code of Commerce*, there are two types of statute of limitations that apply to insurance claims:

1. All insurances (different than liability):

The statute of limitations in all insurances (different than liability) is of two years and starts to run from the moment in which the interested party knew or should have known the moment in which the loss occurred. However, under no circumstances, the period of the statute of limitations can exceed five years from the moment in which the loss effectively occurred.

2. Liability insurance:

   The legal action raised by the victim (third party) to the insured or the insurance company (direct action) has a statute of limitations of five years and starts to run from the moment in which the loss occurred.

   The legal action raised by the insured, once the victim (third party) has filed a claim against him, has a statute of limitations of two years since the third party raises the claim.

Can a third party bring direct action against an insurer?

Yes. A third party can bring direct action against an insurer in civil liability insurances. *Article 1133 of the Code of Commerce* states: "In civil liability insurance the injured parties shall have a direct action against the insurer".

Can an insured bring a direct action against a reinsurer?

There are two different legal positions regarding the possibility for an insured to bring direct action against a reinsurer in Colombia:

1. First position states that it is possible for insured and insurers to agree on the inclusion of cut through clauses which allows an insured to bring direct action against a reinsurer.

   In this sense, the insured would have the power to go directly before the reinsurer and be paid the amount of the claim under the insurance policy. Accordingly, the reinsurer would be able to make the claim payment directly to the insured.

   This interpretation is based on the fact that *Article 1135 of the Code of Commerce* (which establishes that the insured may not cut through and go before the reinsurance company for payment of claims), is modifiable in light of *Article 1162 of the Code of Commerce* (this article establishes which provisions from the insurance regimen are modifiable and which are not).

2. Second positions states that it is not possible to agree clauses which allow the insured to go against the reinsurers. This position is shared by the SFC. Although this position is not mandatory, said entity opines that *Cut Through Clauses* are not permitted in Colombia since the reinsurance and insurance contracts are independent and different from each other. Accordingly, the insured (party to an insurance contract) may not agree on the inclusion of a clause that allows it to go directly before the reinsurance company since it is not party to the reinsurance contract. (*Superintendencia Financiera de Colombia. Reaseguro situación jurídica del reasegurador. Legal opinión No. 1998029661-2*. August 13th, 1998.)

   There has been no ruling issued by the Supreme Court of Justice or the Constitutional Court that sets forth a final decision in connection with these clauses.

Dispute Resolution

Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

In Colombia, the judiciary is organized under the judicial branch of the Public Power. According to *Article 11 of Law 270 of 1996* amended by *Article 4 of Law 1285 of 2009* the judicial branch is composed by different jurisdictions. One of these jurisdictions is the ordinary jurisdiction, which is competent to entertain claims and disputes between private parties and those which are not assigned to another jurisdiction by law, including commercial insurance disputes that do not involve public entities or matters considered to be of administrative or public law.

Ordinary courts' jurisdiction presides over civil, family, criminal, labor and other matters; however, each of these matters has its own judicial organization. For example, the ordinary courts of civil jurisdiction include:

1. The Supreme Court of Justice
2. The Judicial District Courts

3. Circuit Courts
4. Municipal Courts

The Supreme Court of Justice and the Judicial District Courts have a respective chamber competent of civil and commercial matters. Circuit and Municipal Courts also include specialized courts in civil and commercial matters.

These bodies have jurisdiction over civil and commercial proceedings in their different instances, which would include commercial insurance disputes that do not involve public entities or matters considered to be of administrative or public law.

Jurisdiction is assigned by *law (Articles 17 to 34 of the General Procedural Code)* considering the amount, territory, parties and nature of the dispute. Please find refer to the chart summarizing the main jurisdiction assignment rules in civil and commercial matters in the following pages:

Court	Proceeding or matter

Civil Municipal Court	• In a sole instance (cases in which appeal is not available):
	  ◦ Disputes of minimum value (up to 40 legal monthly wages)
	  ◦ Inheritance proceedings of minimum value
	  ◦ Civil marriage
	  ◦ Conflicts among owners of buildings or condominiums and any management of administrative organs
	  ◦ Proceedings related to objections by the purchaser of goods, requests for the trustee to provide inventory of the trusted assets, repairs decided by the majority of owners of ships and petitions for experts that should resolve a determined matter
	  ◦ Proceedings assigned to Family Courts in a sole instance in cases in which a Family Court has not been established in the respective municipality
	  ◦ Different kinds of requirements, regardless of the interested parties.
	  ◦ According to special procedures are assigned to the judge which must dispose either knowingly, or briefly and summarily, or appealing to his prudent judgment, or as an arbitrator.
	  ◦ Proceedings related to insolvency proceedings of persons that are not merchants
	  ◦ Other proceedings determined by law
	• In first instance (cases in which appeal is available):
	  ◦ Disputes of minor value (more than 40 and up to 150 legal monthly wages)
	  ◦ Assets possession proceedings regulated by the Civil Code
	  ◦ Proceedings regulated by Law 1182 of 2008, or the one that modifies or substitutes it
	  ◦ Inheritance proceedings of minor value
	  ◦ Proceedings for opening and publishing of testaments and transcription of oral testaments
	  ◦ Amendments to public certificates regarding civil status and names

Colombia

Court	Proceeding or matter

Civil Circuit Court	• Appeals of decisions issued in the first instance of proceedings carried before Civil Municipal Courts
	• In a sole instance (cases in which appeal is not available):
	  ◦ One instance proceedings regarding intellectual property
	  ◦ Insolvency proceedings that are not of the jurisdiction of the Superintendence of Companies
	  ◦ Appointment of arbitrators in the cases in which the parties have not reached an agreement and did not delegate the decision to a third party.
	• In first instance (cases in which appeal is available):
	  ◦ Disputes of major value (more than 150 legal monthly wages)
	  ◦ Proceedings regarding intellectual property that do not correspond to the administrative jurisdiction
	  ◦ Proceedings related to unfair competition
	  ◦ Disputes related to partnership agreements, legal regulation of companies, as well as the nullity, dissolution and liquidation of companies
	  ◦ Expropriation proceedings
	  ◦ Proceeding assigned to Family Courts in first instance in the cases in which a Family Circuit Court has not been established in the respective municipality.
	  ◦ Constitutional class actions "acciones de grupo" and constitutional actions for the protection of collective rights "acciones populares" not assigned to the administrative jurisdiction
	  ◦ Challenge of minutes issued in meetings of corporate bodies
	  ◦ Proceedings of mayor value related to consumers' rights
	  ◦ Gathering of evidence prior to the initiation of other proceedings
	  ◦ All other proceeding not assigned to a particular court

Civil Chamber of Judicial District Courts	• Appeals of decisions issued in first instance proceedings carried before Civil Circuit Courts • Appeals of decisions issued in first instance proceedings carried before administrative authorities with judicial jurisdiction (e.g. Superintendence of Industry and Commerce in unfair competition matters, etc.) • Motions against judicial decisions that deny appeal • Extraordinary revision motions initiated against rulings issued by Civil Municipal Courts, Civil Circuit Courts and administrative authorities with judicial jurisdiction • Motions to annul arbitration awards that do not correspond to the administrative jurisdiction
Civil Chamber of Supreme Court of Justice	• Extraordinary appeal against second instance rulings "casación" • Extraordinary revision motions not assigned to the Judicial District Courts • Motions against decisions by means of which the extraordinary appeal against second instance rulings "casación" is denied • Exequatur proceeding for the recognition of rulings issued abroad • Proceeding for the recognition of arbitration awards issued abroad • Extraordinary revision motions initiated against arbitration awards that do not correspond to the administrative jurisdiction

Colombia

Colombian Civil Procedure does not provide any type of proceedings involving hearings before a jury or decisions taken by a jury.

What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of a) parties to the action and b) non-parties to the action?

In the course of a judicial proceeding, ex officio and as per a party's request, Civil Courts may order the plaintiff, the defendant or any third party to exhibit or produce any records or documents (including emails or electronic documents) that the court finds relevant for the proceeding. Said exhibition may be carried out in the court's office or in the place where the records and documents to be exhibited or produced are usually stored (e.g. a company's headquarters, offices, etc.)

Articles 265 to 268 of the General Procedure Code set the applicable rules for exhibition or production of documents by the plaintiff, the defendant or any third party. Said rules mainly provide that:

1. The party that intends to use documents or movable assets that are held by the counterparty, or any third party, should request to the Court, in the specific terms set in the law to request the gathering of evidence, that the exhibition or production of said documents is ordered.
2. The party that requests to the Court the exhibition or production shall mention the facts it intends to prove and state that the document it requests to be exhibited is in fact held by the person that should be ordered to show it. In addition, it should describe the type of document and the relation it has with the facts of the case.
3. If the Court finds that the petition meets all legal requirements, it shall order the exhibition to be carried out in the specific hearing, and it will set the corresponding procedure to be followed.
4. If the person that shall exhibit or produce the document is a third party, the Court's order to exhibit shall be served by the "notice" method described below.
5. Once the document is exhibited or produced, the Court will order that it is copied or transcribed unless the party who exhibited it allows that it is incorporated to the file. If the movable asset is not a document, the Court will order a physical representation of the object, either by photography, videos or any other adequate method.
6. The party that is ordered to exhibit or produce a document may file an opposition to the Court's order within the service term of the order, or during the hearing in which it was ordered. The Court will review the arguments of the opposition and decide whether if it is admissible or not. If the Courts finds the opposition inadmissible and finds evidence that the document is in fact held by the party, or if the party ordered to exhibit does not file an opposition but nevertheless refuses to exhibit or does not justifies its non attendance to the hearing set for the exhibition, the Court will consider true the facts that the party that requested the exhibition intended to prove with the document or will have this situation as circumstantial evidence against the party that refused to exhibit, if it is party to the corresponding proceeding.
7. Third parties are not obliged to exhibit documents that are protected by legal reserve or when the exhibition may cause them any harm.
8. If a third party opposes to the exhibition or, without a fair cause, refuses to exhibit, the Court will impose a fine of five to ten monthly legal wages.
9. The exhibition of a merchant's documents (such as the books containing minutes of the board of directors, of the shareholders assembly, accounting records, etc.) should be carried out before the judge but in the place where these records are commonly stored and will limit the production to the documents that have a necessary relation with the object of the proceeding and the review that they comply with legal requirements.
10. If a merchant refuses to exhibit its merchant's documents despite that the Court has ordered it to do so, it will be subject to the evidence contained in the counterparty's records, unless it timely proves that the records got lost or were destroyed or proves any other justified excuse to refuse to exhibit them.

Colombia

Are mediation and arbitration common methods for solving insurance disputes? Are more disputes resolved in or out of court?

Alternative Dispute Resolution ("ADR") mechanisms and techniques, which include conciliation, mediation and arbitration, are commonly used methods of solving insurance disputes in Colombia, taking into account that they are the fastest and most effective way to resolve conflicts due to the time and costs associated with litigation before Courts. In Colombia, ADR mechanisms are regulated by *Decree 1818 of 1998, Law 640 of 2001* and *Law 1563 of 2012*, which entered into force on October 16, 2012.

The most relevant factors that determine that out of court settlements or arbitration, for the resolution of disputes in general and those related to insurance matters, are preferable than litigation before Courts of the Ordinary Jurisdiction in Colombia relate to (i) the time involved in obtaining a final ruling before the ordinary jurisdiction, (ii) the specialized expertise of arbitrators over the matters discussed and (iii) the confidentiality that out of court settlements and arbitration offer.

The approximate duration of ordinary proceedings, under which it is likely that most insurance disputes are resolved by a Civil Court, is from eight to twelve years depending on the number of rulings and extraordinary recourses against the decisions of the courts. The duration of an arbitration proceeding may take approximately one to three years, depending on the amount of evidence that has to be gathered and the complexity of the case. This length includes the eventual filing of a motion to annul the arbitration award before local courts.

Certain measures to expedite the duration of ordinary proceedings before Civil Courts have been taken in the recent years. The enactment of the General Procedure Code is a measure taken by the Congress of Colombia to increase the judicial system efficiency and to correct the Civil Procedure Code deficiencies.

For instance, one of the main reforms to civil procedure introduced by the *General Procedure Code* is the transformation of ordinary proceedings into oral proceedings with the purpose of reducing significantly the length of these proceedings. In addition, pursuant to *Article 121 of the General Procedure Code,* the length of a legal proceeding must be of one year as of the notification of the request admission. The length of the second instance ("segunda instancia") must be of six months as of the docket is received by the higher court. If the above-mentioned legal terms are not accomplished by the judge it shall lose competence of the case and has the obligation to report it to the Higher Counsel of the Judiciary.

Although the *General Procedure Code* was enacted in 2012, it only entered into force in January of 2016, and the Civil Procedure Code (previous civil procedural statute) is still in force for proceedings initiated during the applicability of the latter, therefore the effectiveness of the measures adopted to reduce the duration of proceedings is still to be determined.

As to the expertise of arbitrators in comparison with ordinary judges it is worth noting that, in most of the cases, arbitration centers group arbitrators in certain lists according to their specialty (including insurance and reinsurance matters) thus, if the parties agree on their arbitrators or appoint a particular arbitration center with a specialized list of arbitrators in insurance disputes, the quality of the ruling may be superior to the one that may be issued by an ordinary judge that decides on all sort of matters involving commercial and civil disputes.

Despite that no legal provisions establish that arbitration proceedings are confidential (in fact, after the termination of the proceeding the arbitration award and the entire docket of the proceeding is archived before a Notary for future consultation by any person) in practice, considering that the proceeding is carried out before private institutions, such as the arbitration centers of chambers of commerce, in the course of the proceedings dockets are generally kept in reserve.

Colombia is one of the countries with major trajectory and reputation in arbitration in the region, which has granted its arbitrators and arbitration centers with a well-known reputation. This, in addition to the fact that currently there are approximately 340 arbitration centers in the country, were part of the considerations that the Colombian Congress took into account for the issuance of a new arbitration statue (*Law 1563 of 2012*) with a modern regulation on the matter.

Colombia

What are the provisions regarding timely notice, and what are the legal consequences for non-compliance with the timely notice obligation?

Colombian Law regulates the terms and conditions of judicial notices in *articles 289 to 301 of the General Procedure Code*.

According to these sections, judicial notices must be performed following these methods:

1. The judicial rulings should be communicated to the parties and other interested third parties througfh judicial notices, within the formalities established in the *General Procedure Code.*
    - Except for the cases expressly established by law, court orders do not produce any effects before the judicial notice.
2. If the plaintiff indicates to the judge an address in which the defendant(s) or third parties must be served, a "personal" service method must be carried following these steps:
    - The judge issues the writ by means of which it admits the lawsuit or admits to implead a third party, ordering the initiation of the personal service.
    - The plaintiff sends a communication to the defendant/third party informing it of the existence of proceeding and compelling it to personally (or represented by its lawyer) approach the offices of the Court to be personally served of the aforementioned writ and receive a copy of the file.
    - If the defendant/third party is domiciled in the city in which the Court is located it must approach the Court to be personally served within the next 5 working days as from the day in which the communication was received.
    - If the defendant/third party is domiciled in a different city to the one the court is located, such term corresponds to 10 working days.
    - In case the defendant/third party is domiciled in a foreign country, such term corresponds to 30 working days.
    - If the defendant/third party does not approach the court within the corresponding term to be personally served, the plaintiff will proceed to perform service of process by the "notice"– method. This proceeding consists in the issuance of a notice to the defendant/third party, which is delivered to its address. Service of the admission writ is performed by the sole delivery of the notice. The term to answer the lawsuit will initiate on the working day following the day on which the notice was delivered.
    - If, despite that mailing services certify that the notices were delivered to the Defendant/third party, it does not approach the Court in any of the opportunities aforementioned, then the proceeding will continue without it.
    - In the event that it is not possible to deliver the mentioned notices to the Defendant/third party, law provides different rules for service of process, which are explained below. If the Defendant/third party does not appear before the Court its right to defend itself will be guaranteed by the appointment of a public defender.
3. If the plaintiff swears under oath that it does not know the address of the defendant/third party, the latter will be served by the method of "public notice" according to the following rules:
    - The plaintiff must publish a notice in a media of massive communication (newspaper, television, radio, etc.), in the terms ordered by the Court, in which it compels the defendant/third party to approach the Court to be served.
    - Once the notice is published, the defendant/third party must approach the court within the next 15 business days after the publication.
    - If the defendant/third party does not approach the Court in the above mentioned term, then the Court will appoint a public defender that would act on its behalf in the proceeding.

Colombia

What are the laws regarding bad faith claims? What damages may be awarded if the insurer is found to have acted in bad faith?

Article 1078 of the Code of Commerce states as follows: "The bad faith of the beneficiary or the insured at the moment of the claim shall cause the loss of the right of indemnification. In this sense, no damages may be awarded if the insured is found to have acted in bad faith."

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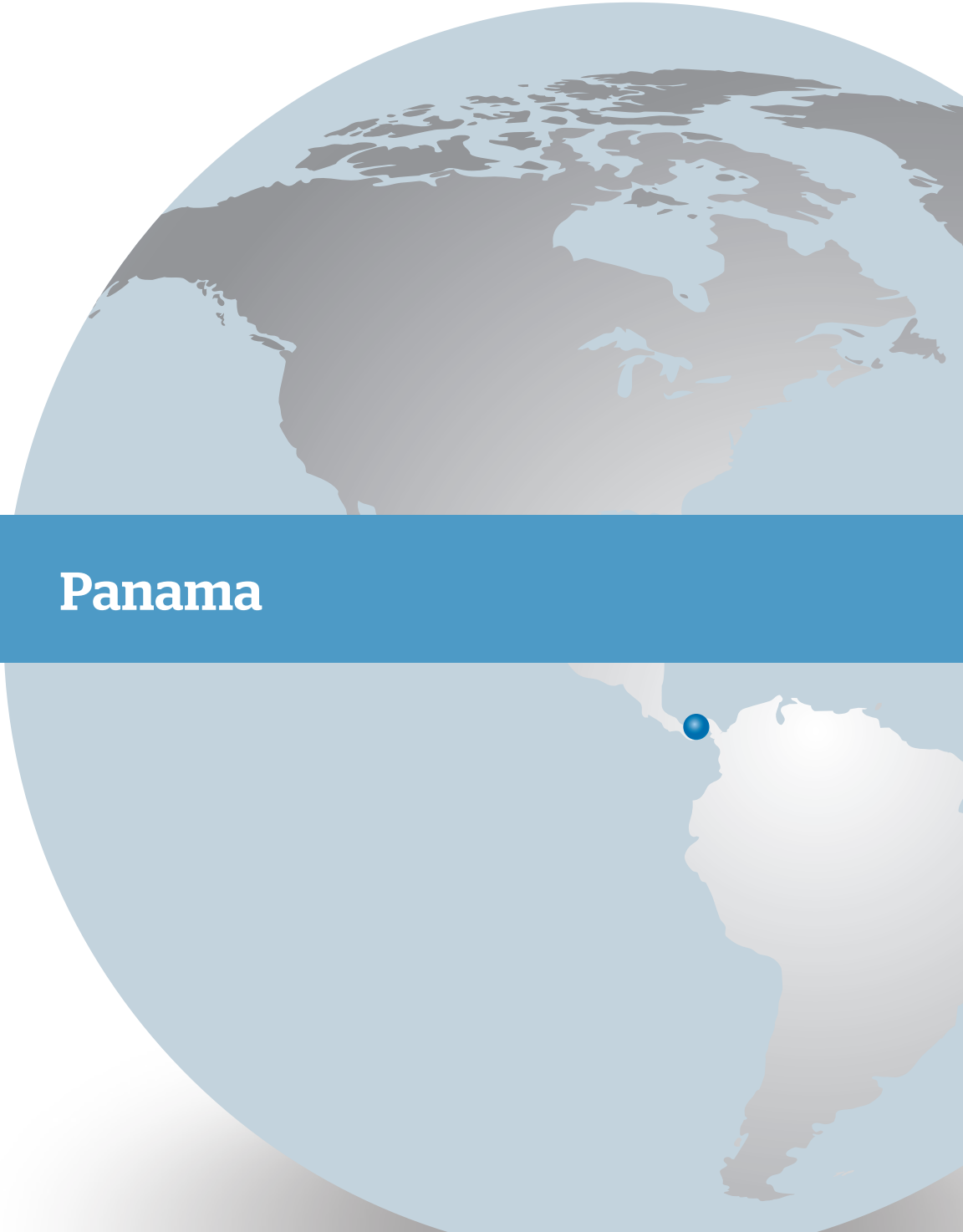

Panama

Overview

Which government bodies/agencies regulate insurance and reinsurance companies in your jurisdiction? What date were those bodies established?

In Panama, the Superintendence of Insurance and Reinsurance (*Superintendencia de Seguros y Reaseguros de Panamá*, or "SIRP") is the statutory regulator of the insurance industry since 1996. The SIRP is in charge of supervising compliance and continuing obligations of both domestic and foreign insurers and reinsurers who offer their products in Panama.

Please list the categories of insurance licenses that exist in your jurisdiction, providing reference to the relevant code/s.

Pursuant to the provisions of *Law 12 of April 3, 2012 (the "Insurance Law")*, *Law 63 of September 19, 1996* (the "*Reinsurance Law*"), *Law 60 of July 29, 1996* (the "*Captive Reinsurance Law*") and related legislation, the SIRP grants the following licenses to legal entities and natural persons interested in providing insurance services:

a. Insurance companies;

b. General reinsurance companies;

c. International reinsurance companies;

d. Reinsurance administrators;

e. Insurance and reinsurance brokers;

f. Portfolio managers of insurance brokers (*Executive Decree 12 of 1998*);

g. Captive insurance companies;

h. Insurance adjusters (*Accord No. 05-2012*);

i. Insurance adjusters' companies (*Accord No. 05-2012*); and

j. Damage inspectors (*Accord No. 05-2012*).

The SIRP separately authorizes insurers and reinsurers to operate in Panama according to the category of insurance products offered. The *Insurance Law* recognizes three categories ("*ramos*"):

1. Persons ("*ramo de personas*"), which includes life and group life insurance, personal accidents, retirement, travelers' aid, amongst others,

2. General ("*ramo general*"), which includes fire, marine, ground and aerial transportation, civil liability, etc., and

3. Bonds ("*Ramo de fianzas*"), which includes compliance bonds related to contract performance and payment.

Are insurance companies in your jurisdiction subject to taxes beyond the ordinary burden faced by all companies?

Insurance companies are required to pay to the SIRP an annual supervisory fee equivalent to 0.5 percent of the sum all net premiums received the previous year, with a minimum of USD 10,000 and a maximum of USD 50,000. Pursuant to SIRP *Accord 10-2013*, insurance brokers are required to pay an annual fee of 0.25 percent of the revenues earned by commissions, with a minimum of USD 100 and a maximum of USD 10,000.

In addition, insurance companies are designated as withholding agents for the collection and monthly payment of the following taxes: i) Premiums tax ("*impuesto sobre primas*") of two percent on net premiums received in relation to insurance policies originated in Panama and covering risks located in Panama, to contribute to a fund benefiting Panama's firefighters; ii) insurance consumption tax ("*impuesto al consumo de seguros*") of five percent on gross premiums received in relation to insurance policies covering risks and guarantees located in Panama, excluding premiums related to fire insurance policies, life insurance policies with redemption value, and agriculture policies; iii) an additional tax of five percent on net premiums received in relation to fire insurance policies, to a fund benefiting Panama's firefighters; and iv) a one percent tax on premiums received from car insurance policies.

What are the approved distribution channels? Are there restrictions?

Insurance in Panama is mainly sold through direct sales by the insurance companies and through insurance intermediaries such as insurance brokers. The *Insurance Law* also offers a third option known as the *alternative commercialization channel*

(*canal alterno de comercialización*), through which companies such as for instance banks, car dealerships, supermarkets, whose main objective is not to offer insurance, may offer insurance to the general public on behalf of insurance companies and insurance brokers for certain types of insurance, including life, personal accidents, fire, cancer and other diseases, dental aid, job loss, travel cancellations, and motor vehicle insurance. *Companies act*ing as alternative commercialization channels are usually characterized by a strong client network.

To act as an alternative commercialization channel, a company may not have as its main objective the insurance business, and its annual gross revenues generated in insurance fees should not exceed 20 percent of the company's gross income. Also, the people offering insurance to customers through these alternative channels must be employees of such company, covered as such by the social security regime.

Does your jurisdiction have any forms of compulsory insurance?

Labor risks insurance and third party motor insurance are the only two forms of compulsory insurance in Panama.

Panama has a special health and social security regime making health insurance compulsory for all employees in both the public and private sector. The employer deducts a percentage from the employee's salary and submits that amount to the Social Security Authority to constitute the employee public health insurance fund.

What major insurance/reinsurance legislation is on the horizon in your jurisdiction?

As of this date, there is no major legislation related to the insurance sector being discussed in the National Assembly.

Market Entry

What are the requirements/procedures for setting up a new insurance or reinsurance company?

In order to set up a new (re)insurance company in Panama, the SIRP requires, among other items: i) a draft of the company´s *Articles of Incorporation*; ii) if a foreign company will be offering insurance through a branch in Panama, an authorization issued by the foreign authorities for the establishment of the company´s branch in Panama; iii) information on the company's board of directors, including each director's curriculum vitae and bank references; iv) drafts of the insurance policies and plans related to the products the company plans to offer and sell; v) draft reinsurance program; vi) a minimum paid-in capital of USD 5 million for insurance companies and USD 1 million for reinsurance companies; vii) a feasibility analysis of the company´s short, medium and long term goals; viii) drafts of the company´s corporate governance and ethics codes; and ix) draft of the company's internal manual related to prevention of money laundering.

Once these documents are duly submitted to the SIRP, a provisional license is granted allowing the insurance or reinsurance company to register the company´s *Articles of Incorporation* with Panama's Public Registry. The final insurance or reinsurance license is obtained when the company is duly registered at the Public Registry and the applicant submits proof of such registration and other additional documents.

Is it mandatory that a company be physically present in the market (HQ or branch office) to write insurance/ reinsurance policies?

Pursuant to the *Insurance Law* and *Reinsurance Law*, both insurance and reinsurance companies operating in Panama must have a physical presence (office) in Panama. Foreign reinsurance companies without a Panamanian license must register with the SIRP in order to be able to reinsure Panamanian risk.

Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Under the *Insurance Law*, natural persons and companies domiciled in Panama may only insure assets and persons located in Panama with insurance companies licensed by the SIRP, except for certain limited exceptions. As described above, local insurance companies may enter into reinsurance agreements only with those foreign reinsurance companies that are registered at the SIRP as a Foreign Reinsurance Companies not established in Panama.

Panama

Is the incorporation of local companies with foreign shareholders permitted?

The incorporation of local companies with foreign shareholders is permitted. However, under the *Insurance Law* and *Accord No. 10 of 2013* of the SIRP, only natural persons holding a license as insurance broker in Panama may incorporate a company intending to offer insurance brokerage services, and the initial shareholders of such a company must also be insurance brokers (natural persons) with the appropriate Panamanian license. *The Insurance Law* and *Accord No. 10 of 2013* do authorize a subsequent transfer of shares to other (non-Panamanian) persons after obtaining of the license, but only if a treaty provides for it and under the condition that at least 49 percent of the shares continue to be owned by Panamanian insurance brokers. Any such change in ownership must be approved by the SIRP. At all times, the legal representative of any insurance brokerage company must also be a Panamanian insurance broker. No insurance company, bank, fiduciary company or other financial company or shareholder thereof may be a shareholder of any Panamanian insurance brokerage company.

Regulatory

What are the main sources for insurance and reinsurance regulatory law?

In Panama, the main sources for insurance and reinsurance regulatory law are: the *Insurance Law (Law 12 of 2012)*, the *Reinsurance Law (Law 63 of 1996)* and the *Captive Insurance Law (Law 60 of 1996)*. Additionally, the SIRP develops the provisions in the aforementioned laws through resolutions, circulars and accords, based on its own administrative practice.

The insurance and reinsurance industry is also subject to the provisions of *Law 38 of 2000* related to the *Attorney's General Office and Law 45 of 2007* related to consumer protection.

Please describe the current regulatory environment, including pending or anticipated regulatory reform.

Under the current regulatory framework, insurance and reinsurance companies regulated in Panama are required to submit to the SIRP periodical reports in connection to their solvency margin and compliance with minimum capital requirements, as well as to timely submit financial statements and report to the SIRP on issues such as changes to model policy contracts. Provisions regarding corporate governance are better developed in the banking sector, nonetheless, the SIRP requires insurance and reinsurance companies to prepare and effectively comply with corporate governance programs. The Insurance Law includes several provisions which grant insureds certain rights regarding the furnishing of information about their insurance policies and the manner in which they may address any dispute against insurers.

Claims

What are the main sources for contract law in your jurisdiction?

The main source for contract law in Panama is the *Code of Commerce*.

In general, is the substantive law relating to insurance more favorable to insurers or insureds?

Panamanian insurance substantive law is more favorable to insureds because of the manner in which the law obliges the insurance companies to render their services with transparency and equality. The *Insurance Law* not only imposes obligations on insurance companies but also on insurance brokers and insurance brokerage companies. Furthermore, the *Insurance Law* contemplates a special chapter for protection of the insurance consumer.

What is the statute of limitations on claims in your jurisdiction?

The statute of limitation on claims against insurance and reinsurance companies is one year, pursuant to *Article 250* of the *Insurance Law* and *article 1651 of the Code of Commerce*.

Can a third party bring direct action against an insurer?

Currently, Panama law does not address this issue. However, the SIRP's position is that no third party can bring a direct action against an insurer since the insurance policy is only between the insurance company and the insured. Nonetheless, the SIRP acknowledges that there could be some exceptions,

in cases of performance bonds and other similar contract types.

Can an insured bring a direct action against a reinsurer?

Panama law does not recognize the enforcement of "cut-through" clauses, however Article 2 of the *Reinsurance Law* states that the reinsurance contract does not modify the insurance contract, and therefore the direct insurer is the sole responsible party towards the insured and its beneficiaries. The SIRP has not yet issued a formal opinion on this matter, however, it has informally confirmed that the insured cannot bring a direct action against a reinsurer.

Dispute Resolution

Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

There are no special courts for insurance disputes in Panama. Depending on the subject matter, disputes are heard by commercial or civil courts. Disputes heard in the commercial courts are related to consumer rights, where the insureds are deemed consumers. Civil circuit courts handle disputes over USD 5,000.00. There is no general right to a hearing before a jury.

What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of a) parties to the action and b) non-parties to the action? Cite relevant codes.

According to Article 261 and Article 265 of the *Insurance Law*, the SIRP has the authority to conduct inspections, order audits, and verify documentation ex officio or in case of actions brought by an interested or non-interested party for presumed violations of the *Insurance Law*. However, books and records are considered private documents and cannot be accessed without the authorization of the merchant or a court mandate. Article 89 of the *Code of Commerce* states that a merchant is only required to grant access to or deliver his books or records in cases of succession or bankruptcy. Except from those two cases, a merchant will only be required to display specific book entries or documents to another party with a court authorization upon the request of an interested party. Furthermore, a merchant cannot affect another person's right to confidentiality. Information provided by a customer to a merchant that is not intended to be made public is protected by a provision in the *Criminal Code* that makes it a crime to divulge the same. However, the *Criminal Code* expressly excludes liability when the customer consents to its publication.

Are mediation and arbitration common methods for solving insurance disputes? Are more disputes resolved in or out of court?

Under Panama law, mediation and arbitration are common methods for solving disputes. Under applicable provisions, all matters in which the parties can dispose of their rights without statutory limitations can be submitted to arbitration. National courts have a duty to refrain from overseeing and deciding matters subject to an arbitration clause. A court facing an arbitration clause is legally required to dismiss the claim and direct the parties to arbitration.

What are the provisions in your jurisdiction regarding timely notice, and what are the legal consequences for non-compliance with the timely notice obligation?

The *Insurance Law* does not provide for any maximum notice periods. Under Article 1651 of *Panama's Code of Commerce*, the statute of limitations for claims derived from insurance contracts of any type is one year.

What are the laws regarding bad faith claims? What damages may be awarded if the insurer is found to have acted in bad faith?

The applicable regulation would be *Articles 986, 987, 988, 991, 992* of the *Civil Code* that regulate the compensation for damages, which can include the value of the loss sustained as well as the loss of profit.

Panama

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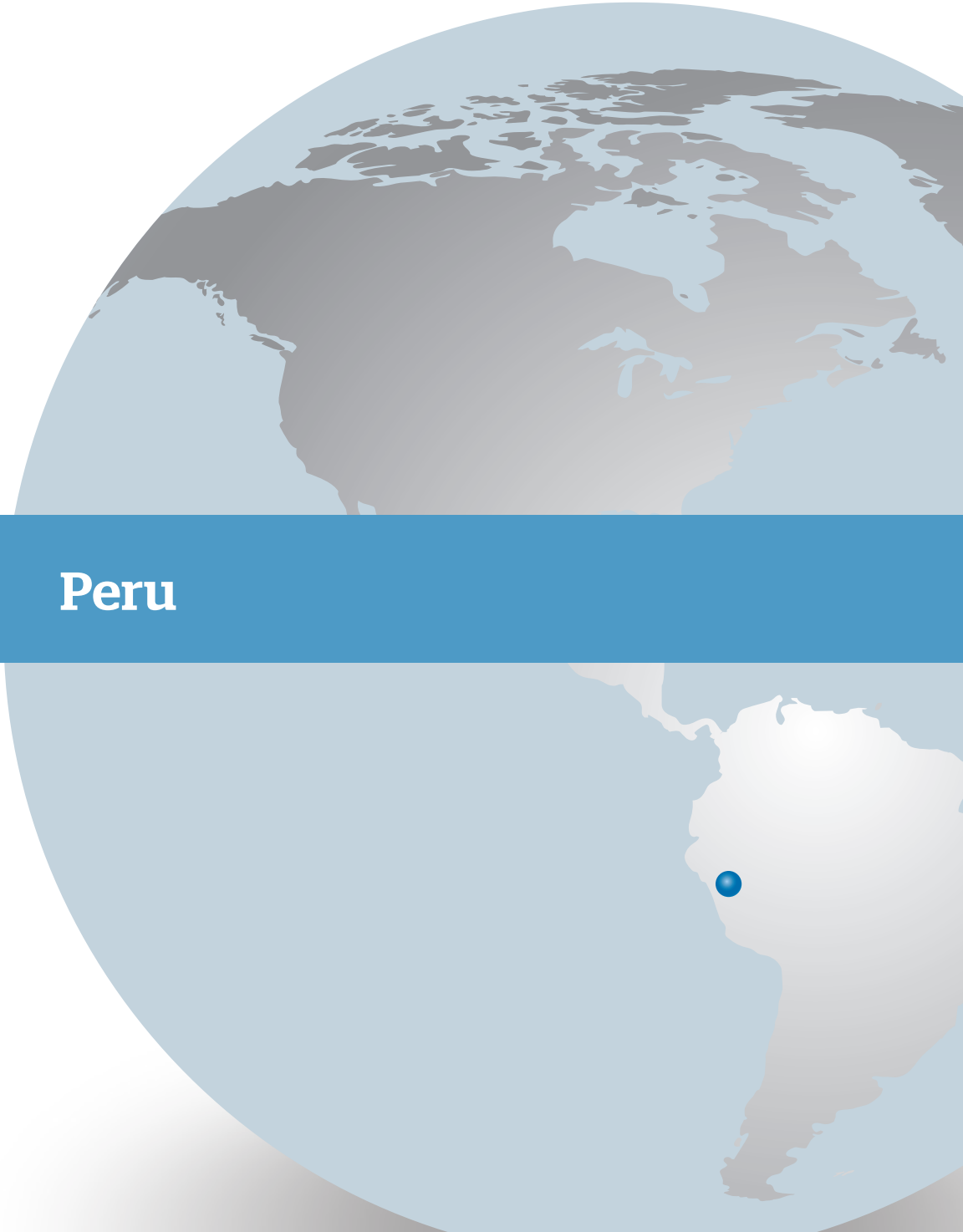

Peru

Overview

Which government bodies/agencies regulate insurance and reinsurance companies in your jurisdiction? What date were those bodies established?

Insurance and reinsurance companies and activities are regulated mainly by the Superintendency of Banking, Insurance and Private Pension Funds (the "SBS"), which was first established in 1931 as a banking regulator entity. The SBS' supervision to insurance companies was included in 1936.

The Peruvian Labor Ministry also regulates the supplemental labor risks insurance, which provides additional coverage to regular members of the Social Health Insurance who develop certain high-risk activities, determined by *Supreme Decree*.

Please list the categories of insurance licenses that exist in your jurisdiction, providing reference to the relevant code/s.

The SBS authorizes insurance and reinsurance companies to operate in Peru. This authorization is subject to compliance with the provisions set forth in *Chapters II and III* of the *General Act for the Financial and Insurance Systems and Organic Law of the SBS* (the "Act").

Licences/authorizations to operate the following activities, among others, are granted by the SBS:

- General insurance
- Life insurance
- General and life insurance
- Reinsurance
- Insurance and reinsurance
- Insurance broker
- Reinsurance broker
- Insurance adjustor

The SBS also qualifies some foreign reinsurers to operate in Peru by registering them in the Registry of Intermediaries and Auxiliary Insurance and Reinsurance Foreign Companies.

Are insurance companies subject to taxes beyond the ordinary burden faced by all companies?

There is no special tax applicable only to insurance companies in Peru. However, there is a special contribution that the supervised companies should make to the supervising entity (SBS), which is established quarterly by the SBS.

What are the approved distribution channels? Are there restrictions?

According to article 335 of the *Act*, insurers can market and sell their products through their own resources/employees or through insurance and reinsurance brokers.

Insurance contracts are subject to the provisions of the *Act*. In addition, these contracts are regulated by the *Insurance Contracts Act*, approved by *Law No. 29946*, which applies to all kind of insurance contracts.

Insurance and Reinsurance Brokers

Insurance and reinsurance brokers are independent from the insurance/reinsurance companies and the clients they assist.

Insurance brokerage activities are regulated in *subchapters I and II of chapter II Title IV of the Act*.

In order to engage in insurance brokerage activities individuals or companies need to obtain the authorization from the SBS, which has a register of authorized brokers.

Are there any forms of compulsory insurance?

Among others, the following forms of compulsory insurance exist in Peru:

- Mandatory life insurance for employees (*Legislative Decree No. 688*)
- Mandatory labor risks insurance (*Law No. 26790*)
- Mandatory health insurance (*Law No. 26790*)
- Mandatory motor vehicle liability insurance (*Supreme Decree No. 024-2002-MTC*)

Peru

What major insurance/reinsurance legislation is on the horizon?

There is a reform project on the regulations governing capital requirements for insurance and reinsurance companies, by which the reinsurance exposures subject to credit risk may be considered eligible personal guaranty with prior approval of the SBS. The portion of exposure covered by reinsurance shall be subject to a regulatory capital requirement for credit risk based on the risk of the reinsurer, taking into consideration the financial strength rating.

Market Entry

What are the requirements/procedures for setting up a new insurance or reinsurance company?

First of all, all insurance and reinsurance companies in Peru must obtain the previous authorization of the SBS. For this, insurance and reinsurance companies shall comply with the following requirements (among others):

- Obtain the authorization of organization from the SBS, for which specific requirements shall be met
- Obtain the operating authorization from the SBS for which specific requirements shall be met
- Have a minimum capital stock set forth by the SBS
- Register their stock in the Lima Stock Exchange

Is it mandatory that a company be physically present in the market (HQ or branch office) to write insurance/ reinsurance policies?

Yes, they need to be authorized by the SBS to write/ sell insurance in Peru.

Insurance policies may be written, marketed and sold outside Peru to Peruvian residents. It is prohibited though to undertake any of these activities in Peru without the SBS prior authorization.

Foreign reinsurers may undertake activities in Peru without the SBS' authorization, provided that certain specific conditions are met.

Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Foreign insurers may not write or sell policies in Peru without the prior authorization from the SBS. They may sell insurance to Peruvian residents but that shall not do it within Peru if not authorized by the SBS. As mentioned above, insurance policies may be written, marketed and sold outside Peru to Peruvian residents. What it is prohibited is to undertake any of these activities in Peru without the SBS' prior authorization.

Is the incorporation of local companies with foreign shareholders permitted?

Yes.

Regulatory

What are the main sources for insurance and reinsurance regulatory law?

The main sources for insurance and reinsurance regulatory law in Peru are:

- *General Act for the Financial and Insurance Systems and Organic Law of the SBS (Law No. 26702)*
- *Insurance Contracts Act (Law No. 29946)*
- *Regulation of payment of insurance policies premiums (Res. SBS No. 3198-2013)*

Please describe the current regulatory environment, including pending or anticipated regulatory reform.

The main source of regulation for insurance and reinsurance activities has always been the *Act*, even though, there were various insurance commercial topics treated before by the *Code of Commerce*, which was derogated by the *Insurance Contracts Act*, the new legislation that establishes the conditions of the insurance contracts, published on November, 2012.

Insurance companies are also required by the SBS to adopt certain corporate governance structures and policies to minimize insolvency risks and abide by anti-money laundering regulations. They must also comply with strict reporting requirements and implement specific customer service guidelines to protect and assists insureds.

Peru

Claims

What are the main sources for contract law?

The main sources for contract law in Peru are the *Civil Code*, and, specifically in respect of the insurance contracts, the *Act* and the *Insurance Contracts Act*. Certain risks have their own specific regulations.

In general, is the substantive law relating to insurance more favorable to insurers or insureds?

The *Insurance Contract Act* was recently enacted as to establish more favorable conditions to insureds.

What is the statute of limitations on claims?

In accordance with the provisions of Article 78 of the *Insurance Contract Act*, the period for which the insured may bring an action on the contract of insurance is 10 years after the loss.

In accordance with the provisions of the preceding paragraph, civil actions expire after 10 years from the date of the loss according to article 2001 of the *Civil Code*.

Can a third party bring direct action against an insurer?

Yes, according to Article 1987 of the *Peruvian Civil Code* any third party may bring a direct action against the insurer in indemnity policies. In this case the insurer is jointly liable with the insured as to the limit of the amount insured.

The *Insurance Contract Act* has a similar provision (*article 110*). In order to bring a direct action against the insurer, the insured has to be included in the suit.

Can an insured bring a direct action against a reinsurer?

In principle, under Peruvian Law an insured cannot bring direct action against a reinsurer. There is no contractual relation between the insured and the reinsurer.

Dispute Resolution

Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

The Courts of Lima (Commercial Courts) are competent for insurance disputes, if the defendant's domicile is in Lima. If the defendant's domicile is not in Lima, then the suit can be filed with the Civil Courts or Peace Courts of the defendant's domicile, depending on the amount of the claim. If the amount of the claim is up to USD 6,800 approximately, then it should be filed with the Peace Courts; any amount above that should be filed with the Commercial Courts or Civil courts.

What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of a) parties to the action and b) non-parties to the action?

The judges may request disclosure/discovery and inspection of documents (i) on its own initiative when he deems that the evidence presented is insufficient and also (ii) by request of any of the parties to the suit, according to *Article 194* of the *Peruvian Civil Procedure Code*.

Are mediation and arbitration common methods for solving insurance disputes? Are more disputes resolved in or out of court?

Yes. Arbitration is also a regular way for insurance companies and insureds to solve disputes. Mediation, on the other hand, is not so commonly used as a dispute solving method. Most sophisticated disputes are resolved by arbitration.

Disputes may be settled by the parties at any time.

The principal factor to choose arbitration or going to the commercial courts is the complexity of the issue in dispute and the amount of the insurance and the damage. In these cases (complex disputes and large amount indemnities), arbitration is usually convened and used.

Peru

What are the provisions regarding timely notice, and what are the legal consequences for non-compliance with the timely notice obligation?

Upon occurrence of the insured event, the insured has to give immediate notice to the insurer. Insurance contracts often specify the requirement of notification without undue delay.

What are the laws regarding bad faith claims? What damages may be awarded if the insurer is found to have acted in bad faith?

There are no specific sanctions provided for in the *Insurance Law* in respect of an insurer found to have acted in bad faith. However, based on common civil law provisions, the insurer would be required to pay damages.

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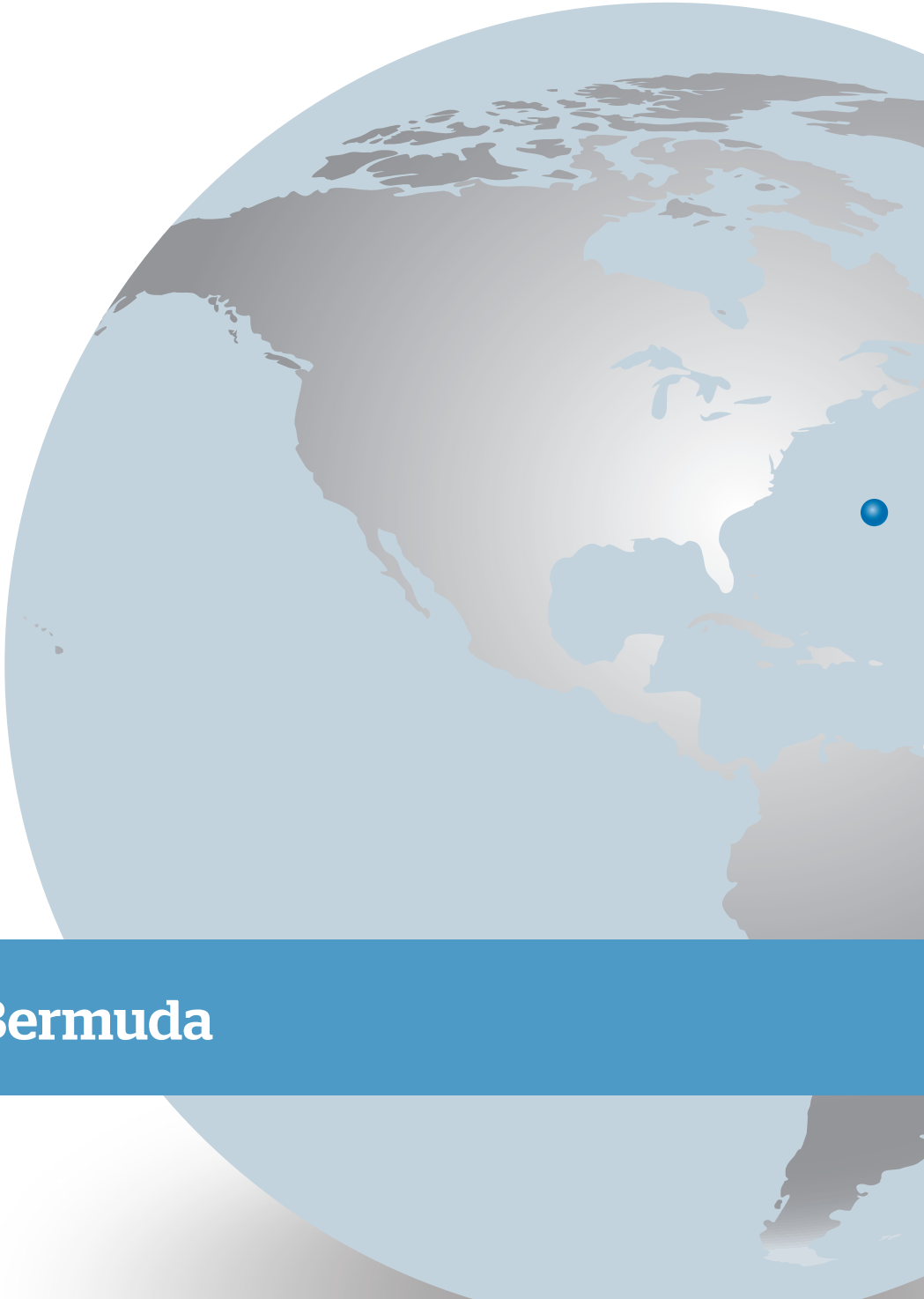

Bermuda

Overview

Which government bodies/agencies regulate insurance and reinsurance companies?

The Bermuda Monetary Authority (BMA) is responsible for the licensing, supervision and regulation of (re)insurers. It adheres to international best practices established by the International Association of Insurance Supervisors, of which it is a charter member, ensuring that the insurance industry in Bermuda is run in a prudent and credible manner.

The BMA, an independent body that has been in existence since 1969, took over responsibility for the supervision of the insurance industry in 2001, replacing the Ministry of Finance. The BMA has evolved as a supervisor, regulator and inspector of financial institutions in accordance with the evolution of international standards. Over the last decade the organization's powers have been bolstered by legislative amendments to the *Insurance Act* 1978 (Insurance Act) which contains the legal framework for insurance regulation in Bermuda.

The BMA maintains a distinct Insurance Division comprised of a Supervisor of Insurance, technical analysts and other staff focusing solely on the regulation of insurers.

What are the categories of insurance licenses that exist?

The *Insurance Act* divides insurance companies by type of risk into two main categories:

i. general business (products liability, property, casualty, etc); and

ii. long-term business (life, annuity, health etc))

General business insurers are registered under one of six classes and long-term insurers under one of five classes.

General Business

The classes are:

- **Class 1:** Pure captives or companies that write coverage for a group of affiliates;
- **Class 2:** Insurers owned by unrelated shareholders that insure the risks of any of those shareholders or their affiliates and also insure business that is connected with the operations of the shareholders or their affiliates;
- **Class 3:** Captive insurers underwriting more than 20 percent and less than 50 percent, unrelated business;
- **Class 3A:** Small commercial insurers whose percentage of unrelated business represents 50 percent or more of net premiums written or loss and loss expensive provisions, and where the unrelated business net premiums are less than USD 50 million;
- **Class 3B:** Large commercial insurers whose percentage of unrelated business represents 50 percent or more of net premiums written or loss and loss expensive provisions, and where the unrelated business net premiums are more than USD 50 million; and
- **Class 4:** Insurers and reinsurers capitalized at a minimum of USD 100 million underwriting direct excess liability and/or property catastrophe reinsurance risk.

Long-term insurers

- **Class A:** Where the insurer is wholly owned by one person or is an affiliate of a group and intends to carry on long-term business.
- **Class B:** Where the insurer is wholly owned by two or more unrelated persons and intends to carry on long-term business. The applicant will have to meet certain criteria.
- **Class C:** Insurer has total assets of less than USD 250 million and is not registrable as a Class A or Class B insurer (all companies which reinsure affiliates or are permit companies).
- **Class D:** Insurer has total assets of USD 250 million or more but less than USD 500 million and is not registrable as a Class A or Class B insurer.
- **Class E:** Insurer has total assets of more than USD 500 million and is not registrable as a Class A or Class B insurer.

The BMA may issue a license to a Special Purpose Insurer (SPI) to transfer risks to the capital markets in the form of cat bonds and other securitizations, derivatives and swaps.

To qualify for registration as an SPI, the applicant will have to meet certain criteria.

The BMA may issue a composite licence in certain rare and limited circumstances which would allow a single vehicle to write both general and long-term business.

The BMA recognizes that there might be circumstances that require an insurer to be licensed in a different classification than otherwise might be required and the legislation reserves for the BMA the capacity to do so.

Are insurance companies subject to taxes beyond the ordinary burden faced by all companies?

In Bermuda, there are no taxes on profits, income or dividends, nor is there any capital gains tax, estate duty or death duty. Profits can be accumulated and it is not obligatory to pay dividends. A certificate, issued by the Ministry of Finance upon application, currently extends the no-tax guarantee to the year 2035.

The only "tax" imposed on an exempted company (so long as it does not have an office with employees in Bermuda) is an annual government fee. The first payment of such fee is made immediately upon incorporation and subsequent payments are made in January of each year.

All exempted companies with employees in Bermuda must pay a payroll tax which is calculated according to total remuneration paid to employees for services performed wholly or mainly in Bermuda up to a maximum of USD 750,000 annually per employee. Remuneration received by an employee that exceeds USD 750,000 will not be subject to payroll tax. Currently, exempted companies are taxed at the rate of 14 percent but may withhold up to 5.25 percent of an employee's salary to be applied to the payroll tax liability in respect of that employee. Returns must be filed and paid within 15 days of the end of every quarterly tax period. There is a penalty for failure to do so.

What are the approved distribution channels? Are there restrictions?

The *Insurance Act* applies to any persons carrying on insurance business in or from Bermuda, and requires the registration of all insurers as well as insurance managers, brokers and agents. Insurance managers must maintain an accurate list of all insurers for which they act as insurance manager and must, if required by the BMA, provide the BMA with a copy of that list. In relation to any insurance contract to which an insurer is a party and in relation to which an insurance broker, agent or salesman has apparent authority to act for the insurer and receives a premium under the contract, both the broker, agent or salesman is deemed to be the agent of the insurer and the insurer is deemed to have received the premium.

Are there any forms of compulsory insurance?

Yes, there are a number of types of compulsory insurance in Bermuda – the most common forms of compulsory insurance being motor vehicle insurance and professional indemnity insurance for certain providers of professional services such as solicitors, accountants and insurance intermediaries. There is also an obligation upon all employers to provide major medical insurance to their staff.

What major insurance/reinsurance legislation is on the horizon?

In July 2015, the BMA published a series of Insurance (Prudential Standards) (Solvency Requirement) Amendment Rules 2015 (the Rules). These Rules formed part of the regulatory framework which established an Economic Balance Sheet (EBS). The EBS is contained in Schedule XIV of the Rules and it includes a requirement for an Actuary's Opinion (Schedule XV) to be provided on the insurance technical provisions. The EBS requirements apply to Class 3A, Class 3B, Class 4, Class C, Class D, Class E insurers (collectively commercial insurers) and Insurance Groups.

The EBS does not have a formal audit requirement, and as such, the provision of a formal actuarial opinion gives the Authority assurance as to the reasonableness of the insurance technical provisions contained in the EBS.

The EBS framework, including the valuation requirements, comes into effect on 1st January 2016, and applies to all commercial insurers and Groups. In effect, the first reporting required under the new Rules will be due after the end of the financial year commencing on or after 1st January 2016 – in most cases this will be in 2017.

The BMA has drafted a Guidance Note (GN) entitled "Actuary's Opinion on EBS Technical Provisions" (EBS AO) in order to provide guidance on the BMA's expectations for the provision of such Opinions. The EBS AO replaces the existing reserve opinion requirements for the commercial classes.

Bermuda

Market Entry

What are the requirements/procedures for setting up a new insurance or reinsurance company?

Setting up a (re)insurance company in Bermuda is a relatively straightforward process that can usually be completed within a two-week period provided all the relevant information is given to the lawyers and the regulators do not have any substantive questions about the insurance, or the structure, of the proposed insurance company's program.

A Bermuda insurance company is normally established and able to commence business by a process that includes:

- a pre-vetting of the proposed insurance program of the company
- incorporating the company
- organizing the company
- registering the company as an insurer under the *Insurance Act*

Every insurer is required to maintain a principal office in Bermuda and to have a principal representative in Bermuda. In most cases, the latter will be the insurer's insurance manager and the principal office will be the office of the insurance manager.

Is it mandatory that a company be physically present in the market (HQ or branch office) to write insurance/ reinsurance policies?

Any company proposing to carry on insurance business in Bermuda must be authorized by the BMA to do so. In addition, as of 1 January 2016, every Class 3A, Class 3B, Class 4, Class C, Class D and Class E insurer must maintain its head office in Bermuda.

An overseas company, that is to say a company incorporated outside Bermuda which seeks to "engage in or carry on any trade or business in Bermuda", may only do so with a permit issued by the Minister of Finance.

Such companies are referred to as "permit companies". The application procedure which normally takes from three to five days to complete, corresponds to the procedure relating to the incorporation of an exempted company.

An overseas company will not be deemed to be carrying on business in Bermuda simply because meetings of its officers or shareholders are held in Bermuda or because the company acquires, holds or deals in securities issued or created by a Bermuda entity.

Generally, a permit company will be carrying on its business and will only be allowed to do so in the same manner as an exempted company (i.e., outside Bermuda) from a place of business within Bermuda or with other exempted undertakings. It is subject to many of the provisions of the *Companies Act* that govern companies incorporated in Bermuda; for example, those relating to prospectuses required in connection with public offerings.

Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

The Non-Resident Insurance Undertakings (Long-Term Insurers) Investment in Bermuda Order 1985 requires every insurer that is a non-resident insurance undertaking (i.e., a foreign incorporated insurer writing domestic business through the medium of a resident agent pursuant to a permit granted under the *Non-Resident Insurance Undertakings Act* 1967) to keep invested in Bermuda approved assets (referred to in the Insurance Act as "investment assets value") at a level of 30 percent of the value of the insurer's domestic liabilities, being liabilities outstanding on account of the insurer's long-term business. Approved assets include mortgages on land in Bermuda, loans to the Bermuda Housing Corporation and such other assets as the BMA may approve.

The operation of certain parts of the *Companies Act*, including the compulsory winding-up provisions, has been extended to non-resident insurance undertakings.

In addition, there have been a small number of foreign insurers which have received authorization to write business directly into the Bermuda market through a combination of obtaining a permit to engage in trade or business under the *Companies Act* (see the response to the preceding question for more details) and obtaining the requisite licence from the BMA for the insurance business they intend to underwrite.

Bermuda

Is the incorporation of local companies with foreign shareholders permitted?

Most insurance companies are established as exempted companies under the *Companies Act* and are therefore exempt from the requirement (applicable to "local" companies) that at least 60 percent of the company is owned by Bermudians. The *Companies Act* therefore allows an exempted company to be 100 percent foreign owned.

Regulatory

What are the main sources for insurance and reinsurance regulatory law?

The *Insurance Act* and its related regulations apply to any person carrying on insurance business in or from within Bermuda, and provides for the registration of all insurers and insurance managers, brokers, agents and salesmen. The *Insurance Act* sets out the legal framework for insurance regulation together with the related regulations – key amongst these being the Insurance Accounts Regulations 1980 and the Insurance Returns and Solvency Regulations 1980.

The *Life Insurance Act 1978* applies to contracts of life insurance and prescribes the contents of policies, group policies and certificates.

The *Segregated Accounts Companies Act 2000* provides that any company to which the *Companies Act* applies may apply to operate segregated accounts enjoying statutory division between accounts.

Under the *Insurance Amendment Act 2008*, the BMA introduced prudential standards in relation to the Enhanced Capital Requirement (ECR) and Capital and Solvency Return (CSR).

The ECR is determined using a risk-based capital model termed the Bermuda Solvency Capital BSCR or an approved internal model.

The CSR is the return setting out the (re)insurers risk management practises and other information used by the (re)insurer to calculate its approved internal model ECR. The new capital requirements require certain classes of (re)insurers to hold available statutory capital and surplus equal to or exceeding ECR.

The Insurance Amendment Act 2010 and *Insurance Amendment (No.2) Act 2010* (2010 Amendments) provided for supplemental supervision of insurance groups. The 2010 Amendments enable the BMA to monitor the risk exposure of an insurance group and introduced a number of new statutory definitions for parent company, subsidiary company, group, insurance group and designated insurer.

Revised Rules for Eligible Capital, Group Supervision and Insurance Group Solvency requirements became effective on 1 January 2014. New group supervision rules increase the BMA's reach to be a group supervisor. They require the BMA to take into account certain matters before deciding whether it is appropriate for it to be the group supervisor of a particular insurance group.

An *Insurance Code of Conduct* (Code of Conduct) based on international standards was introduced in 2010 which builds on and codifies the governance standards already established in the Bermuda insurance market. It establishes the principle of proportionality, duties, requirements and standards, including the procedures and sound principles, to be observed by firms in the areas of:

- Corporate Governance
- Risk Management
- Governance Mechanisms
- Outsourcing
- Market Discipline
- Disclosure

Failure to comply with the Code of Conduct is a factor taken into account by the BMA in determining whether an insurer is conducting its business in a sound and prudent manner.

Please describe the current regulatory environment, including pending or anticipated regulatory reform.

Solvency and capital requirements

In line with global supervisory trends, predominantly the European Union's development of Solvency II, the movement to a risk-based supervisory approach to capital adequacy and solvency margin requirements reflects Bermuda's development of and commitment to achieving equivalency with key regulatory regimes, including *Solvency II*.

The BMA has implemented a risk-based supervisory approach to capital adequacy and solvency margin requirements. The BSCR employs a standard mathematical model that can relate more accurately the risks underwritten by (re)insurers to the capital

that is dedicated to their business. The particular framework that has been developed seeks to apply a standard measurement format to the risk associated with a (re)insurer's assets, liabilities and premiums, including a formula to take account of catastrophe risk exposure.

Confidentiality

In addition to powers under the Insurance Act to investigate the affairs of an insurer, the BMA may require certain information from an insurer (or certain other persons) to be produced to it. Further, the BMA is not prohibited from providing documentation on a registered person to other regulatory authorities, including foreign insurance regulatory authorities but subject to restrictions. For example, the BMA must be satisfied that the documentation being requested is in connection with the discharge of regulatory responsibilities of the foreign regulatory authority corresponding to the functions of the BMA under the *Insurance Act*. Further, the BMA must consider whether co-operation is in the public interest. The grounds for disclosure are limited and the *Insurance Act* provides sanctions for breach of the statutory duty of confidentiality.

Supervision

Legislation enacted in 2010 introduced a group-wide supervisory regime into the Bermuda regulatory landscape, initially applicable principally to the large commercial insurance and reinsurance groups defined as Class 3B and Class 4 registrants in the Bermuda insurance industry, and now extended to Class 3A, as well as Classes C, D and E insurers.

The purpose of the new supervisory regime is to enable the BMA to form a comprehensive view of the overall risk exposure of an insurance group and further prepares the Bermuda market for achieving regulatory compliance under the European Union's *Solvency II Directive*.

Corporate governance

The Insurance Amendment Act 2004 provided a framework for the BMA to publish guidance notes on various aspects of the operation of insurance business as part of the move from a solvency-based regulatory approach to a risk-based approach to insurance regulation. The guidance notes also require insurers to evaluate their corporate governance and internal controls or, at the very least, require them to assess the adequacy of their corporate practices against the standards specified in the various guidance notes. In particular, insurers should carefully review the notes related to corporate governance and risk management, internal controls, insurance activity and investments.

The *Code of Conduct* requires every insurer to establish and maintain a sound corporate governance framework, having regard for international best practice. Corporate governance, as espoused by the *Code,* includes principles on corporate discipline, accountability, responsibility, compliance and oversight.

The board of directors of each insurer is responsible for the sound and prudent management of the insurer and, ultimately, for compliance with the *Code of Conduct*.

Reporting requirements

The Insurance Act requires an insurer registered in Bermuda to prepare financial statements in respect of its insurance business for each financial year. These financial statements must be in the format prescribed on the Insurance Returns and Solvency Regulations 1980 and must be submitted to the BMA as part of the annual statutory financial return (**Return**). The Return is filed with the BMA annually but is not available for public inspection.

In addition, the larger commercial carriers (i.e., Class 3A, 3B, 4 and Class E (re) insurers) must also file a copy of their audited general purposed financial statements with the BMA each year. The audited financial statements must be compliant with IFRS or prepared in accordance with GAAP for a recognized jurisdiction such as USA, UK or Canada and they will be available for public inspection via the BMA website.

Consumer protection

There are no substantive consumer protection bodies which provide consumers with increased remedies beyond general insurance contract law.

Broker remuneration

In relation to any insurance contract to which an insurer is a party and in relation to which an insurance broker, agent or salesman has apparent authority to act for the insurer, and receives a premium under the contract, both the broker, agent or salesman is deemed to be the agent of the insurer and the insurer is deemed to have received the premium.

Bermuda

Claims

What are the main sources for contract law?

The Bermuda market sells insurance policies with a standardized excess liability wording known as the Bermuda Form policy. The policy is made subject to an amended form of New York law but its arbitration provisions usually name either London or Bermuda as the seat of arbitration and consequential curial law. A similar standardized wording for the excess market is available called the Bermuda Shorts Form.

In general, is the substantive law relating to insurance more favorable to insurers or insureds?

The BMA's primary objectives of insurance supervision are policyholder protection and development of the Bermuda (re)insurance market.

The BMA applies a risk-based regulatory approach that assesses the nature, scale and complexity of entities seeking to conduct business in Bermuda, their related risk and the level of sophistication of the clients involved, and supervises them accordingly.

What is the statute of limitations on claims?

Six years for contractual claims. Please refer to the *Limitation Act 1984.*

Can a third party bring direct action against an insurer?

As a result of the doctrine of privity of contract, there is no provision for a third party to bring direct action against an insurer.

Can an insured bring a direct action against a reinsurer?

There is no privity of contract between an insured and a reinsurer, and Bermudian law retains the strict common law doctrine of privity. An express provision in a reinsurance contract purporting to confer on the insured a right to claim directly from the reinsurer (cut-through clause) is generally ineffective under Bermuda contract law.

Dispute Resolution

Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

The Supreme Court is the principal trial court in Bermuda. It comprises a Chief Justice and several Puisne Judges. The Court of Appeal hears appeals from the Supreme Court, and there is a further and ultimate right of appeal from the Court of Appeal to the Judicial Committee of the Privy Council in England. The Privy Council sits before a panel comprising members of the English House of Lords and certain senior Commonwealth appellate judges. The Supreme Court is bound by the decisions of the Court of Appeal which, in turn, is bound by decisions of the Privy Council.

Of great significance for the international business sector is the Commercial Division of the Supreme Court which specializes in commercial actions. Commercial cases are allocated to specialist Commercial Judges (currently three). This ensures that judges with commercial expertise and experience hear commercial matters. Furthermore, with a separate cause list, commercial cases are heard more expeditiously than in the not too distant past.

What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of a) parties to the action and b) non-parties to the action?

The process of discovery in ordinary litigation before the Bermuda courts is governed by the same rules as those set out in the *Rules of Supreme Court* in force in England and Wales in 1999 prior to the introduction of the *Civil Procedure Rules*. The court may make orders limiting or targeting discovery, or adapting its processes to take account of the challenges posed by the identification and storage of information generated by modern electronic processes.

Each party to an action begun by writ is under an obligation to make discovery (i.e. to disclose relevant documents) to each other. Each party must disclose to the other all of the documents relevant to the claim in their possession, custody or control. Discovery obligations must be taken very seriously. A wide approach must be taken to the question of relevance and the parties must assume it covers all documents which relate to the matters in issue in the litigation, regardless of whether they help a case or harm it.

A party may submit an application requiring the other side to disclose specific documents which appear to be missing from those already disclosed.

As in England, a party may obtain an order under the principles set down in *Norwich Pharmacal Co. v Commissioners of Customs and Excise* [1973] 2 All ER 943 which requires a respondent to disclose certain documents or information to the plaintiff. The plaintiff must establish that (i) the order is necessary in the interests of justice, (ii) the target of the order is mixed up in the alleged wrongdoing but (iii) is unlikely to be a defendant to the principal action.

Are mediation and arbitration common methods for solving insurance disputes? Are more disputes resolved in or out of court?

Arbitration is a common and preferred approach in Bermuda for resolving (re)insurance disputes, with the vast majority of contracts stipulating arbitration as the exclusive forum for dispute resolution.

(Re)insurance arbitrations in Bermuda are generally subject to the *Bermuda International Conciliation and Arbitration Act 1993* (Arbitration Act) which governs international commercial arbitration and the enforcement of foreign arbitral awards. It enacts the UNCITRAL Model Law on International Commercial Arbitration.

In the event a dispute is not subject to arbitration, it will be heard before the Commercial Division of the Supreme Court.

The Bermuda legislation and authorities set-out a strong pro-arbitration legal framework. Where parties have agreed to settle a dispute by arbitration, particularly through international arbitration applicable as defined in the *Arbitration Act*, the Bermuda Courts will generally show substantial deference to the arbitration tribunal and will not interfere except to give effect to an award or interim procedural order of the tribunal, or preserve the subject matter of the arbitration where the tribunal lacks jurisdictional or procedural powers to do so.

What are the provisions regarding timely notice, and what are the legal consequences for non-compliance with the timely notice obligation?

There is no statutory or regulatory obligation to provide timely notice of actual or potential claims.

In the vast majority of cases, the extent to which a (re) insurer may avoid a claim on the basis of a failure to provide timely notice will be a matter of the express terms of the policy. Whether, in the absence of an express term in the policy requiring notice, such an obligation may be implied is a matter of controversy.

What can be said is that in order to make out an arguable case for implication of such a term, a (re) insurer would be required to demonstrate that the implied term contended for is either necessary to give business efficacy to the policy or necessarily imposed as an extension of the insured's duty of good faith.

An example where these grounds might be made out is where a (re)insurer is entitled under the express terms of the policy to charge additional premium following notification or payment of a claim.

What are the laws regarding bad faith claims? What damages may be awarded if the insurer is found to have acted in bad faith?

There is no statutory basis for bad faith claims against (re)insurers in Bermuda. Similarly, at present there is no applicable Bermuda common law precedent for bad faith claims.

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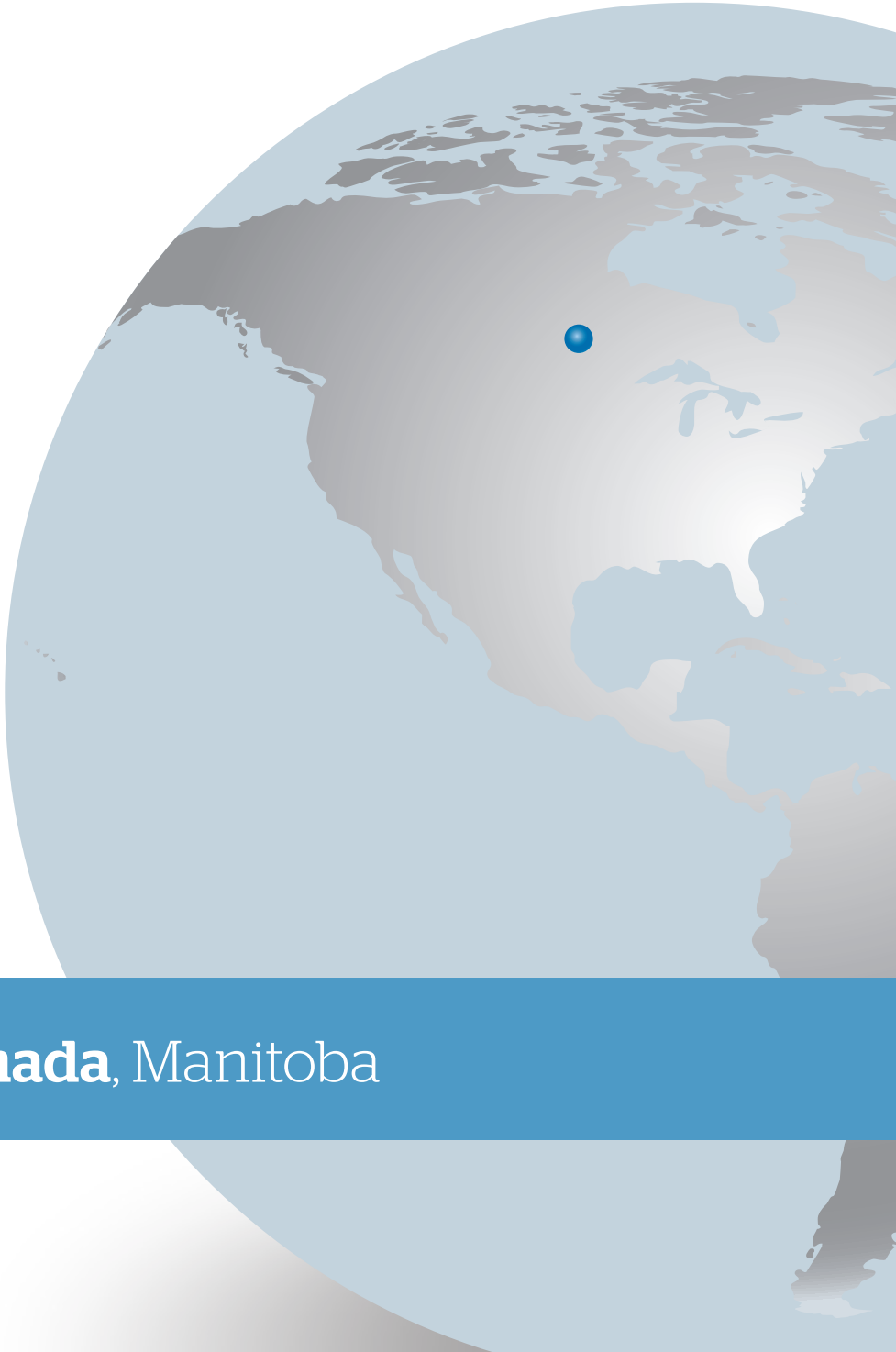

Canada, Manitoba

Manitoba

Prepared by Thompson Dorfman Sweatman LLP
Lex Mundi Member Firm for Canada, Manitoba

Overview

Which government bodies/agencies regulate insurance and reinsurance companies?

The Manitoba Department of Finance, Financial Institutions Regulation Branch (FIRB), Superintendent of Financial Institutions- Insurance regulates insurers and reinsurers in Manitoba. The FIRB was established in 2010, but the predecessor Office of the Superintendent of Insurance was first established in 1906.

What are the categories of insurance licenses that exist?

(a) Accident
(b) Aircraft
(c) Automobile
(d) Boiler and machinery
(e) Credit
(f) Employers' liability
(g) Endowment
(h) Fidelity
(i) Fire
(j) Guarantee
(k) Hail
(l) Inland transportation
(m) Legal expense
(n) Life
(o) Livestock
(p) Marine
(q) Mortgage
(r) Personal property
(s) Plate glass
(t) Property Damage
(u) Public liability
(v) Sickness
(w) Sprinkler leakage
(x) Surety insurance
(y) Theft
(z) Title
(aa) Weather
(ab) Workers compensation

Are insurance companies subject to taxes beyond the ordinary burden faced by all companies?

Insurance companies in Manitoba are subject to the same general taxes as all other businesses in Manitoba, but in addition pursuant to the provisions of *The Insurance Corporations Tax Act* S.M. 1992, c.52 as amended must pay a tax of two percent of the net amount of the premiums payable under contracts of accident insurance, life insurance and sickness insurance, and three percent of the net amount of the premiums payable under any other contract of insurance.

What are the approved distribution channels? Are there restrictions?

The presently approved distribution channels in Manitoba are as follows:

- Independent brokers and agents;
- captive agents; and
- direct writing.

Are there any forms of compulsory insurance?

Automobile insurance is compulsory in Manitoba, and is provided by a Crown Corporation (i.e. Government owned), The Manitoba Public Insurance Corporation (MPI). As well, various professional groups in Manitoba must compulsorily carry errors and omissions liability insurance, including for example, lawyers, engineers, architects, insurance agents, brokers, medical doctors and several other professions.

What major insurance/reinsurance legislation is on the horizon?

Several amendments have been proposed for *The Insurance Act*, R.S.M. 1987, c. I40 which were to have been proclaimed into existence on July 1, 2014, though now delayed indefinitely. They principally involve the following:

- Permitting recovery by innocent multiple insureds;
- limiting recovery to proportionate interest of multiple insureds;
- prohibiting certain exclusions in property policies;
- limitation period revised to delete Statutory Condition No. 14 and providing for a period of two years after the date the insured knew or ought to have known that loss or damage occurred;
- significant changes to the appraisal process including providing that umpires will now be bound by the rules of procedural fairness in carrying out their function;
- provisions for agreeing in writing to a joint survey, examination, estimate or appraisal;

- expansion of the basis for statutory estoppel against property insurers;
- subrogation provisions altered to provide a mechanism to apply to the Court for conduct and control of any subrogated action, and a provision that settlements and Releases will not bar the rights of the insured or the insurer unless they have concurred in the settlement;
- expanding the duty to disclose to apply to applications for additional coverage, but in such instances limiting relief to disclosure/ misrepresentations rendering contracts voidable only in relation to the addition, increase or change of insurance;
- extending the grace period after policy lapse due to non-payment of premiums for a period of a further 30 days, for effectively a total of 60 days (i.e. 30 days before lapse, 30 days after);
- proof of insurability not required within the incremental 30 days after policy lapse;
- limitation period under life policies will be increased from the existing one year to two years, and specifically stated to arise not later than the earlier of two years after the date evidence is provided to the insurer, or six years after the date of death;
- limitation period for disability benefits changed to two years after the date the claimant knew or ought to have known of the first instance of the loss or occurrence giving rise to the claim;
- insurance brokers and agents will be permitted to offer reasonable customer inducements, such as loyalty reward programs;
- a broker or agent will no longer be prohibited from charging a fee on commercial insurance transactions in which a commission is also earned;
- amendments to facilitate and regulate electronic transactions under *The Insurance Act;*
- authorization for regulations to be enacted directing how insurers may use information about the credit status of policy holders and applicants for property insurance relating to a residence;
- provide legislative authority for licensing of incidental sellers of insurance;
- provide legislative authority to introduce regulations on the use of credit scores;
- provide for recognition of electronic means of communicating in insurance transactions including its use for termination of contracts, subject to a consumer's prior consent;
- provide for allowing use of electronic signatures for designation of beneficiaries in life and accident and sickness insurance, subject to a consumer's prior consent;
- provide legislative authority to introduce regulations dealing with the market conduct of insurers who market or sell products electronically; and
- provisions to clarify the appeal processes involving brokers and agents disciplined by The Insurance Council of Manitoba.

Market Entry

What are the requirements/procedures for setting up a new insurance or reinsurance company?

The requirements/procedures for establishing a new insurance or reinsurance company in Manitoba, as well as its continuing governance are set out in *The Insurance Act* Sections 22 through 87 inclusive. Copies of the cited Sections of *The Insurance Act* are appended as Appendix "A".

As it happens, however, almost no insurers choose to incorporate in Manitoba. In fact, at this point there remains only one Manitoba incorporated insurer. There are, however, several Manitoba-organized fraternal insurance societies and reciprocal insurance exchanges.

In Canada almost all insurers of any size are federally incorporated, but licensed by various provinces of their choosing to transact business in those provinces. As noted above, an exception in Manitoba lies with fraternal organizations, insurance reciprocals and the like, typically smaller affiliation insurance operations which do not have a scope beyond their province of incorporation, and by definition quite parochial in their operations.

Manitoba

Is it mandatory that a company be physically present in the market (HQ or branch office) to write insurance/ reinsurance policies?

It is not mandatory that a company be physically present in Manitoba, either by virtue of headquarters or a branch office, to write insurance/reinsurance policies. Rather, the company must simply be licensed to carry on business in Manitoba pursuant to the provisions of The Insurance Act.

Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Foreign insurers are able to write business directly if licensed in Manitoba.

Is the incorporation of local companies with foreign shareholders permitted?

The incorporation of local companies with foreign shareholders is permitted in Manitoba, though a minimum of one third of the directors must be Canadian residents.

Regulatory

What are the main sources for insurance and reinsurance regulatory law?

The main sources for insurance and reinsurance regulatory law in Manitoba are a combination of the (federal) Insurance Companies Act, S.C. 1991, c. 47 as well as The Insurance Act, and numerous Regulations enacted under both the federal and provincial statutes. A list of the Regulations enacted under The Insurance Act is appended as Appendix "B".

Please describe the current regulatory environment, including pending or anticipated regulatory reform.

The current insurance regulatory climate in Manitoba including pending or anticipated reform is as follows:

- The Solvency and capital requirements are as specified in Manitoba Regulation 174/97, a copy of which is appended as Appendix "B". Essentially, they require capital stock of not less than USD 4,000,000.00 subscribed for in good faith, allotted and fully paid, together with an unimpaired surplus of not less than USD 1,000,000.00.
- At present there is minimal confidentiality for insurers under The Manitoba Insurance Act. To promote greater risk-based self-evaluation, however, the proposed amendments to the Act will provide that insurers who conduct their own compliance audits have a limited privilege in relation to the audit documentation.
- The supervisory function of the Superintendent of Insurance is more of an advisory and reactive supervision, than a proactive one. Under the proposed amendments to The Insurance Act, that situation does not change significantly.
- As noted elsewhere, Sections 41.1 to 41.25 of The Insurance Act deal with governance matters, and are quite detailed. The regulatory climate toward governance in Manitoba, as elsewhere, is in the ascending phase, and the Act contains relatively stringent requirements in respect of Corporate Audit Committees, Conduct Committees, and so on.
- Detailed Annual Reports are required from each insurer in accordance with various provisions of The Insurance Act mandating such reports, including gross premium dollars written, and other statistical information required by the Office of the Superintendent of Insurance for evaluation and calculation of taxes and fees, among other things. Among other requirements, insurers must file copies of all Corporate Bylaws enacted, an Annual Statement every year relating to the condition of affairs of the insurer as at December 31 of the preceding year, as well as a wealth of other statistical information.
- Consumer protection initiatives are in the ascending phase presently under The Manitoba Insurance Act and Regulations enacted thereunder. Under the proposed pending amendments to The Insurance Act and Regulations are the following:
    - life and Accident and Sickness Insurance provisions to be amended to allow consumers to have greater access to documents they may need from an insurer at the time of claim;

- restrictive prohibitions to be eliminated so that insurers and agents/brokers may offer consumer inducements such as common loyalty award programs;
- provisions to improve the dispute resolution process between insurers and policyholders;
- provisions to protect innocent persons from loss of property coverage due to the intentional acts of co-insureds or other persons;
- provisions requiring long term disability plan sponsors to disclose to members if a plan is uninsured.

Presently brokers and agents are restricted to solely earning commission income in Manitoba. The proposed amendments to The Insurance Act will eliminate the restrictive prohibitions on agents and brokers so that they may charge a fee on commercial insurance policies on which a commission will also be paid. As well, as earlier noted, restrictive prohibitions prohibiting agents and brokers from offering consumer inducements such as common loyalty reward programs will be abolished.

Claims

What are the main sources for contract law?

The main sources for contract law in Manitoba are the Anglo-Canadian Common Law of Contract, as supplanted or displaced by various provisions contained in The Manitoba Insurance Act.

In general, is the substantive law relating to insurance more favorable to insurers or insureds?

In general, the substantive law relating to insurance does not favor insurers or insureds with the possible exception of the recent decision of the Ontario Court of Appeal extending (Judicature Act) relief from forfeiture for pre-loss breach of Policy conditions, in circumstances where prior thereto only post-loss events causing loss of coverage could be relieved against. The Courts of Manitoba are more likely than not to follow the Ontario Court of Appeal in that regard.

What is the statute of limitations on claims?

Subject to the pending limitation period revisions discussed above, the relevant limitation periods presently governing claims in Manitoba are as follows:

Fire and Property Insurance

Within two years next after the loss or damage occurs (Statutory Condition No. 14 located in Section 142 of The Insurance Act).

Life Insurance

Not more than one year after the furnishing of the evidence required by the proof of claim provisions of the Act, being the customary statistical information about date of death, name of beneficiary and so on, or more than six years after the happening of the event upon the insurance money becomes payable, whichever period first expires.

Accident and Sickness Insurance

Not more than one year after the date the insurance money becomes payable or would have become payable if there had been a valid claim. By way of explanatory note, all monies become payable under sickness and accident policies in Manitoba within 60 days after an insurer has received proof of claim. Notice of claim is required within 30 days of the date upon which the claim had arose, and proof of claim is required within 90 days from the date of claim. (accident and sickness insurance Statutory Conditions 12 and 7 contained in Section 211 of The Insurance Act).

Breach of insurer's contractual obligations e.g. the duty to defend in liability coverage-six (6) years.

As noted above, the limitation provisions affecting certain insurance claims were to be amended effective July 1, 2014, now postponed indefinitely.

Can a third party bring direct action against an insurer?

Third parties suffering injury to the person or property who obtain judgment against an insured which goes unsatisfied may sue the defendant judgment debtor's insurer directly on the judgment up to the face value of the policy, but subject to the equities as between the insurer and the insured.

Non-judgment creditor third parties can also bring direct action against an insurer on an assignment

basis; that is, it is not uncommon for a plaintiff to take judgment by consent against a defendant whose insurer has denied coverage, undertake not to execute judgment, take an assignment of the insured's rights against the insurer, and thereafter pursue the insurer directly in an action commenced in the third party's own name, again subject to the equities existing as between the insurer and the insured.

Can an insured bring a direct action against a reinsurer?

An insured cannot maintain a direct action against a reinsurer in Manitoba.

Dispute Resolution

Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

The Manitoba Court of Queen's Bench is the Superior Trial Court in which insurance claims are typically heard in Manitoba. The Small Claims division deals with claims up to but not beyond USD 10,000.00. The regular division of the Court of Queen's Bench has an expedited process under Rule 20A under the Queen's Bench Rules to deal with claims under USD 100,000.00 with truncated rights of documentary production, discovery, and so on. Otherwise, claims in excess of USD 100,000.00 proceed under the ordinary provisions of the Court of Queen's Bench Rules.

What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of a) parties to the action and b) non-parties to the action?

The Court of Queen's Bench Act mandates and contains the power, if necessary, to order the disclosure/discovery and inspection of all relevant documents in the possession, power and control of the parties to an action. As well, the Court can order non-parties to attend on examination and to produce relevant documents on discovery. Queen's Bench Rule 30 governs the disclosure, discovery and inspection of documents in the possession of parties, as well as non-parties.

Are mediation and arbitration common methods for solving insurance disputes? Are more disputes resolved in or out of court?

Mediation and arbitration are common methods used for resolving insurance disputes in Manitoba, but only consensually. There is no mandatory mediation in Manitoba either under The Insurance Act or the Queen's Bench Rules. In all likelihood more disputes are resolved out of Court than in Court. There are no particular factors affecting that dynamic in Manitoba other than mediated resolutions typically contain a confidentiality provision, and to that extent are viewed as advantageous by both insurers and insureds alike.

What are the provisions regarding timely notice, and what are the legal consequences for non-compliance with the timely notice obligation?

In Manitoba, Notice of Claim must be provided promptly to insurers regarding claims under all types of insurance. The relevant provisions are as follows:

Property Claims

Notice to be given forthwith upon the occurrence of any loss or damage to property (Statutory Condition 6 contained in Section 142 of The Insurance Act);

There is no statutory provision relating to the consequence of failure to give timely notice for proof of loss in respect of property claims in Manitoba; however, any action is time-barred two (2) years after the date of loss or damage;

Life Claims

No statutory notice period is prescribed. However, the latest an action may be commenced is six years after the death of the insured, while benefits are payable 30 days after proof of the claim is submitted (Sections 180 and 184 of The Insurance Act);

There is no statutory provision relating to timely notice in Manitoba in respect of life claims.

Rather, as noted in (i) above, the latest an action may be commenced is six years after the death of the insured, while benefits are payable 30 days after proof of claim is submitted. Accordingly, notice of claim and proof of claim at any time during the six

years referenced is deemed to be adequate in the circumstances.

Accident and Sickness Claims

Notice to be given not later than 30 days from the date a claim arises under the contract (Statutory Condition 7(1) contained in Section 211 of The Insurance Act);

Failure to give notice of claim or furnish proof of claim within the times prescribed does not invalidate the claim if the notice or proof is given as soon as reasonably possible, and in no event later than one year from the date of the accident or the date a claim arises under the contract on account of sickness or disability, if it is shown that it was not reasonably possible to give notice or furnish proof within the times prescribed (Statutory Condition 7(2) contained in Section 211 of The Insurance Act).

Under the liability coverage provisions of various types of insurance policies in Manitoba, including CGL policies, at common law the absence of timely notice can lead to forfeiture of coverage, particularly if an insurer can be said to have been actually prejudiced by the late notice; that is, by not having an adequate or any opportunity to investigate the circumstances giving rise to any particular claim, notably where witnesses or property go missing, or the physical evidence has been disturbed or destroyed. In appropriate cases, however, where no genuine breach of a condition precedent has occurred (i.e. there has been at the least substantial compliance), relief from forfeiture is likely available in respect of pre-loss forfeitures (undecided in Manitoba, but likely to follow Ontario's recent judicial lead, The Court of Queen's Bench Act, Section 35), and is definitely available in respect of post-loss forfeitures (The Insurance Act, Section 130).

What are the laws regarding bad faith claims? What damages may be awarded if the insurer is found to have acted in bad faith?

Bad faith claims in Manitoba are governed solely by common law, and are not statutory. In Manitoba, as established by the Supreme Court of Canada for all of Canada, aggravated damages and punitive damages can be awarded for bad faith in an appropriate case. The Supreme Court of Canada had several years ago suggested that an appropriate upper limit for punitive damages lies in the range of USD 100,000.00, with most awards fetching substantially less, though the USD 400,000.00 mark is not at all out of range per recent decided cases at the provincial appellate level throughout Canada. In a very recent exceptional Saskatchewan case presently under appeal, the Saskatchewan Court of Queen's Bench awarded punitive damages of USD 4,000,000.00 against Zurich General Insurance Company.

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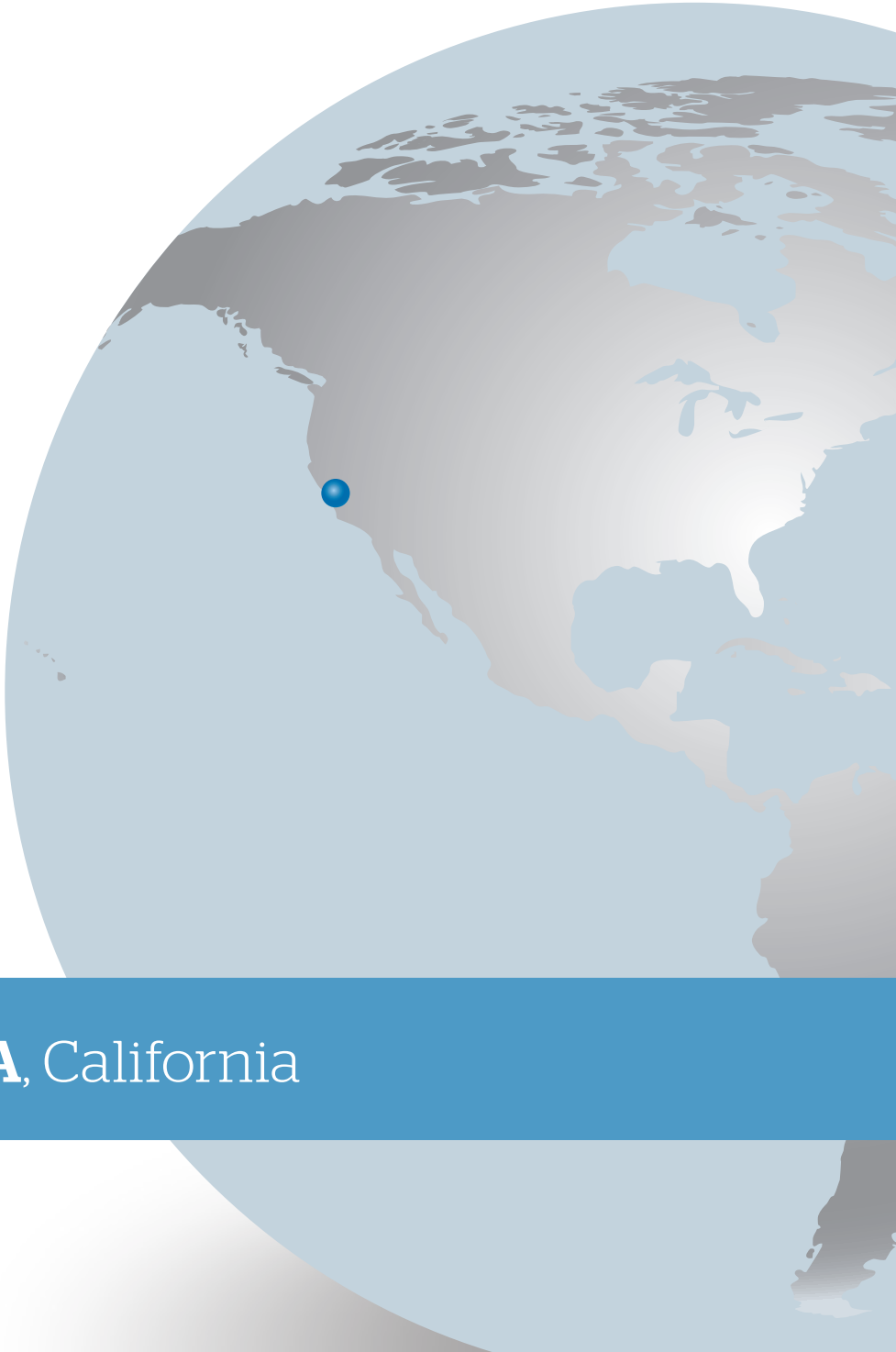

USA, California

California

Prepared by Morrison & Foerster LLP
Lex Mundi Member Firm for USA, California

Overview

Which government bodies/agencies regulate insurance and reinsurance companies?

The California Department of Insurance ("CDI") is the California regulating authority. The CDI was first created in 1868.

What are the categories of insurance licenses that exist?

To operate in California, all insurers must gain admittance by obtaining a Certificate of Authority. Cal. Ins. Code § 700, *et seq.*

Are insurance companies subject to taxes beyond the ordinary burden faced by all companies?

Yes. In addition to tax on gross premiums, California imposes a retaliatory tax and an ocean marine tax. Surplus lines brokers are also subject to a tax on policies placed with non-admitted insurers.

What are the approved distribution channels? Are there restrictions?

In California, we have standard distribution channels through insurance agents and brokers. Insurance intermediaries are subject to the licensing requirements of the CDI.

Are there any forms of compulsory insurance?

Drivers in California must meet the financial responsibility obligations required by state law, which are typically satisfied by purchasing auto insurance. Mandatory health coverage is beyond the scope of this note.

What major insurance/reinsurance legislation is on the horizon?

None at this time.

Market Entry

What are the requirements/procedures for setting up a new insurance or reinsurance company?

Insurers that wish to conduct business in California must apply for a Certificate of Authority from the CDI. The CDI accepts the National Association of Insurance Commissioner's ("NAIC") Uniform Certificate of Authority Application ("UCAA"). The CDI requires the submission a Plan of Operation, which should set forth the insurance products that the applicant wishes to offer, the sales and distribution channels for such products, and the details of its underwriting operations, claims function, investments, and security. Any newly formed insurance company that wishes to sell securities must obtain an organization permit from the CDI by filing an application drafted in accordance with the *California Insurance Code*.

Is it mandatory that a company be physically present in the market (HQ or branch office) to write insurance/reinsurance policies?

No. However, foreign insurers (i.e., insurance carriers organized in the United States, but not organized under the laws of California) and alien insurers (i.e., insurers organized under the laws of another country) must obtain name approval from the California Secretary of State and designate an agent for service of process in California.

Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Foreign and alien insurers are permitted to write business directly in California provided a Certificate of Authority is obtained from the CDI. Alien insurers are required to make a deposit for the benefit and security of policyholders in the United States. This is typically accomplished through a trustee arrangement with a qualified bank or trust company.

Is the incorporation of local companies with foreign shareholders permitted?

Yes.

California

Regulatory

What are the main sources for insurance and reinsurance regulatory law?

The *California Insurance Code* and Title 10, Chapter 5 of the *California Code of Regulations* are the main sources for insurance and reinsurance regulatory law in California. In addition, the Insurance Commissioner publishes Precedential Decisions providing further guidance and interpretation. Federal regulation, such as the *Non-Admitted and Reinsurance Reform Act of 2010* ("NRRA"), may apply to surplus lines insurers and reinsurers.

Please describe the current regulatory environment, including pending or anticipated regulatory reform.

California is one of the largest insurance economies in the world. The CDI's recent focus has been on promulgating regulations to implement the federal *Affordable Care Act*. In addition, the current regulatory environment is consumer focused as demonstrated by initiatives to reduce premiums, prevent fraud, and pursue investigations based on consumer complaints. The CDI continues to intervene with regards to failing insurers to ensure policy holder security.

In 2013, California enacted the *Own Risk and Solvency Assessment* (ORSA) law to require insurers to maintain an effective risk management system. The law was developed in response to the 2008 economic crisis and the need for insurers to better evaluate their risks. The law is based on the NAIC's model ORSA law, which establishes regulatory oversight to assess an insurer's ability to weather severe economic stress. The legislation establishes enhanced risk management requirements and provides the CDI access to better information.

Claims

What are the main sources for contract law?

Basic contract interpretation rules as developed by precedential opinions of the California courts will apply to the interpretation of insurance contracts. In addition, the *California Insurance Code* has specific provisions applicable to insurance contracts that should be consulted. In general, California is a relatively predictable and stable jurisdiction as regards to interpretation of insurance policies.

In general, is the substantive law relating to insurance more favorable to insurers or insureds?

The law in California is more favorable to the insured. Any ambiguity in a policy of insurance will be resolved in favor of coverage. *Montrose Chem. Corp. v. Admiral Ins. Co.*, 10 Cal. 4th 645, 670 (1995). Exclusions to coverage are strictly construed against the insurer. *Minkler v. Safeco Ins. Co. of America*, 49 Cal. 4th 315, 323 (2010).

What is the statute of limitations on claims?

With respect to third-party liability claims against an insured, property damage claims must be brought within three years and bodily injury claims must be brought within two years. Cal. Code Civ. Proc. §§ 338 and 335.1. First-party disputes regarding coverage and denial of insurance benefits must be brought within four years. Cal. Code Civ. Proc. § 337. Bad faith claims must be brought within four years of the alleged breach of the implied covenant of good faith and fair dealing. *Id*. *Note*, however, that bad faith claims seeking tort damages, such as emotional distress, attorneys fees, and punitive damages, must be brought within two years. *Smyth v. USAA Prop. & Cas. Ins. Co.*, 5 Cal. App. 4th 1470, 1476-77 (1992). California recognizes exceptions to the foregoing time limitations based on equitable grounds involving fraud and concealment.

Can a third party bring direct action against an insurer?

No, unless the insurance contract has been made *expressly* for the benefit of a third party. *Jones v. Aetna Cas. & Surety Co.*, 26 Cal. App. 4th 1717, 1724-1725 (1994). Courts in California *rarely* confer standing on third parties to bring an action against an insurer absent an assignment of rights by the insured.

Can an insured bring a direct action against a reinsurer?

No. See *Ascherman v. General Reinsurance Corp.*, 183 Cal. App. 3d 307, 312 (1986).

California

Dispute Resolution

Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

The Superior Courts of the various counties in California will have jurisdiction over insurance disputes in excess of USD 25,000. The Superior Courts are courts of general jurisdiction. We do not have specialized commercial courts in the California system. As in any civil case in the United States, an insurance dispute entitles the parties to a trial by jury. Some issues, such as contract interpretation, will be left to the judge. To the extent there are disputed facts that will be determinative of the court's interpretation of an insurance policy, such factual disputes will be resolved by a jury. In addition, there may be federal jurisdiction in cases brought by a California insured against a foreign or alien insurer based on federal diversity jurisdiction when the amount in controversy exceeds USD 75,000.

What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of a) parties to the action and b) non-parties to the action?

California courts have broad discovery rules, which apply to parties and non-parties. Any document request that is likely to lead to the discovery of non-privileged, admissible evidence is appropriate. See *California Civil Discovery Act*.

Are mediation and arbitration common methods for solving insurance disputes? Are more disputes resolved in or out of court?

Mediation and arbitration of insurance disputes in California is very common. The vast majority of civil cases, including insurance disputes, are resolved out of court. Arbitration clauses in insurance contracts are presumptively valid. In addition, some insurance policies have mandatory mediation provisions, which require mediation prior to filing suit. Mediation and arbitration can avoid the expense of discovery and trial in California, which is preferable in most situations.

What are the provisions regarding timely notice, and what are the legal consequences for non-compliance with the timely notice obligation?

Timely notice requirements are contractual and will be determined by the policy terms and conditions. California is not like other jurisdictions that have mandatory policy language concerning sufficiency of notice. The notice defense is generally disfavored in California and will void coverage only if the insurer suffers prejudice as a result of the insured's failure to provide timely notice of an occurrence giving rise to a claim or a lawsuit. *Safeco Ins. Co. of America v. Parks*, 170 Cal. App. 4th 992, 1003–04 (2009). Prejudice is usually established if the insured's delay prevents the insurer from conducting an adequate investigation, or in the case of a lawsuit, the opportunity to control the defense.

What are the laws regarding bad faith claims? What damages may be awarded if the insurer is found to have acted in bad faith?

Bad faith claims in California are not statutorily based, though an insurer's violation of the *Unfair Practices Act of the California Insurance Code* may form the underlying basis for a claim. Prohibited acts include (i) misrepresentations regarding coverage, (ii) failure to act promptly upon communications, (iii) not attempting in good faith to effectuate prompt, fair, and equitable settlements of third party claims, and (iv) failure to promptly provide a reasonable explanation for the denial of insurance benefits. *Cal. Ins. Code § 790.3*.

Bad faith claims have been judicially created in California based, in part, on the implied covenant of good faith and fair dealing that is read into every contract. The claim can arise in the context of an insurer's failure to settle liability claims against the insured or the insurer's refusal to pay insurance benefits. Damages available in bad faith actions include contract damages (typically economic losses resulting from the insurer's refusal to settle or pay benefits), attorneys fees, tort damages (such as emotional distress), and punitive damages.

California

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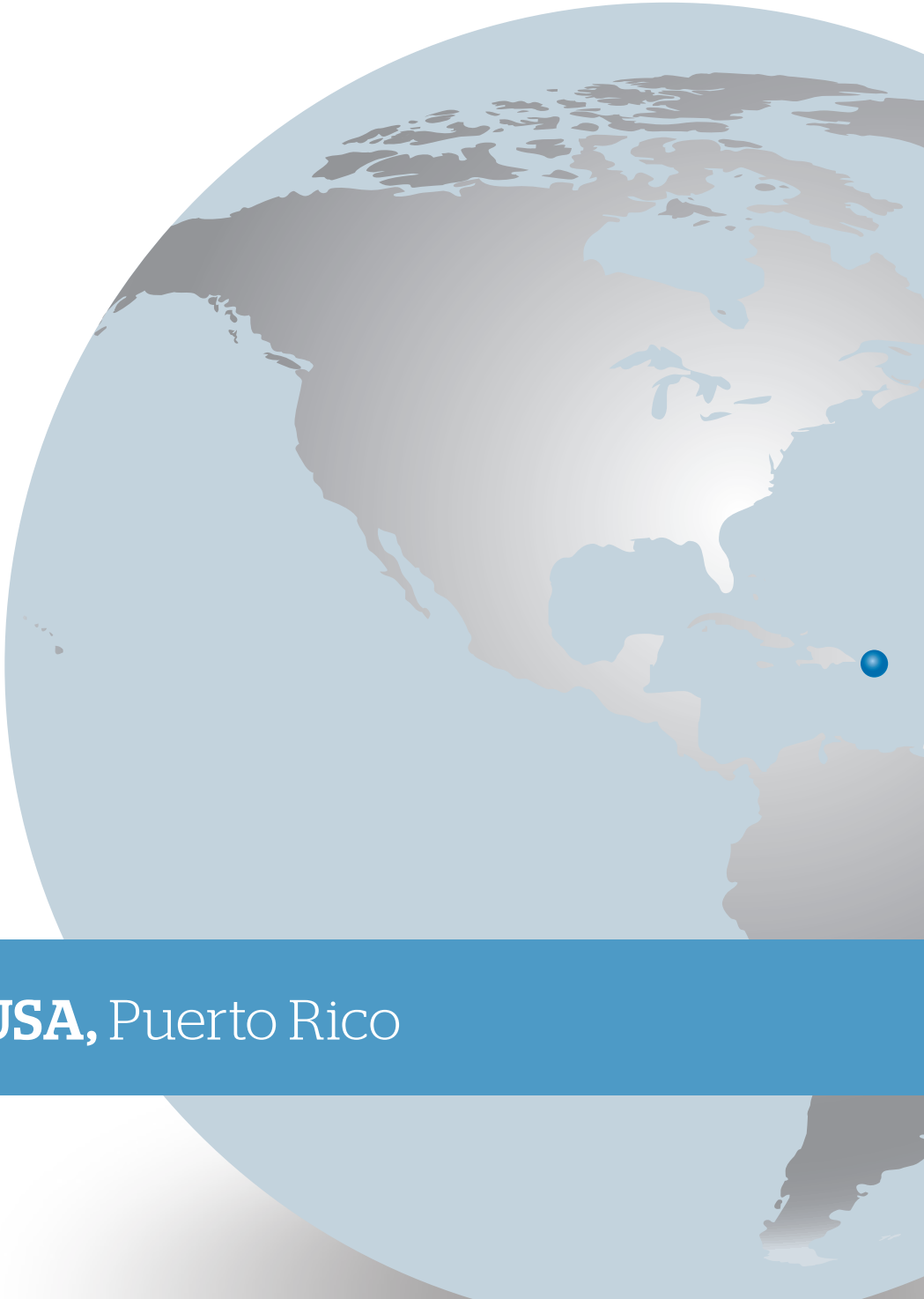

USA, Puerto Rico

Overview

Which government bodies/agencies regulate insurance and reinsurance companies?

Insurance and reinsurance companies are regulated by the Office of the Commissioner of Insurance of Puerto Rico (the "OCI"), an agency created in 1957 by Act 77-1957. The *Insurance Code* is codified in Title 26 of the *Laws of Puerto Rico Annotated* ("LPRA").

What are the categories of insurance licenses that exist?

Insurer

Domestic insurer – 26 *LPRA § 301(1).*

Foreign insurer – 26 *LPRA § 301(2).*

Insurers may be authorized to transact any one kind or combination of the following kinds of insurance, as defined in 26 *LPRA §§ 401 to 414*: life, disability, health, property, marine and transportation, agricultural, vehicle, casualty, surety and title insurance, except that a life insurer may not be authorized to contract any other kind of insurance except for disability. This limitation does not apply to insurers who engage exclusively in reinsurance.

An authorized insurer may also accept reinsurance only of the kinds of insurance which it is authorized to transact direct in Puerto Rico or elsewhere.

International Insurer

An International Insurer (as defined in 26 *LPRA § 4302(4))* may be organized or authorized under Chapter 43 of the *Insurance Code*, known as the "*International Insurers and Reinsurers Act.*"

An International Insurer may hold one or more of six classes of authority, including, among others, the authority to transact insurance or reinsurance of all types; authority to transact all types of insurance or reinsurance including high limit accident insurance and property catastrophe reinsurance; authority to transact disability insurance, life insurance and reinsurance thereof; and authority to transact risk securitization programs.

An International Insurer may not provide direct insurance on risks that reside, are located, or are to be executed in Puerto Rico, unless the international insurer has the authorization to transact surplus lines insurance pursuant to the provisions of 26 *LPRA §§ 1001 thru 1020*.

An International Insurer with Class 3, 4, or 5 authority may obtain authorization to assume reinsurance on risks that reside, are located, or are to be executed in Puerto Rico, provided that 51 percent of the premiums written by the international insurer must correspond to risks from outside of Puerto Rico.

Surplus Lines Insurer

Although not a license per se, an unauthorized insurer may become an eligible surplus lines insurer in accordance with the provisions of 26 *LPRA § 1007a*.

Other licenses (Chapter 9 of the Insurance Code)

Producer; Authorized Representative (Agent); Solicitor; General Agent; Adjuster; Insurance Consultant; Non-resident Producer; Reinsurance Intermediary. The Commissioner may grant a license as nonresident producer to any person who comes from a state or jurisdiction of the United States that has adopted the provisions of the *Model Act for Licensing Producers* approved by the National Association of Insurance commissioner and that grants to a resident producer in Puerto Rico a similar privilege.

Automobile Clubs or Associations and Service Contract Providers (Chapter 21 of the Insurance Code)

Are insurance companies subject to taxes beyond the ordinary burden faced by all companies?

All insurers authorized to conduct business in Puerto Rico (except domestic insurers with a home office that qualify for an exemption) shall pay a six percent tax on premiums and three percent tax on annuity remunerations, on insurance transacted in Puerto Rico or covering risks resident, located or to be executed in Puerto Rico. Domestic insurers who maintain a home office in Puerto Rico, are exempt from payment of this premium tax (26 *LPRA §§ 702 and 702a*). In addition, all insurers authorized to conduct business in Puerto Rico shall pay an additional one percent tax on premiums. No exemption applies in this case.

A tax equal to nine percent of the total premium collected on surplus lines coverage shall be paid by the surplus lines insurer. 26 *LPRA § 1013*. This tax does not apply to any insurance covering medical-hospital professional malpractice.

Puerto Rico

What are the approved distribution channels? Are there restrictions?

All insurance must be placed through producers or authorized representatives of the Insurer in Puerto Rico. If the insured is represented by a producer, said insurance shall be executed through the manager, general agent or authorized representative of the insurer residing in Puerto Rico. 26 *LPRA § 329*. Insurance vending machines (26 *LPRA § 951k*) and sales of insurance over the internet are also allowed.

Are there any forms of compulsory insurance?

Compulsory Motor Vehicle Liability Insurance 26 *LPRA §§ 8051 et seq*.

What major insurance/reinsurance legislation is on the horizon?

None, as of September 11, 2014.

Market Entry

What are the requirements/procedures for setting up a new insurance or reinsurance company?

To apply for an original certificate of authority an insurer seeking to become authorized to transact insurance in Puerto Rico insurer shall file with the OCI an application in the form provided by said agency for general information on the entity. The insurer shall also file or deposit with the OCI, among others, the following documents:

a. Resolution of its board of directors or other governing body, determining to transact insurance in Puerto Rico and designating the officer or officers of the insurer who shall have authority from time to time to inform the OCI as to the kind or kinds of insurance to be so transacted.

b. Corporate organization documents.

c. Copy of its most recent annual statement.

d. Copy of the report of the last examination made of the insurer, if any, certified by the insurance supervisory official of its domicile.

e. A certificate from the insurance supervisory official of its domicile stating the kinds of insurance it is authorized to transact in its domicile and the amount of its paid-in capital and surplus.

f. A certificate of consent to be sued in the courts of Puerto Rico.

g. Designation of the insurer's manager or general agent.

The following requirements also apply:

1. **Paid-in capital**

The insurer must hold, at the time of its original authorization in Puerto Rico, paid-in capital (if a stock insurer) or surplus (if a mutual insurer) in amounts which vary depending on the lines of business which the insurer intends to transact (26 *LPRA § 312*). At the time of its original authorization in Puerto Rico, the insurer must possess additional surplus equal to one-half of the surplus required under 26 *LPRA § 309*, or an additional USD 1,500,000.

2. **Deposit requirement**

Insurers organized in the United States or Puerto Rico, and insurers organized outside of the United States or Puerto Rico but authorized to conduct insurance business in one or more U.S. states, are required to deposit, and maintain on deposit, assets worth no less than the lesser of fifty percent of the amount of the paid-in capital of the insurer, or USD 1,000,000, for the protection of policyholders and creditors in Puerto Rico. 26 *LPRA § 313, 314*.

At its discretion, the OCI may require of an insurer organized outside of the United States, who is not authorized to conduct insurance business in any of the U.S. states, to also maintain in Puerto Rico such part of its assets representing reserves, or part thereof, of its insurance business in Puerto Rico. 26 LPRA § 314(2).

3. **Investment in Puerto Rico Securities**

Insurers must have and maintain invested in eligible securities (as published by the OCI from time to time) an amount not less than one-half of the required capital, if a stock insurer. In the case of foreign insurers the amount shall not be greater than USD 1,000,000. 26 *LPRA § 316*.

Puerto Rico

Incorporation and financing of a PR domestic insurer

The incorporation and capitalization of a domestic insurer should be conducted in accordance with the provisions of Chapter 28 of the *Insurance Code*. Generally, five or more individuals may incorporate a stock insurer; ten or more individuals may incorporate a mutual insurer. A majority of the incorporators shall be citizens of the United States residing in Puerto Rico. 26 *LPRA § 2804*.

The corporation must apply for and obtain a Solicitation Permit for raising capital. Actual solicitation under the solicitation permit shall be made only by individuals expressly licensed therefor by the OCI. 26 *LPRA § 2813(1)*. A sales representative license shall also be applied for in the form provided by the OCI and as per applicable requirements.

Incorporation, authorization and financing of an International Insurer

The process to incorporate and obtain authorization to act as an under the International Insurers and *Reinsurers Act* is set forth in Chapter 43 of the *Insurance Code* and shall also be subject to the provisions of 26 *LPRA §§ 2801 – 2810*, except for certain exceptions specifically set forth in 26 *LPRA § 4319*. One or more persons may incorporate an International Insurer. 26 *LPRA § 4319(6)*. It is not required that any of the incorporators, organizers, directors, members or officers of any International Insurer be citizens or residents of the United States or residents of Puerto Rico.

A. The applicant shall complete an "International Insurer Application for Authorization," in the form provided by the OCI and which must contain, without limitation, the following:

    1. Name of proposed International Insurer; name, address, voting percentage, and net worth of controlling persons; explanation of the relationship among the controlling persons, including a description of any contracts, arrangements or understandings with respect to any voting securities of the proposed International Insurer and any controlling person; and financial information of controlling persons.

    2. Type of authorization being requested:

        a. Class 1 and Class 2 authority – for insurers who will operate as captive insurers or reinsurers.

        b. Class 3 authority – to transact all types of insurance or reinsurance with the exception of disability insurance, life insurance, high limit casualty insurance or property catastrophe reinsurance.

        c. Class 4 authority – to transact all types of insurance or reinsurance, including high limit casualty insurance and property catastrophe reinsurance, but not including disability insurance or life insurance.

        d. Class 5 authority – to transact disability insurance, life insurance, and reinsurance thereof.

    3. Information and documentation regarding the organization of the proposed international insurer, such as: principal office/place of business; location of books and records; names and addresses of the principal representative, auditor, actuary, directors, and officers; certified copy of the corporate resolution authorizing the International Insurer to transact insurance business and designating the officer or officers of the insurer who will have the authority to report to the Commissioner, from time to time, regarding matters on which it will act on behalf of the insurer; and corporate organization documents, among others. The articles of incorporation should be submitted to the OCI in draft form, for their review and approval.

    4. Financial Information, including amount of paid-in capital, types of stock to be authorized, number of shares, par value and initial financial statement.

    5. Business Plan

    6. The applicant must possess the minimum initial capital and surplus for the type of authority being requested:
    Class 3 Authority: not less than USD 1,500,000; Class 4 Authority: not less than USD 100,000,000; Class 5 Authority: not less than USD 750,000, in addition to the

requirements for other classes of authority with which it may be combined.

B. Financing – Any solicitation of funds from residents of Puerto Rico must be conducted in accordance with 26 *LPRA §§ 2806 – 2817*. In such case, the corporation must apply for and obtain a Solicitation Permit. Actual solicitation under the solicitation permit shall be made only by individuals expressly licensed therefor by the Commissioner. 26 *LPRA § 2813(1)*.

Is it mandatory that a company be physically present in the market (HQ or branch office) to write insurance/ reinsurance policies?

An insurer does not have to be physically present in Puerto Rico to write insurance policies. However, insurers must appoint a local General Agent or Manager (*Article 3.290*), but, this requirement does not apply to: (1) surplus lines insurers; (2) inland or ocean marine insurers; or (3) reinsurers.

Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Authorized foreign insurers may write business directly. Non-authorized foreign insurers may also be registered as surplus lines insurers and, as such, may write business directly. Non-authorized reinsurers who meet certain requirements set forth in 26 *LPRA § 412* of the *Insurance Code*, may reinsure risks located in Puerto Rico provided that prior approval from the Insurance Commissioner is obtained.

Is the incorporation of local companies with foreign shareholders permitted?

Yes. However, no less than a majority of the directors of a local insurer must be residents of Puerto Rico. No less than three fourths of all directors must be U.S. citizens. *Article 29.150*. These requirements do not apply to local insurers organized under the *International Insurers and Reinsurers Act*, Chapter 43 of the *Insurance Code*.

Regulatory

What are the main sources for insurance and reinsurance regulatory law?

The *Insurance Code of Puerto Rico*, 26 *LPRA §§ 101 et seq.*

Please describe the current regulatory environment, including pending or anticipated regulatory reform.

As of 9/11/2014, there is no pending or anticipated regulatory reform in any of the foregoing areas.

Claims

What are the main sources for contract law?

The *Puerto Rico Insurance Code* governs insurance contracts in Puerto Rico. Courts also look to the *Puerto Rico Civil Code* as a supplemental source of insurance contract interpretation law.

In general, is the substantive law relating to insurance more favorable to insurers or insureds?

As contracts of adhesion, insurance contracts in Puerto Rico are subject to the rules of interpretation generally applicable to adhesion contracts. Ambiguities are generally resolved in favor of the insured. See, *e.g.*, *Meléndez Piñero v. Levitt & Sons of P.R.*, 129 D.P.R. 521 (1991); *Soc. de Gananciales v. Serrano*, 145 D.P.R. 394 (1998). In addition, the *Insurance Code* contains provisions which also favor insureds, such as when there is a discrepancy between the English and Spanish version of a policy form, the version most favorable to the insured prevails. 26 *LPRA § 1114(2)*.

What is the statute of limitations on claims?

Contract claims are subject to a 15 year statute of limitations. 31 *LPRA § 5294*. The statute of limitations may be shortened by contract. *R.P. Farnsworth & Co. v. Puerto Rico Urban Renew. & H. Corp.*, 289 F.Supp.666 (D.P.R. 1968). However, with regard to insurance policies, the period of time within which an action may be brought against an insurer under an insurance contract may not be reduced to less than one year from the date the cause of action accrued

(on all policies except property, ocean marine and inland marine) or one year from the date of the event which caused the loss (on property, ocean marine and inland marine policies). 26 *LPRA § 1119(1)(c).*

Can a third party bring direct action against an insurer?

Yes. 26 *LPRA § 2003.*

Can an insured bring a direct action against a reinsurer?

No. 26 *LPRA § 413.*

Dispute Resolution

Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

Puerto Rico Court of First Instance (no monetary threshold, no right to jury trial); U.S. District Court (only when there is diversity of citizenship and the amount in controversy exceeds USD 75,000, right to jury trial).

What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of a) parties to the action and b) non-parties to the action?

As to parties to the action, discovery rules allow for discovery of documents that are relevant to the action, and are not otherwise protected under privilege under the Rules of Evidence. This is the case in both state and U.S. District Court. As to non-parties to the action, both state and U.S. District Court have ample subpoena authority to compel non-parties to the action to produce non-privileged information that may be relevant to the dispute.

Are mediation and arbitration common methods for solving insurance disputes? Are more disputes resolved in or out of court?

No, mainly because our *Insurance Code* prohibits any policy language that may deprive the insured of the right to access to the courts for determination of his rights under the policy in the event of dispute, therefore precluding mandatory arbitration clauses in insurance contracts. 26 *LPRA § 1119(1)(a)*. There is no case law determining whether this provision is consistent with the *Federal Arbitration Act*. The OCI enforces this prohibition in the course of its review of policy forms.

What are the provisions regarding timely notice, and what are the legal consequences for non-compliance with the timely notice obligation?

The general rule is that untimely notice is a bar to recovery only if shown to be prejudicial to insurer. However, with regard to claims-made policies, the Puerto Rico Supreme Court has held that the notice requirement is an integral part of the risk foreseen and assumed by the insurance company; therefore, if the insured fails to comply with the notice requirement, the insurance company has no obligation to grant coverage. *Marina v. Den Caribbean, Inc.*, 490 F.Supp.2d 244 (D.P.R. 2007) citing *Torres v. E.L.A. de P.R.*, 130 D.P.R. 640 (1992).

What are the laws regarding bad faith claims? What damages may be awarded if the insurer is found to have acted in bad faith?

Puerto Rico does not have a statute providing a cause of action against insurance companies for bad faith refusal to settle a claim. In the context of third-party claims, the Puerto Rico Supreme Court has recognized the failure of an insurer to accept a reasonable settlement offer within policy limits as constituting bad faith. *Morales v. Automatic Vending Services, Inc.*, 103 D.P.R. 281 (1975). The standard that is generally applied is whether a reasonable insurer would have accepted the offer. Furthermore, it is not necessary for the insurer to be found guilty of fraud or malicious misconduct when allowing a judgment in excess of policy limits. Accordingly, a court may impose a judgment in excess of policy limits when the insurer acted unreasonably by not settling the claim. Id.

Yet, in the absence of proof that an insurer unreasonably denied a settlement offer within policy limits, a court may not make a finding of bad faith and impose a judgment in excess of policy limits even though the insurer might have acted recklessly when not depositing funds with the court, and continued to litigate the case even though the responsibility of the

insured was evident. *Flores v. Municipio de Guayama*, 114 D.P.R. 193 (1983).

At least one Puerto Rico appellate court has interpreted *Flores* to require three separate findings before imposing a judgment on the insurer exceeding policy limits: (1) the evident responsibility of the insured, (2) that the insurer acted negligently or in bad faith, and (3) the existence and rejection a reasonable settlement offer that was not communicated to the insured. *Ponce v. Rolling Mills of Puerto Rico, Inc.*, 2007 PR App. Lexis 3338 (2007) (confirming trial court finding that the insurer was only liable up to the policy limits even though the insurer filed two separate summary judgment motions arguing that the policy did not cover the insured).

However, in a fairly recent case, *Maderas Tratadas, Inc. v. Insurance Alliance, Inc.*, 2012 TSPR 101 (2012), the court stated:

As it is known, an insurer is called to respond in excess of policy limits when it places its interests ahead of those of its insured and fails in performing its intrinsic duties of representation, defense and/or settling claims for a reasonable amount within the policy limits.

Even though the above language is obiter dicta in the context of the case, the Court clearly expands the range of situations for which an insurer may face a judgment in excess of policy limits beyond that of merely failing to settle claims within policy limits. This is consistent with holdings of courts in other states that have also imposed judgment in excess of policy limits for negligence during litigation proceedings that are under the control of the insurer. See, *e.g.*,*Tucson Airport Auth v. Certain Underwriters at Lloyd's London*, 918 P.2d. 1063 (Ariz. Ct. App. 1996); *Timberlake Constr. Co, v. USF&G*, 71 F.3d 335, 341 (10th Cir. 1995).

In the context of first party claims, a person aggrieved by an insurer's bad faith refusal to settle a claim may proceed with an action under the general provisions in the *Civil Code* concerning contract and tort law. *Díaz Irizarry v. Ennia*, N.V., 678 F.Supp. 957, 960 (D.P.R. 1988).

An action for special damages for breach of contract arises under *Articles 1054, 1058, and 1060* of the *Civil Code*, even in the absence of bad faith, fraud or reckless behavior, if such damages are foreseeable. *Díaz Irizarry*, 678 F.Supp. at 961. Negligent breach is enough. If it is determined that an insurer was negligent in breaching the insurance policy contract by failing to indemnify the insured for his losses, any resulting damages which were foreseeable are compensable. *Id*. However, upon a finding of bad faith or fraud, all damages caused by the breach are compensable, whether they are foreseeable or not. *Díaz Irizarry*, 678 F.Supp. at 960.

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