



ICLG

The International Comparative Legal Guide to: **Insurance & Reinsurance 2018**

7th Edition

A practical cross-border insight into insurance and reinsurance law

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General Chapters:

1	Aspects of the Impact of Brexit on UK/EEA Insurance and Reinsurance – Jon Turnbull & Ivor Edwards, Clyde & Co LLP	1
2	Cyber Insurance at Lloyd's: Coverage and Regulation of Global Digital Risks – Patrick Davison & David Powell, Lloyd's Market Association	7
3	Fire and Wire: Canadian Business Interruption Insurance in the Age of Cyber-Risk and Climate Change – David R. Mackenzie & Dominic T. Clarke, Blaney McMurtry LLP	14
4	Brexit Relocations: The Story So Far – Darren Maher, Matheson	21
5	Trending Tremors: Cat Bond Developments in Mexico and Latin America – Leonel Pereznieta del Prado & María José Pinillos Montaña, Creel, García-Cuellar, Aiza y Enríquez, S.C.	23
6	Reinsurance in an Era of Sanctions – Lilia Klochenko & Stanislava Adamaytis, AKP Best Advice	27

Country Question and Answer Chapters:

7	Australia	MinterEllison: Kemsley Brennan & James Stanton	31
8	Austria	Vavrovsky Heine Marth: Philipp Strasser & Jan Philipp Meyer	38
9	Azerbaijan	CIS Risk Consultant Company (insurance brokers) LLP (CIS): Homi Motamedi & Valentina Pan	44
10	Belgium	Steptoe & Johnson LLP: Philip Woolfson & Alexander Hamels	49
11	Bermuda	Kennedys Chudleigh Ltd.: Mark Chudleigh & Nick Miles	57
12	Brazil	Tavares Advogados: André Tavares & Daniel Chacur de Miranda	63
13	Canada	McMillan LLP: Carol Lyons & Lindsay Lorimer	69
14	Cayman Islands	Maples and Calder: Abraham Thoppil & Luke Stockdale	78
15	Colombia	DAC Beachcroft Colombia Abogados SAS: Juan Diego Arango Giraldo & Angela María Hernández Gómez	84
16	Costa Rica	Cordero & Cordero Abogados: Ricardo Cordero B.	91
17	Denmark	BECH-BRUUN: Anne Buhl Bjelke & Henrik Valdorf-Hansen	96
18	England & Wales	Clyde & Co LLP: Jon Turnbull & Michelle Radom	102
19	Finland	Railas Attorneys Ltd.: Lauri Railas	111
20	Georgia	CIS Risk Consultant Company (insurance brokers) LLP (CIS): Homi Motamedi & Valentina Pan	117
21	Germany	Clyde & Co (Deutschland) LLP: Dr Henning Schaloske & Dr Tanja Schramm	121
22	Greece	Christos Chrissanthis & Partners: Dr. Christos Chrissanthis & Xenia Chardalia	128
23	India	Tuli & Co: Neeraj Tuli & Celia Jenkins	136
24	Ireland	Arthur Cox: Elizabeth Bothwell & David O'Donohoe	143
25	Israel	Gross Orad Schlifmoff & Co.: Harry Orad	150
26	Italy	Legance – Avvocati Associati: Gian Paolo Tagariello & Daniele Geronzi	156
27	Japan	Chuo Sogo Law Office, P.C.: Hironori Nishikino & Koji Kanazawa	163
28	Kazakhstan	CIS Risk Consultant Company (insurance brokers) LLP (CIS): Homi Motamedi & Valentina Pan	168
29	Korea	Bae, Kim & Lee LLC: Jong Ku Kang & Jong Min An	173
30	Malta	Camilleri Preziosi Advocates: Diane Bugeja & Francesca Galea Cavallazzi	179
31	Mexico	Creel, García-Cuellar, Aiza y Enríquez, S.C.: María José Pinillos Montaña & Allan Galileo Olmedo Villegas	186
32	Netherlands	Dirkzwager advocaten & notarissen N.V.: Daan Baas & Niels Dekker	191

Continued Overleaf ➡

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Country Question and Answer Chapters:

33	Norway	DLA Piper Norway DA: Alexander Plows & Michal Jorek	198
34	Portugal	Gouveia Pereira, Costa Freitas & Associados: José Limón Cavaco & Ana Isabel Serra Calmeiro	204
35	Russia	AKP Best Advice: Lilia Klochenko & Ekaterina Mikhaylova	210
36	Saudi Arabia	Clyde & Co: Mark Beswetherick & Saud Alsaab	217
37	Singapore	Rajah & Tann Singapore LLP: Elaine Tay Ling Yan	222
38	Spain	DAC Beachcroft SLP: José María Pimentel & José María Álvarez-Cienfuegos	227
39	Sweden	Advokatfirman Vinge KB: Fabian Ekeblad & Paulina Malmberg	233
40	Switzerland	Eversheds Sutherland Ltd.: Peter Haas & Barbara Klett	240
41	Taiwan	LCS & Partners: Mark J. Harty & Alex Yeh	245
42	Thailand	R & T Asia (Thailand) Co., Ltd.: Sui Lin Teoh & Saroj Jongsaritwang	250
43	Turkey	Cavus & Coskunsu Law Firm: Caglar Coskunsu & Burak Cavus	255
44	Ukraine	BLACK SEA LAW COMPANY: Evgeniy Sukachev & Anastasiia Sukacheva	261
45	United Arab Emirates	BSA Ahmad Bin Hezeem & Associates LLP: Michael Kortbawi & Michel Abi Saab	266
46	USA	Paul, Weiss, Rifkind, Wharton & Garrison LLP: H. Christopher Boehning	272
47	Uzbekistan	CIS Risk Consultant Company (insurance brokers) LLP (CIS): Homi Motamedi & Valentina Pan	279

EDITORIAL

Welcome to the seventh edition of *The International Comparative Legal Guide to: Insurance & Reinsurance*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of insurance and reinsurance.

It is divided into two main sections:

Six general chapters. These are designed to provide readers with an overview of key issues affecting insurance and reinsurance work, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in insurance and reinsurance laws and regulations in 41 jurisdictions.

All chapters are written by leading insurance and reinsurance lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Jon Turnbull and Michelle Radom of Clyde & Co LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

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Creel, García-Cuellar, Aiza y Enríquez, S.C.

1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

In Mexico, insurance and reinsurance companies are regulated by the National Insurance and Bonding Commission (CNSF). The CNSF is the governmental body responsible for the licensing and authorisation of Mexican insurance companies as well as supervising their day-to-day operations. The Commission for the Protection and Defence of Users of Financial Services (CONDUSEF) is the agency responsible for receiving complaints from financial services consumers, including policyholders.

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

In accordance with the Insurance and Bonding Companies Law (*Ley de Instituciones de Seguros y de Fianzas*) (LISF), the process for setting up a new insurance (or reinsurance) company must be followed before the CNSF. As an initial step, a submission must be filed enclosing detailed financial information and forecasts, technical guidelines (i.e., underwriting, reinsurance, risk management) and corporate governance information (i.e., directors, officers and manuals). The draft charter documents to be adopted by the insurance/reinsurance company must also be filed for review by the CNSF. Once the filed documents and information are approved by the Governing Board of the CNSF, the CNSF shall issue an official communication that authorises the formation of the company as a stock corporation which shall be published in the Official Gazette of the Federation. The official approval by the CNSF is a condition verified by the notary public responsible for issuing the corresponding deed of incorporation and by the Public Registry of Commerce prior to recording such deed. Once incorporation of the company is evidenced before the CNSF, it will issue the insurance licence authorising the company to commence operations and requiring it to do so within the following 90 days. During such 90-day period, an operational audit must be carried out by CNSF. Failure to obtain the CNSF's sign-off and commence operations within such 90-day period will result in the cancellation of the licence, which means that the process will need to be restarted. The approval process for a new Mexican insurance/reinsurance company takes approximately nine months from the relevant filing.

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

In principle, the offering and sale of insurance by foreign insurance companies in Mexico is prohibited. The LISF sets forth the lines of insurance business and other circumstances where the participation of foreign insurers is expressly prohibited. The prohibition applicable to the underwriting of insurance by foreign insurers in Mexico, however, is not absolute: a foreign insurer may coordinate with its prospective insured to request a waiver with respect to the applicable prohibition. The waiver mechanism, however, is limited to those cases where the insurance offered or provided by the foreign insurer is not otherwise available in the Mexican insurance market. Also, a waiver may be obtained by foreign insurers when the type of insurance offered in Mexico covers losses that may only occur in the country where the foreign insurer is authorised to conduct its business. Unlike the insurance business, the offering and sale of reinsurance in Mexico is open to foreign reinsurers, provided they are recorded with the General Registry of Foreign Reinsurers kept by the CNSF.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

Insurance products must be registered with the CNSF prior to their marketing. The registration process requires the filing of a technical note corresponding to the product, the relevant contractual documentation, an analysis executed by a certified lawyer and a certified actuary to the effect that the former and the latter are consistent and compliant with Mexican laws and regulations, including certain specific terms required by law and a legal opinion. CONDUSEF may request amendment of the wording of insurance policies. As of 2017, non-negotiable insurance products must also be registered with the CONDUSEF.

1.5 Are companies permitted to indemnify directors and officers under local company law?

Yes, under the General Law of Commercial Companies (*Ley General de Sociedades Mercantiles*), companies are allowed to indemnify their directors and officers. D&O liability insurance is available in Mexico for that purpose.

1.6 Are there any forms of compulsory insurance?

Yes, in Mexico there are some industries and activities that must maintain compulsory liability insurance to cover third-party claims for damages such as public transport concessionaries, handling of hazardous waste and material. Automobile insurance affording liability coverage is mandatory for all private vehicles using Federal highways; failure to obtain such insurance while using Federal highways will be subject to a fine. Although automobile insurance is compulsory in some states of Mexico for using intra-state roads, except for Mexico City, the applicable regulations do not set forth a penalty for lacking such insurance and thus compulsory car insurance may not be enforced.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

In general terms, the substantive law relating to insurance is more favourable to insurers. There are some aspects, however, where the law narrows the discretion of insurers. For instance, in the context of the duty of utmost good faith of the insured, the insurer's right to avoid the cover must be based on misrepresentations and inaccuracies made in the questionnaire required for obtaining disclosure of relevant facts. Also, the greater attributions afforded to CONDUSEF have reinforced insured rights *vis-à-vis* insurers.

2.2 Can a third party bring a direct action against an insurer?

In Mexico, generally speaking, the doctrine of privity of contract is strictly upheld and, therefore, actions by third parties against an insurer for coverage have only a remote chance of succeeding.

Article 147 of the Mexican Insurance Contract Law (*Ley sobre el Contrato de Seguro*), however, provides that “liability insurance shall directly confer the right to be indemnified to the affected third party, who will be considered as beneficiary, since the date of the loss occurrence”. Consequently, in the case of liability insurance, the affected third parties can claim payment directly from the insurer.

2.3 Can an insured bring a direct action against a reinsurer?

No, the only statutory provision in the Insurance Contract Law that refers to reinsurance clearly states that, even when the relevant insurance company is reinsured, it will only be liable to the insured. Accordingly, one of the few reinsurance principles under Mexican law for which there is clear and express authority is that a policyholder or non-signatory to a reinsurance agreement cannot bring a direct action against a reinsurer for coverage.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

In accordance with the Insurance Contract Law, an insurer can avoid the insurance contract based on misrepresentations contained in the relevant application or questionnaire, even if the actionable misrepresentation has no bearing on the loss. The insurer must notify the insured of its decision to rescind within 30 days of having

knowledge of the misrepresentation; otherwise the insurer would be estopped from exercising its right to rescind.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

At inception, the duty of the insured to disclose matters material to the risk is limited to the questions specifically contained in the questionnaire that may be requested by the insurer. After inception, the insured has a duty to disclose any circumstance that materially varies the risk within 24 hours of having knowledge of such circumstance, unless such requirement is waived.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

Yes, the Insurance Contract Law provides for an automatic right of subrogation by the insurer with respect to the rights of the insured upon the payment of an indemnity.

3 Litigation - Overview

3.1 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 may be brought before state courts or federal courts at the option of the plaintiff. State courts are generally preferred as they handle commercial cases more frequently. Please note that, in accordance with the LISF, plaintiffs can bring insurance complaints before any office of the CONDUSEF and the competent judge will be the one corresponding to the domicile of the CONDUSEF office where the dispute has been brought. Notwithstanding the foregoing, the Federal Law for the Protection of Users of Financial Services (*Ley de Protección y Defensa al Usuario de Servicios Financieros* – the “CONDUSEF Law”) provides that all financial institutions (including insurance companies) must have a special client attention unit for receiving claims and complaints in connection with insurance contracts. Pursuant to the CONDUSEF Law, the insured will have the right (but not the obligation) to seek mandatory non-binding conciliation with the insurer before CONDUSEF prior to resorting to either an arbitral procedure with CONDUSEF or to courts. Also, insurers may agree to be part of the Arbitral System managed by CONDUSEF and file at least three insurance products, disputes over which may be solved through such mechanism. Mexico does not have a jury system.

3.2 How long does a commercial case commonly take to bring to court once it has been initiated?

A commercial case is immediately brought to court once the complaint is filed. The court may take a few days to decide on whether or not to admit the complaint. The court may refuse admission of the complaint if it is notoriously frivolous. Once the complaint is admitted, the trial commences before the court. Generally speaking, the scope of pre-trial procedures in Mexico is very limited and is optional.

4 Litigation - Procedure

4.1 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 concept of discovery does not exist in Mexican procedural law. A party to the action can request the court to order the production of specifically identified documents that are in the records of the opposing party or in the files of a government office. Also, a party may request the inspection of documents or records held by third parties as evidence of specific facts alleged in the complaint. An order for the general production of documents, however, is beyond the powers of Mexican courts.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers or (b) prepared in contemplation of litigation or (c) produced in the course of settlement negotiations/attempts?

Statutory provisions applicable to professional secrecy in Mexico exempt legal counsel from testifying against clients or delivering documents and information in their possession that relate to the client. There is no rule, however, that extends the privilege to attorney-client work product in possession of a party; thus, a party would, in principle, have no legal basis for withholding documents in its possession (a) relating to advice given by lawyers, (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts, if so ordered by the court.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

Mexican courts have powers to require witnesses to give evidence during the evidentiary stage of the trial, provided that the party offering such witnesses swears under oath that it is not able to present such witness. Before the trial, the only witnesses that may be examined are those that are awaiting an imminent death or those that are ready to leave the country, in which case the judge may also exercise its subpoena powers.

4.4 Is evidence from witnesses allowed even if they are not present?

In principle, witnesses must be present to testify. Written testimony is only allowed from senior citizens, persons that are ill and government officials. Also, witnesses whose testimony is obtained through domestic or international letters rogatory do not need to be present for testifying before the court conducting the proceedings.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

Expert witnesses must hold a professional title or certificate, unless the profession in which they are an expert does not require a title or certificate. If there is a conflict between the testimonies rendered by the expert witnesses called by each of the parties to testify on a given matter, the court shall appoint an expert witness.

4.6 What sort of interim remedies are available from the courts?

Interim remedies available in the Commerce Code for commercial proceedings are strictly limited to: (i) the curfew of a person who is feared to be at risk of leaving the jurisdiction without appointing a representative to follow the proceedings; and (ii) the temporary attachment of assets when there is a fear that the same may be wasted, concealed or when the defendant does not own any other assets. Notwithstanding the foregoing, a binding court precedent has expanded the types of interim remedies available under the Federal Civil Procedures Code to include injunctions that, broadly considered, preserve the subject-matter of the litigation whilst the relevant proceedings are conducted.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

There is a right of appeal from the decisions of the courts of first instance. Generally speaking, the grounds for appeal are defects in the first instance judgment that are in violation of constitutional rights contemplated in the Mexican Constitution or the statutory requirements that the judge must observe when conducting the proceedings and in reaching his/her conclusions. A party that is not in agreement with the appeal decision and identifies violations of constitutional rights contemplated in the Mexican Constitution which the first instance judge and/or the court of appeals have incurred (i.e., due process, legality), may commence a direct constitutional appeal action (*amparo directo*) before federal courts that effectively serves as a third stage of appeal limited to constitutionality issues.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Interest is generally recoverable in respect of commercial claims at an annual rate of 6 per cent. Specifically, the LISF sets forth the rules for calculating interest in respect of insurance claims at a rate of 1.25 multiplied by the index identified as "cost for attracting liabilities" (*costo de captación de pasivos*) over the amount of the relevant claim converted into Investment Units (*unidades de inversión* (UDIS)).

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

In Mexico, costs refer to attorneys' fees and other expenses incurred in connection with the proceedings (i.e., expert witness fees, notarial fees). Courts are prohibited from charging any fees for conducting the judicial process. Accordingly, the standard rule regarding costs is that they will be awarded against parties that pursue a frivolous claim or against the party that loses in the first and second instance on consistent grounds. Costs are capped at a rate approved for each local jurisdiction; for example at Mexico City venues, costs are capped at 6 per cent of the total amount of the award at first instance and 8 per cent at second instance. There are specific caps for declaratory judgments that do not award money amounts. Cost advantages of making an offer to settle include the possibility of negotiating legal fees actually incurred and not paying out on a percentage of the recovery.

4.10 Can the courts compel the parties to mediate disputes? If so, do they exercise such powers?

No, commercial courts entertaining insurance and reinsurance disputes cannot compel the parties to mediate; however, local courts in Mexico City may suggest the parties refer the dispute to mediation.

4.11 If a party refuses to a request to mediate, what consequences may follow?

As outlined in question 4.10 above, the mediation of disputes cannot be compelled.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

The principle of party autonomy is generally respected by Mexican courts. If there is a valid arbitration clause, the matter must be submitted by the court to arbitration at the request of any party. Mexican courts will not intervene in the conduct of an arbitration; however, the courts may assist the arbitration procedure in granting interim measures and the taking of evidence as set forth in the Commerce Code (*Código de Comercio*).

5.2 Is it necessary for a form of words to be put into contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

No specific form of words is required. The essential terms of the arbitral clause or arbitral agreement will need to be clearly laid out in writing by expressly submitting the definitive resolution of the dispute to arbitration and without establishing the option to go to courts. It is suggested to include other information such as the arbitration rules, appointing the administrator if any, the number of arbitrators, the seat of the arbitration, the language of the arbitration and the choice of law.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

As explained in question 5.1 above, if there is no ambiguity as to the parties' agreement to submit to arbitration, a refusal by a court to enforce such a clause is unlikely unless it is proven that the arbitration agreement is null, ineffective or is impossible to enforce.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

Statutory provisions applicable to arbitration do not limit the forms in which relief may be obtained. Mexican courts may grant the interim relief identified in question 4.6 above.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

The general rule is that the arbitral tribunal is legally bound to give detailed reasons for its award, unless the parties have agreed otherwise or the parties have reached a settlement. The award shall be given in writing and signed by the arbitrator(s).

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

No, there is no right of appeal to the courts from the decision of an arbitral tribunal. If the seat of the arbitration is within Mexico, a party may request the annulment of the award based on limited grounds stated in the Commercial Code. In any case, there is the right to resist enforcement of an arbitral award on limited grounds before the court where the award is filed for enforcement.

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CREEL GARCÍA-CUÉLLAR AIZA Y ENRÍQUEZ

Creel, García-Cuellar, Aiza y Enríquez was founded in 1936 and is a full-service corporate law firm, with an established reputation for providing in-depth, sophisticated and responsive legal advice, coupled with an unwavering commitment to excellence. Our practice is based on the philosophy that a client is best served by legal advice designed to anticipate and avoid problems, rather than to respond to them.

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