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Practical cross-border insights into insurance and reinsurance law

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Q&A Chapters

Q&A Chapters Continued

Brazil


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1 Regulatory

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

The Brazilian Federal Government structured the regulation of insurance, reinsurance and pension fund under multi-bodied and multi-layered systems.

Pertaining to **(re)insurance and open-end pension funds**: (i) the National Council of Private Insurance (CNSP) is the body responsible for enacting general regulation such as policies' guidelines and directives; and (ii) the Superintendence of Private Insurance (SUSEP) is the executive body of the system, responsible for (ii.1) enforcing CNSP's policy, (ii.2) enacting specific regulation, (ii.3) supervising the conduct and solvency of the (re)insurance and open-end pension agents, and (ii.4) installing and judging sanctioning procedures, among other attributions.

Pertaining to **closed-end pension funds**, (i) the National Council of Private Pension (CNPC), and (ii) the National Superintendence of Private Pension (PREVIC) are analogous to CNSP and SUSEP, respectively.

Finally, pertaining to **health insurance**, all regulation and supervision is carried out by the National Health Agency (ANS).

Other bodies such as the Brazilian Central Bank (BCB) and the National Monetary Council (CMN) are not part of the re(insurance)/pension funds regulatory framework but might enact norms that apply to (re)insurers and pension funds, mainly regarding actuarial reserves and provisions allocation.

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

Setting up a new (re)insurance company in Brazil is subject to several requirements under federal law and in regulation enacted by CNSP and SUSEP (see question 1.1 above). The paragraphs below present an overview on such matter.

Before operating as an **insurance company**, the following requirements must be met by the controlling group and/or person(s): (i) secure prior approval by SUSEP; (ii) file the corporate acts for a joint-stock company at the Board of Trade and Brazilian Securities and Exchanges Commission (if applicable); (iii) pay the minimum capital required, which varies according to branch(es) and location(s) of operation; and (iv) secure a ratification of approval by SUSEP.

Reinsurance companies are subject to similar requirements as well as varying additional requirements, depending on their nature as: (i) local reinsurers; (ii) admitted reinsurers; or (iii) occasional reinsurers.

Local reinsurers are companies organised under Brazilian law and must meet the same requirements as an insurance company. However, the requirements for **admitted reinsurers** and **occasional reinsurers** are simplified.

Admitted reinsurers are foreign companies that, in order to operate locally, must: (i) open a representation office in Brazil; and (ii) have registered previously at SUSEP, proving compliance with minimum requirements (*e.g.* credit ratings).

Finally, **occasional reinsurers** are foreign companies that must solely have registered previously at SUSEP, proving compliance with minimum requirements (*e.g.* credit ratings).

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

Pursuant to Supplementary Law No. 126/07, (i) all mandatory insurance, and (ii) insurance contracted by a natural person or an entity residing in Brazil, must be issued by a domestic insurer. Therefore, in most cases, a foreign insurer will not be able to write business directly in Brazil.

However, there are a few exceptions to the rule in item (ii) (above), the most important being the refusal by (at least) five local insurers to an insurance proposal (identical to the one accepted abroad).

Moreover, there are a lot of possible arrangements between a foreign insurer with local companies, enabling a wide range of operation without the need to write insurance directly in Brazil.

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?

Recently, Brazilian insurance authorities (CNSP and SUSEP – see question 1.1 above) have been pushing for deregulation, which has contributed to fostering the parties' freedom of contract.

Since 2021, there is a split in insurance products between: (i) large-risk non-life insurances, which are subject to fewer binding rules and terms; and (ii) mass (and all-life) risks, which is more closely regulated by the authorities. Furthermore, standardised products have been revoked by SUSEP across the board.

Notwithstanding these advances, some rules restricting the parties' freedom of contract remain in effect, such as those stated in the Brazilian Civil Code and the Brazilian Consumer Defense Code, or in regulation (*e.g.* minimum mandatory requirements and clauses).

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

Brazilian company law allows companies to indemnify directors and officers for losses deriving from acts related to their position and in the company's best interest, barring any malicious act.

However, it is recommended that companies aiming at indemnifying their directors and officers directly – that is, without a D&O Insurance Policy – carefully draft an internal indemnity policy to avoid any conflict of interest.

1.6 Are there any forms of compulsory insurance?

Mandatory insurance has become less prevalent over the years; however, some are still required by Brazilian legislation. They are mostly listed in article 20 of Decree-Law No. 73/66, but other special statutory law may require additional ones.

Some examples are: (i) fire insurance for assets owned by a legal entity; (ii) liability of aircraft owners; and (iii) liability insurance for marine carriers (against damages to the cargo), among others.

2 (Re)insurance Claims

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

The main piece of substantive law applicable to insurance is the Brazilian Civil Code, which is neutral. Most rules stated in the Brazilian Civil Code are (i) applicable to both parties (*e.g.* good faith), and/or (ii) reflect principles and parties' rights and obligations that are common worldwide.

Furthermore, the parties have recently been granted more freedom to contract in their own terms (see question 1.4 above), and such private arrangements are protected by Law No. 13,874/2019 (known as the Economic Freedom Act).

However, insurance contracts subject to the Brazilian Consumer Defense Code – mainly those classified as mass risks – still tend to be interpreted in favor of the insureds, whom (as the weaker party) is protected by both substantive law and the courts' interpretation.

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

Only in case of mandatory insurance, as provided for in the Brazilian Civil Code, can a third party bring a direct action against an insurer.

Although there are no provisions in the Brazilian Civil Code or other legislation forbidding direct action by third parties in relation to optional insurance, the Brazilian Superior Court of Justice has issued a precedent with binding force (Precedent No. 529) stating: "In civil liability insurance, the filing of a lawsuit by an injured third party directly and solely against the insurer of the injuring party is not admissible."

The precedent binds all lower courts, and, as such, has force of law within the Judiciary. It can, however, be revoked by the Brazilian Superior Court of Justice, and does not bind the Legislative.

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

Pursuant to Supplementary Law No. 126/07, that dictates general rules for reinsurance operation in Brazil, the insured cannot bring direct action against a reinsurer.

There are, however, two exceptions: (i) if the contract expressly permits it ("cut-through clause"); or (ii) in case of bankruptcy of the insurer (as per articles 13 and 14, sole paragraph of the law referred above).

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

In cases of misrepresentation or non-disclosure by the insured, the insurer has the remedies stated in the Brazilian Civil Code.

If the misrepresentation or non-disclosure was intentional (in bad faith), the insurer has the right to (i) deny cover of any claim while retaining the full premium charged, and (ii) deny coverage to any claims by the insured. However, the insurer bears the burden of proof of the insured's bad faith, according to caselaw of the Brazilian Superior Court of Justice.

If the misrepresentation or non-disclosure was unintentional (not in bad faith), the insurer has the right to: (i) terminate the contract retaining the premium proportional to the effective period of cover; or (ii) maintain the contract charging additional premium (or retaining it from an indemnity due to the insured).

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?

The Brazilian Civil Code demands the parties' good faith, and particularly in case of insurance contracts, **utmost good faith** (*uberrimae fidei*). Therefore, the insured is bound to disclose all information material to the insured risk, irrespective of being specifically asked about them, for example, if there is an event that aggravates the risk.

However, the above should be taken with a grain of salt. Except in extreme circumstances (for example, reckless behaviour or gross negligence) that provide evidence of bad faith by the insured, the courts tend to overturn the insurers' denial of cover in cases of aggravated risk and protect the insured (as the party with lesser knowledge on risk and insurance).

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?

There is an automatic right of subrogation, as per the Brazilian Civil Code. However, except for malicious acts, the subrogation right is not enforceable against the insured, his/her spouse, or relatives (by blood or law).

Furthermore, any act by the insured that diminishes the right of subrogation (without the insurer's consent) is null and void.

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?

There are no courts specialised in insurance litigation, so the appropriate courts for any commercial litigation are the Federated States' Civil Courts. Depending on the parties involved in the dispute and/or the Federated State or judicial

section where litigation occurs, special rules based on matter (such as consumer or business) or value of the dispute may apply.

Also, pursuant to Federal Act No. 9,099/95, if the value of the dispute does not exceed 40 times the current minimum wage, the plaintiff can opt to litigate before a Small Claims Court, subject to an expedited and simplified civil procedure.

Both parties have the right to request, at any time prior to trial, a conciliation or mediation hearing. Additionally, a discovery hearing may be held prior to or at the trial, in order to collect testimonial evidence from parties, expert witnesses and witnesses. On this topic, see questions 4.3, 4.4 and 4.5 (below).

Furthermore, the parties are free to solve any dispute, irrespective of the value, through mediation, conciliation, arbitration, or other Alternative Dispute Resolution (ADR) methods.

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

The plaintiff shall collect a court fee to initiate any commercial insurance dispute, which varies depending on the Federated State and court, reaching up to 2% of the value at stake, in case of lawsuits filed before the São Paulo State Court.

Any party entitled to free legal aid is exempted from paying initial fees and/or other court fees and costs.

For a more in-depth view, see question 4.9 (below).

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

The Brazilian Code of Civil Procedure states that the parties are entitled to a full resolution of the dispute within a reasonable timeline, and the Judiciary has been taking steps to ensure compliance with this provision. Notwithstanding, the duration of a lawsuit still varies substantially depending on several factors, such as: (i) the need to produce expert evidence; (ii) the complexity of the case; (iii) the number of parties; and (iv) the backlog on the allotted court, among others.

In rough estimation, the parties should expect: (i) a one to two-year period for a first instance decision, which could go up to a four-year period if complex evidence is required; (ii) a further one to two-year period for a second instance decision; and (iii) a final three to four-year period for a decision at the Superior Courts (see question 4.7 below), when a special or extraordinary appeal is permitted.

3.4 Does COVID-19 have, or continue to have, a significant effect on the operation of the courts, or litigation in general?

The COVID-19 pandemic brought substantial changes to the operation of courts (and to all other public services), which was mostly face-to-face interactions and printed paperwork.

Some of the most relevant developments during this pandemic period are: (i) the effort to broaden the reach of digital civil procedure, adapted to home office by both attorneys and members of the Judiciary; and (ii) widespread use of videoconference and other remote tools to facilitate the regular flow of the procedures.

These changes remain even as the pandemic softens and the Judiciary resumes its regular activities, as evidence that a flexible and hybrid (remote and in-person) work model will most likely continue.

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?

Pursuant the Brazilian Code of Civil Procedure, the courts have the power (and duty) to supervise the production of evidence in a lawsuit, including: (i) taking the necessary measures so that evidence requested by the parties (and useful to the lawsuit) is produced; and (ii) requesting further evidence *ex officio*.

Therefore, parties and non-parties of the lawsuit may figure as recipients of a court order to present documents. In case of unjustified refusal to comply, the parties or third parties could be subject to fines and/or other coercive measures determined by the judge.

An important note on Brazilian civil procedure: the courts can also redistribute the burden of proof between the parties, which may lead to disclosure of documents without the need for any additional measures.

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?

The parties have no obligation to present documents produced under these circumstances.

First and foremost, the "attorney client privilege" is guaranteed under Federal Act No. 8,906/98 and covers any documents produced and/or communications exchanged with the mantle of confidentiality.

Furthermore, the evidence produced during settlement negotiation, in or out of court, is protected by the Brazilian Code of Civil Procedure and by Federal Act No. 13,340/15, exempting the parties from disclosing it and/or preventing the judge using it as grounds for judgment.

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

The courts have powers to summon witnesses, either at the request of the parties or the judge. The hearing will commonly be held at trial; however, the judge may decide to collect the witnesses' testimony at a prior date (in a discovery hearing) or by letter, for example, when there is risk the evidence might perish, or the witness is gravely ill.

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

As a rule, the witnesses testify at the trial before the judge. However, the Brazilian Code of Civil Procedure allows for other means of testimony, such as by letter or by videoconference, particularly if the witness is unable to be present or resides in a different judicial district, section or subsection.

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?

There are no restrictions. Both parties are permitted to name

their private expert witnesses. Furthermore, the judge can also name a court expert witness, irrespective of the parties having named private expert witnesses or not.

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

As per the Brazilian Code of Civil Procedure, there are two forms of interim remedies available from the courts.

Interlocutory relief is granted when there are elements that prove: (i) the probability of the alleged claim (*fumus boni iuris*) and/or a risk of loss or injury to the useful outcome of the lawsuit (*periculum in mora*); and (ii) anticipatory measures, when there is strong evidence of the author's constitutive rights, without the defendant presenting elements that allow for reasonable doubt. The request for interlocutory relief may be presented prior to the claim, if there is urgency.

Evidence relief is granted (regardless of risk of loss or injury to the useful outcome of the lawsuit), among other cases, if the plaintiff produces sufficient evidence of its right and the defendant fails to produce evidence capable of creating reasonable doubt. In short, an evidence relief anticipates the outcome of the lawsuit.

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?

The parties have a right to appeal from the decision of first instance, grounded on dissatisfaction with any part of the decision.

The first instance (single judge) decision is appealable to a second instance (High Court of Justice at the state or federal level, depending on the matter), that will re-examine all the evidence and arguments in the procedure and pass a new judgment.

Furthermore, in case of dissatisfaction with the High Court's judgment, the parties may appeal to the Brazilian Superior Court of Justice or Supreme Federal Court, but only if there is violation of federal law or the Constitution, respectively. As the appeal to the Superior and Supreme Courts is exceptional, these do not constitute a third instance.

In short, according to Brazil civil procedure, the parties have: (i) access to two instances, in all cases; and (ii) access to a special instance, in exceptional cases.

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

Interest is recoverable in a claim, as is monetary correction. The court award will usually state the interest rate that applies. Even if the sentence is omissive, the winning party is entitled to interest, as per caselaw from the Brazilian Superior Court of Justice.

The interest rate most commonly applied in civil or commercial disputes (as is the case of most (re)insurance litigation) is 1% a month, in addition to monetary correction (which is also subject to a plethora of indexes). Another frequently used interest rate is the one provided by the Special Settlement and Custody System Index (SELIC), maintained by the BCB, particularly in case of tax litigation.

Furthermore, insurance policies will often state the interest rate and monetary correction applicable to the parties, thus becoming a part of the claim.

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

According to the standard rule, any act that has a cost shall be paid upfront by the requesting party.

The plaintiff pays court costs proportional to the value of the dispute, and further costs – such as those associated with services provided by the court – will be paid according to the standard rule stated above. In case an act was requested by the court or by both parties, they will split the cost in the proportion determined by the court.

Finally, the defeated party shall reimburse all costs paid by the winning party during the procedure, in addition to the attorney fees determined by the court (in a range between 10% and 20% of the value at stake).

Considering the costs involved in litigating are heavy and increase the higher the instance, settling prior to trial is often beneficial to the parties.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

Brazilian law, particularly the Brazilian Code of Civil Procedure, is supportive of mediation, conciliation and other ADR, but these remain consensual measures and the courts cannot compel the parties to participate.

Notwithstanding, if the parties do not express their lack of interest in conciliation or mediation, or if any of the parties expressly manifests interest in attempting mediation or conciliation, the courts will schedule a hearing for that purpose.

4.11 If a party refuses a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

There are no consequences to the party that does not wish to participate in ADR, unless it is bound to it by contract.

However, if the conciliation hearing has been scheduled and the party did not object in a timely manner, unjustified absence may be considered contempt of court, resulting in a fine of up to 2% of the value at stake.

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?

Arbitration has seen significant development as an ADR method in Brazil, thus becoming ingrained in Brazilian procedural legislation. As a result, courts on all levels respect and enforce the principle of party autonomy, barring any unlawfulness or defect of consent.

The arbitrator leads the arbitration mostly without intervention by the courts; however, there are specific circumstances in which they are called, most notably to enforce the arbitration award or other measures granted by the arbitrator.

Further interactions with the courts provided for in the Brazilian Arbitration Act include those necessary, for example, to grant injunctions, to annul the arbitration award, and to

decide points on which the parties couldn't reach an agreement (such as fees, arbitrators, arbitration rules, etc.).

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

Brazilian law requires no set form of words to ensure that an arbitration clause will be enforceable, thus granting the parties ample freedom to write their agreement. The arbitration clause may be inserted directly into the re(insurance) contract or signed as a separate document.

Furthermore, there are no requirements on the content of the arbitration clause. Notwithstanding, it is highly recommended that it states at least the elected chamber and key rules that will apply to the arbitration.

Finally, if the re(insurance) contract is an adhesion contract, as in case of contracts subject to the rules of the Brazilian Consumer Defense Code and/or drafted solely (or mostly) by one of the parties, the arbitration clause shall be: (i) highlighted and signed (or checked) by the adhering party, if placed in the contract itself; or (ii) signed as a separate document.

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

If the arbitration clause complies with Brazilian law, the courts are bound to enforce it, as firmly established in caselaw of the Brazilian Superior Court of Justice and other lower bodies.

Therefore, a court will refuse to enforce an arbitration clause solely if it violates Brazilian law, most notably the Brazilian Arbitration Act, the Brazilian Consumer Defense Code and/or the Brazilian Civil Code.

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

The Brazilian Arbitration Act states that, before the commencing of the arbitration, any of the parties is permitted to request provisional measures of protection and urgent relief to a court, but must show evidence of its right and that delaying said measure would be harmful (requirements known in Civil Law systems as *fumus boni iuris* and *periculum in mora*. Common examples of precautionary or urgent measures are: (i) freezing of assets; (ii) securing perishable evidence; and (iii) confiscating documents, among others.

If and once the measure is granted by a court, the party must file the request for arbitration in 30 days. Failure to comply with the deadline will lead to the measure being automatically revoked.

Finally, once arbitration has commenced, the arbitrator(s) will decide on maintaining, modifying or revoking the measures, and will be the competent body for granting any new injunction or relief measure.

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?

Pursuant to the Brazilian Arbitration Act, the arbitration award shall be in writing and must comply with mandatory requirements that include – among others – the grounds of the decision, with express reference to (i) the analysis of fact and law, and (ii) whether the arbitrators judged on equity or law.

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?

The arbitration award is final and unappealable, as expressly stated in article 18 of the Brazilian Arbitration Act. Therefore, the parties have no right to appeal to court and such appeal, if attempted, will be voided by the Judiciary.

Notwithstanding, there is an exception to the rule: a party can request the courts to declare the arbitration award null and void. For example: if the arbitration agreement is void; if the award does not comply with the rules in the arbitration agreement; or if the arbitrator is deemed impeded or partial.

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