Insurance & Reinsurance Law & Regulation

Jurisdictional comparisons **First edition 2014**

General Editor: Clive O'Connell
Goldberg Segalla Global LLP

THE EUROPEAN LAWYER REFERENCE

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Foreword

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Insurance is about the spreading of risk. Ever since Lombard merchants introduced marine insurance in 1200 or Icelandic farmers formed themselves into a mutual later that century, the risk of one has been spread across many.

Of course, sharing risk among people exposed to the same peril does not always work. Accumulation of risk in one geographic area or some other similarly exposed grouping simply magnifies the problem. It was for this reason that reinsurance was born in the fourteenth century in order to allow greater diversification of security and of risk. Risks crossed frontiers, often on a reciprocal basis. A calamity in one place was resolved from the purses and pockets of strangers from far away.

As much early insurance and reinsurance was based upon international trade, the growth of insurance and reinsurance has always been international and the geographic sharing of risk has allowed economies to flourish or, at least, has prevented them from an even earlier demise.

Insurance and reinsurance are not the sole preserves of capitalism. Socialist countries, for example, have used the world's reinsurance markets to protect their macroeconomic interests. Even North Korea used to reinsure itself around the world until sanctions denied it protection. Countries in the former Soviet bloc used reinsurance not merely to protect themselves, but as a way to earn "hard" currency. Often they did so only to find that claims had to be paid in hard currency as well.

The global economy is growing and is becoming ever more interconnected. With the growth in economies, the need for insurance grows as well. Whereas, in the early 1980s, the USA accounted for around 40 per cent of the world's insurance premiums, that figure has fallen to under 25 per cent today while, at the same time, US premiums themselves have continued to grow.

Insurers have also tended to become larger. As global enterprises have consolidated and grown, their need for ever larger insurers has increased. These larger insurers, in turn, need larger reinsurers to protect their capital.

New markets are developing around the world. As they do so, established insurers are often seeing their opportunities for growth there rather than in established and over-competitive locations.

As economies expand, insurance is required in new areas, both geographically and conceptually. New forms of risk are emerging and insurers are struggling to apply old forms of cover to them, often restricted in what they can do by regulatory regimes.

Insurance does not merely follow but can be used as a tool to assist development. Microinsurance schemes are being established, often

in conjunction with microfinance, to help create a middle class and a sustainable economy in poorer countries, and to allow them to develop beyond subsistence. Takaful is being developed to give access to risk sharing to millions of devout Muslims, who make up a significant proportion of the world's population, often in areas undergoing some of the fastest economic growth, and who would otherwise have no recourse to cover.

The insurance and reinsurance industry, however much it may be growing, is still dwarfed by the capital markets. Following the global economic downturn and the combined effects of a number of natural disasters, a need emerged for non-correlated security to protect insurers. At the same time, capital, lacking opportunity elsewhere, was available. As economies have recovered, the capital has remained, and now it is clear that insurance-linked securities are not a temporary trend but a significant change in the way that insurers protect themselves and that capital markets interact with them.

As capital markets become familiar with and develop an appetite for risk transfer, the issue arises as to what extent they will still require the intervention of insurers or whether they might be better suited to providing new solutions to those requiring protection directly. The ability of capital markets to innovate within the confines of their regulatory framework could present the greatest challenge yet to insurers.

Regulators are bound by the limits of their jurisdiction. Those that they regulate and those they protect operate on a broader, often global, scale. Cooperation between regulators is required for fear of loopholes emerging between them which could be exploited by those without good faith.

The international nature of recent developments, adding to an already global industry, presents challenges not only to regulators, but also to legal systems. Principles of insurance law, developed from cases surrounding eighteenth- and nineteenth-century ocean voyages, where cargos were carried on sailing ships, are now being asked to respond to quasi-financial instruments protecting satellite launches.

Often the transaction will be reflected in a number of documents involving parties in a variety of jurisdictions and subject to different forms of regulation.

Existing laws and regulations are being tested. It is too early to say whether they will pass these tests, but all concerned must be aware of the issues that they face.

To aid this process, we have brought together leading insurance lawyers from around the world to ponder and opine upon some of the challenges the insurers and their lawyers and regulators will face in the coming years. The questions considered in this book will be asked for many years to come.

Chile

Acuña, Sahurie, Hoetz & Cifuentes
Alejandro Acuña & Emilio Sahurie

1. WHAT RISKS MUST BE INSURED?

1.1 What are the compulsory classes of insurance?

Under Chilean law there are four main forms of compulsory insurance:

1. pension insurance, which can only be taken out with companies established in Chilean territory;
2. compulsory insurance of motorised vehicles (for death and personal injuries);
3. different forms of compulsory insurance for civil liability for environmental damage, and
4. different forms of compulsory insurance for airplane passengers.

1.2 Who must they be insured with?

1.2.1 Locally admitted insurers

Insurance and reinsurance companies can be formed in Chile only as stock corporations (*sociedad anónima*). There are no restrictions on foreign companies or individuals incorporating or acquiring control of insurance or reinsurance companies.

Insurance companies can be formed to conduct only one of the three kinds of business: general and casualty, credit insurance (including fidelity and guarantee) and life insurance.

The requirements to organise an insurance company engaged in any of the above lines of business include a minimum capital, which has to be completely underwritten and paid in order to obtain the authorisation to conduct business. It amounts to 90,000 Unidades de Fomento (the UF, which is an indexation unit, varies daily on the basis of the previous month's inflation). Using the exchange rates of 16 June 2014, the minimum capital required to form an insurance company amounts to USD 3,790,793.

Other requirements include filing information with the Superintendence, proving that the shareholders in the company have a net worth equivalent to the proposed investment in the company; and identifying the shareholders, the controlling parties and holders of 10 per cent or more of the shareholders' equity. They must also provide evidence that:

- the controllers, majority shareholders, directors, administrators and officers have not been convicted of crimes or other criminal offences;
- none of the above have been subject to any prohibition or incapacity to conduct business; and
- none of the above have been subject to any sanction, fine or penalty imposed by the Superintendence.

1.2.2 Foreign insurers

Chilean legislation allows foreign insurance companies to open a branch in Chile. Capital and other requirements are the same as those imposed upon insurance companies to be organised in Chile.

Operations between branch offices and their parent companies are deemed to have been performed as separate entities. The parent company is not liable for the obligations assumed by the Chilean branch office, and it may reinsure its risks without any limitation.

Commercialisation of MAT business by foreign insurance entities

International marine transportation, international commercial aviation and cargo in international transit (or MAT) insurance and reinsurance may be offered and sold in Chile directly by foreign insurers. Foreign brokers may intermediate MAT insurances in Chile if the state where they are established has signed a treaty with Chile allowing them to contract such insurance from companies in that state. Such is the situation with the USA and the European Union.

Commercialisation of MAT business in Chile by foreign insurers is an exception to the general rule under which foreign insurers are banned from offering and commercialising insurance in Chile, directly or through intermediaries. However, any person may freely buy insurance out of Chile from a foreign insurer.

Foreign insurers

With the exception of MAT, foreign insurers cannot write business in Chile, but Chilean nationals or residents may contract insurance outside of Chile.

2. WHO CAN INSURE NON-COMPULSORY CLASSES OF RISK?

Non-compulsory classes of risk can be insured only by local insurance companies and local branches of foreign insurers. MAT insurances can also be insured by foreign insurers, as indicated above.

3. WHICH REINSURERS CAN BE USED?

3.1 Must they be locally admitted?

3.2 If not, are security requirements imposed?

Foreign insurers or reinsurers can directly write reinsurance in Chile covering Chilean risks, provided that they are registered with the Chilean regulator. They must present two risk rating reports assigning them a minimum rating of BBB, and appoint a legal representative in order to attain this registration. If they are not registered but comply with the two risk rating reports, they can reinsure Chilean risks but through a registered reinsurance broker, which will have the legal representation of the reinsurers for the purposes of lawsuit service.

4. THE TAXATION OF INSURANCE

4.1 What taxes are levied on insurance premium?

4.2 What exceptions are there?

Local insurance companies are subject to income law tax. There is a draft law (which has been approved by most of the political parties in a Protocol and should be passed as law in August or September 2014) which increased income tax from 20 to 27 per cent as of 1 January 2007.

Residents who contract insurance out of Chile are subject to a withholding tax of 22 per cent on the total insurance premium.

Local insurers which reinsure with foreign reinsurers are subject to a withholding tax of 2 per cent on the total reinsurance premium. The withholding of 2 per cent tax over the reinsurance premiums to foreign reinsurers has to be made by the local insurance companies. They have to effect payment to the Chilean tax collection authority within the first 12 days of the month following the month in which the reinsurance premium was paid.

The above withholding taxes do not apply in respect of insurance or reinsurance taken with foreign insurers and reinsurers which do not have a permanent establishment in Chile, and reside in a state with which Chile has a double taxation agreement. At present, such kinds of treaties (generally structured along the OECD format) are in force between Chile and the following states: Australia, Belgium, Brazil, Canada, Colombia, Korea, Croatia, Denmark, Ecuador, France, Ireland, Malaysia, Mexico, Norway, New Zealand, Paraguay, Peru, Poland, Portugal, Spain, Sweden, Switzerland, Thailand and the UK.

Chile has also signed treaties with Austria, South Africa and the USA, but they are in the process of ratification.

A 19 per cent value added tax applies to contracts of insurance, with the following exemptions: carriage of goods imported or exported; marine hull, commercial aviation, and earthquake (including fire originated by an earthquake).

5. INSURANCE REINSURANCE AND CAPITAL MARKETS

5.1 How is finite reinsurance treated?

Despite the fact that in 2013 the provisions of the contract of insurance were completely replaced, there are no provisions that specifically refer to insurance or reinsurance in relation to capital markets in matters such as finite risk reinsurance, wagering agreements and industry loss warranty derivatives in general, as well as alternative risk transfer schemes.

However, the Law on Insurance Companies establishes that reinsurance receivables will be deducted from the technical reserves. In addition, the Insurance Superintendence has issued rules limiting the investment of insurers in derivative financial products. These cannot exceed 20 per cent of the company's net patrimony or 1 per cent of its technical reserves and outstanding loss reserve.

Insurable interest

This is defined in the Code of Commerce as the interest of the insured in the avoidance of the risk. The insurance interest is not an element of the essence of the contract, but if it does not exist at the time of the occurrence of the loss, the contract will terminate. In addition, and in respect of property insurance, the norms peremptorily establish that insurance is an indemnity contract and may not be the source of a profit. This provision does not govern financial risks, although general principles of insurance may lead to its application.

5.2 Derivatives, ILWs and wagering agreements

N/A.

5.3 Side cars and CAT bonds

There are no specific norms about side cars. If they are structured as insurance contracts, all the norms governing the insurance contract, including non-disclosure, would apply.

In respect of reinsurance, there is ample freedom of contract which may encompass financial devices and reinsurance along the structure of quota-share or even more complex reinsurance schemes. In the absence of any stipulation referring to insurance law, the general law of contracts shall apply.

As regards bonds, insurance companies may issue these kinds of titles and the participants in the security market may invest in them as long as they comply with the classification risk, and with the other requirements and limits imposed by the regulator.

5.4 Other ILS and ART products

Remedies in cases of either misrepresentation or non-disclosure

The new rules of the Code of Commerce that have been in force since 1 December 2013 impose on the insured the obligation to honestly answer all the questions asked by the insurer to identify and perceive the nature of the risks. There has been a change in the nature of the obligation, from total disclosure in the past to honest answers to the insurer's questions today: the burden has been placed on the insurance company. If the company does not ask the question, then, legally, there is no misrepresentation.

If a loss has not taken place and the insured has incurred an unjustified reticence, error or inaccuracy in responding the insurer's question, which is determinant to the risk insured, the insurer is entitled to rescind the contract.

If the reticence, error or inaccuracy in the response to the insurer's question does not have such characteristics, the insurer may propose an amendment to the contract terms in order to adjust the premium or the terms of coverage to the circumstances improperly informed by the insured. Should the insured not accept the modifications or not respond to the insurer's proposal, then the insurer may rescind the contract.

If a loss has taken place, the insurer is exonerated from paying any indemnity if the loss has arisen out of a risk in respect of which the reticence, error or inaccuracy was determinant. If it does not have such a characteristic, the insurer may reduce the indemnity in proportion to the higher premium that would have been charged if all the circumstances had been properly informed.

The insured does not have a positive duty to disclose to insurers all matters material to a risk. His obligation is to honestly answer only the questions raised by the insurer.

6. COMMISSIONS

6.1 What commissions and brokerages are permissible? What disclosure of commissions is required?

The quantum of commissions and brokerages is not regulated, but the amount shall be disclosed in the insurance policy. Circular letter 2123, issued by the insurance regulator on 22 October 2013, establishes that the policy shall indicate in detail the total premium, the part of the premium corresponding to the basic cover, and to additional covers and taxes. Also, it shall indicate, for informative purposes, the total commission for intermediation stipulated with the intermediary, as well as any other payment or stipend to be made in favour of the contracting party or the intermediary, or any persons related to them.

This regulation provides specific instructions as to the form in which this information shall be included in individual and collective policies.

7. HOW ARE AGENTS (BROKERS AND UNDERWRITING AGENTS AND THIRD PARTY CLAIMS ADMINISTRATORS) REGULATED?

There are no regulations at all regarding underwriting agents and third party claims administrators. Therefore, the general law of agency or mandate applies to regulate their relation with the parties to the insurance contract.

Agents and brokers are governed by norms of the Law of Insurance Companies, decrees and regulations issued by the Superintendence of Insurance on this matter. In accordance with these norms, insurance policies can be contracted directly with the insurer, through the insurer's agents or through independent intermediaries (insurance brokers).

Agents act and sell insurance only for one insurance company. They have to be included in a registry of sales agents to be kept by every insurance company.

Unlike agents, insurance brokers act on behalf of the insured, whom they shall assist whilst the insurance contract is in force.

To be registered as an agent or insurance broker, it is necessary to have a proper business background and to demonstrate knowledge of insurance (by taking a test before the regulator). This requirement may be waived if the agent is a juridical person who acts as a distribution channel for commercialising individual insurance, as long as the insurer provides the necessary technical support.

In addition, brokers shall present to the regulator a guarantee (which may be a banking guarantee or professional indemnity insurance). Its amount shall be equivalent to 30 per cent of the premium intermediated in the previous year, with a maximum of USD 2,527,195 and a minimum of USD 21,060 at the exchange rates of 16 June 2014.

A number of incompatibilities are established in the Law of Insurance Companies: directors, managers, representatives of insurance and reinsurance companies and loss adjusters cannot be insurance brokers.

In respect of reinsurance brokers, they may be Chilean or foreign, but have to be approved by the Superintendence. Reinsurance brokers cannot be insurance brokers, and must present professional indemnity insurance in an amount equivalent to one-third of the premium intermediated in the previous year, with a minimum of USD 842,398 (at the exchange rates of 16 June 2014). Foreign reinsurance brokers must also present a certificate of good standing and appoint a representative in Chile.

Reinsurance of insurance contracts effected in Chile can be placed with Chilean insurance or reinsurance companies or with foreign reinsurers included in the regulator's list of approved foreign reinsurers, or with any foreign reinsurer that complies with a risk rating BBB or equivalent, but in such case the reinsurance shall be placed through Chilean or foreign reinsurance brokers registered before the insurance regulator.

8. IS TAKAFUL POSSIBLE?

N/A.

9. WHAT SCOPE IS THERE FOR MICROINSURANCE?

The Law of Insurance Companies has expressly banned any kind of mutual protection associations created to insure risks with funds of contributing members. Insurance of risks is reserved to insurance companies authorised by the regulator to operate on the basis of premiums.

10. EXIT SOLUTIONS – WHAT SOLUTIONS ARE AVAILABLE AND HOW DO THEY OPERATE? HOW ARE FOREIGN SOLUTIONS RECOGNISED?

They are not regulated under Chilean law. Foreign solutions would be recognised unless the transaction affects Chilean public order.

10.1 Portfolio transfer

Insurance companies are allowed to transfer their business portfolios, in total or partially, through a cession to another insurance company established in Chile. The terms and conditions of the transfer shall not prejudice the insurers, and have to be authorised by the insurance regulator. The transfer also has to be informed to the insureds by mail, and they may oppose the transfer.

The transfer of the brokers' portfolio is not regulated by insurance regulations. Therefore, the general law regarding the cession of rights would apply.

10.2 Statutory portfolio transfer
N/A.

10.3 Novation
Novation is not regulated in respect of insurance, and the general norms of the Civil Code would be applicable to this transaction. Accordingly, the insured has to agree to have the insurer replaced, and has to appear giving his acceptance in the novation agreement, together with the original and the new insurers.

10.4 Commutation
Commutation is not regulated in Chilean law. However, since freedom of contract widely applies to reinsurance, the parties may stipulate a commutation mechanism or may agree on a policy buy-back.

10.5 Policy buy-back
In respect of large risks, there is freedom of contract and therefore a buy-back is possible. Large risks are those in which the insured party and beneficiary are legal entities, and the annual premium exceeds USD 8,424 at the exchange rates of 16 June 2014. Also, there is freedom of contract for marine insurance.

In respect of regulated contracts, there may be restrictions emanating from mandatory provisions, and the policy has to follow a form previously deposited with the regulator. Therefore, the buy-back terms should be included in the policy form previously deposited with the regulator.

10.6 Solvent scheme
A scheme of arrangement is not available to Chilean insurers. In the event of a patrimonial deficit, the company shall increase its capital, and the regulator may impose a deadline for that. Also, there are norms for reorganisation of an insurance company under which the company may propose solutions to be approved by creditors and supervised by the regulator.

10.7 Assignment
The policy may be assigned by endorsement if it is to the order. If it is nominative, the transfer has to be approved by the insurer. The credit that an insured may have in respect of a loss that has taken place can be assigned in accordance with the general rules of cession or rights.

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