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The International Comparative Legal Guide to:

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A practical cross-border insight into insurance and reinsurance law

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Chile

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1 Regulatory

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

The main regulator supervising the insurance and reinsurance activity is the Securities and Insurance Superintendence (the Superintendence). The Superintendent is the higher authority, and he is seconded by an insurance intendant, who leads several divisions made up of specialised officers who act in the various areas that are controlled and supervised by the Superintendence.

Indirectly, governmental agencies envisaged in the Consumer Protection Law 2004 may play a role in the defence of "collective and diffuse interest of consumers", who may be entitled to commence a class action or collective lawsuit.

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

Chilean insurance and reinsurance companies

Insurance and reinsurance companies can be formed in Chile only as a *sociedad anónima*, that is, as a company by shares. There are no restrictions on foreign capitals to participate in the formation of a company of insurance or reinsurance, or to take control thereof.

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 of 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* (UF), which is a unit of indexation that varies daily based on the previous month's inflation). In accordance with the values on 28 November 2014, the minimum capita to form an insurance company amounts to USD 3,687,127.

Other requirements include a submission to the Superintendence evidencing that the shareholders of the company have a net patrimony equivalent to the investment proposed for the company, providing the identity of the shareholders, the controlling parties and holders of 10 per cent or more of the shareholder equity, and providing evidence of the following:

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

Foreign insurance subsidiaries

Recent Chilean legislation allows foreign insurers 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 the branch offices and their parent companies are deemed to have been effected between different entities. The parent company is not responsible for the obligations assumed by the Chilean branch office and may reinsure its risks without any limitation.

Direct sale of MAT business by US and EU companies or brokers

Insurance for international marine transportation, international commercial aviation, cargo in international transit, and satellites and their cargo (MAT) may be commercialised in Chile by foreign insurance companies. This is an exception to the general rule that, save for some compulsory insurances, any Chilean citizen is able to buy insurance abroad and to approach a foreign insurer for such purpose, but foreign insurers are banned to offer and intermediate insurance in Chile.

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

With the exception of MAT, foreign insurers cannot write business in Chile, although any citizens may write insurance business out of Chile. The insurance premium is subject to a 22 per cent withholding tax. However, this tax would not be applicable in respect of most of the states that currently have a Tax Treaty Convention in force with Chile, including Australia, Belgium, Brazil, Canada, Colombia, Croatia, Denmark, France, Ireland, Korea, Mexico, Norway, Peru, Portugal, the United Kingdom, Russia, Sweden and Switzerland.

In respect of reinsurance, they can reinsure Chilean risks, provided that they are registered before the Superintendence. For that, foreign reinsurers shall present two risk-rating reports with a minimum BBB rating, and appoint a legal representative domiciled in Chile. There is a withholding of 2 per cent of the reinsured amount. This tax would not be applicable in respect of most of the states that currently have a Tax Treaty Convention in force with Chile.

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?

In respect of large risks, there is absolute freedom of contract. It is deemed to be a large risks if the insured party and beneficiary are a legal entity (as opposed to an individual), and the annual premium exceeds 200 "*Unidades de Fomento*" (a unit of indexation), which, at the exchange rates prevailing on 28 November 2014, amounts to USD 8,194. In those cases, and also in respect of cargo insurance and marine and hull insurance, there are no restrictions to the parties' freedom of contract and the policy forms are not subject to previous deposit before the insurance regulator.

In contracts other than "large risks" freedom of contract is restricted. The restrictions include mandatory regulations, which are imperative to all insurance contracts, and specific regulations, which apply to a particular kind of insurance contract. Only policy forms that have been previously deposited before the regulator can be commercialised by insurance companies.

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

Companies are permitted to indemnify its directors and officers. However, a special regulation exists which forbids companies (or associated entities) to indemnify or cover the costs of fines for infractions to norms that protect free competition.

1.6 Are there any forms of compulsory insurance?

Under Chilean law there are at least four different forms of compulsory insurance:

1) compulsory insurance on pension funds;
2) compulsory insurance on motorised vehicles;
3) different forms of compulsory insurance on civil liability caused by environmental harm; and
4) different forms of compulsory insurance for passengers on air transportation.

2 (Re)insurance Claims

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

In respect of large risks (as defined in question 1.4 above) the law is neutral and due respect is given to the parties' contractual freedom. The rules governing the rest of the contracts of insurance protect the insured or beneficiary, and the contract is regulated by the law. The parties cannot stipulate against mandatory norms unless the stipulation is favorable to the insured.

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

As a rule, third parties cannot bring a direct action against an insurer for coverage. One exception is in marine insurance, the beneficiary or holder of a letter of undertaking issued by a liability marine insurer can claim directly against the insurer.

A few authors hold that, under the new rules on insurance contract in force since December 2013, third parties have direct action against the liability insurer. This is a highly debatable issue. So far there has not been issued any court ruling on the matter.

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

An insured cannot bring direct action against the reinsurer. The exception is in case of bankruptcy of the insurer. Also, the parties to the insurance and reinsurance contract can stipulate a cut-through clause allowing the insured to bring direct action against the reinsurer.

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

Until the amendment to the Code of Commerce, which entered into force on 1 December 2013, in case of misrepresentation or non-disclosure by the insured, the insurance company was entitled to rescind or resolve the contract. The new legal regulation imposes on the insured the obligation to "honestly answer all the queries asked by the insurer to identify and perceive the nature of the risks". The new provision has changed the nature of the obligation, which previously was total disclosure. Now, the requirement is to give honest answers to the insurer's specific queries, placing the burden on the insurance company. If the queries are not made by the insurer, then there is no misrepresentation under the law. If the query is made, however, the insurer can rescind the contract (if the misrepresentation is decisive) or propose modifications to the policy. Should the insured not accept the modifications, then the company can rescind the contract.

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 insured is obligated to honestly answer only the questions raised by the insurer, and no more than that.

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?

By virtue of payment of the insurance indemnity the insurer subrogates all rights and actions of the insured against third parties that may be liable for the loss. The insured party is also responsible to the insurance company of all actions or omissions that could lessen or weaken the subrogated right.

This legal subrogation has limits. The insurer will not subrogate the insured in respect of the following third party: the spouse or a close relative; and those for which the insured has to respond, unless there is fraud, or the third party is insured.

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 disputes regarding insurance shall be resolved in arbitration. This has been viewed as the most appropriate alternative as it provides specialised judges with specific knowledge on the subject matter, offers more freedom to the parts and generally solves

disputes in a more expedite manner. However, if the quantum of the dispute is less than 10,000 "*Unidades de Fomento*" (USD 409,680 at exchange rate of 28 November 2014), the insured may opt to bring his claim to ordinary courts.

The parties cannot designate the person of the arbitration before the loss or claim occurs. Once the loss takes place, if the parties do not agree in the name of the arbitrator, he or she shall be appointed by the ordinary courts.

First instance courts in Chile offer a good level of legal resolutions but they are not specialised in insurance or reinsurance commercial disputes and the duration of a proceeding is longer than arbitration. Resolution of appeals, or cassation before Superior courts, such as the appellate courts and particularly the Supreme Court, provide a high level of legal analysis.

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

Arbitration usually takes around a year to be resolved. If an arbitration Appellate Court has been stipulated in the arbitration agreement, the appeal may take three to six months.

Before ordinary courts, first instance takes about two years – usually more. The appeal takes one year, and taking cases to the Supreme Court usually adds another year.

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 courts have the power to order any party to the dispute, or even to third parties, to disclose any documents that are not confidential, as long as they pertain directly to the disputed matter. Disclosure can also be ordered in a pre-trial phase, in order to prepare for the commencement of proceedings.

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 advice given by lawyers to their clients is confidential and both the lawyers and the clients can withhold that information from the courts, although there are exceptions in criminal matters. If documents are prepared in contemplation of litigation, they may be deemed as privileged information between clients and lawyers.

The documents produced in the course of the negotiation of a settlement are not protected by any confidentiality law, but they can be protected by the negotiating parties with a confidentiality agreement.

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

Under Chilean jurisdiction, ordinary courts can compel witnesses to appear and surrender testimony. If the witness does not comply with the order, the court may apply fines, and even short imprisonment.

If the witness resides in a different jurisdiction, the court can issue a rogatory letter to the court corresponding to the domicile for the production of the evidence. If the witness does not live in Chile, the court will issue a rogatory letter to the court where the witness has residency through the Ministry of Foreign Affairs. The rules of said country shall determine whether or not the witness may be compelled to attend.

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

In ordinary courts, witnesses have to attend to a hearing and give their testimony in person, and the other party has the right to cross-examine. In arbitration proceedings, the parties can agree that a written statement can be presented, and in those cases, usually it will be the right of the other party to determine whether or not the witness's personal appearance will be required for cross-examination.

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 in calling expert witnesses, which shall be appointed by the court. It is a common practice, however, that the parties request a report from experts, and then request the expert as a witness. However, an expert appointed by the court will usually have more weight in the judge's assessment.

The cost of the expert is borne by the party who requested it, without prejudice to the court's decision on costs.

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

The court may order interim measures, which may include seizure or freezing of goods or assets, disclosures of documents, exhibition of documents, and prohibition to celebrate or execute certain civil acts in respect of the disputed goods.

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 right to seek a review of a judicial decision is guaranteed by the Constitution and is part of the due process of law. However, the parties may renounce to the appeal.

The general ground for appeals is prejudice caused by non-conformity of the decision to the law (including the contract).

In Chile there is only one appellate stage, before appellate courts. However, there is also a special recourse of cassation that can be taken up to the Supreme Court, which is the highest court in Chile.

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

Interest is recoverable since the date of the claim or since the date of the award or judicial decision. Courts fix the interest rate to be applied, and for that, they take as a reference the prevailing banking interest.

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

The rule is that the party that is completely defeated in the sentence shoulders the costs of that trial, which can be waived by the court if it considers that there were plausible grounds for the defeated party to litigate.

There are no costs advantages in making offers to settle prior to the trial. Such offers, and the possibility of settlement, are not taken into consideration in the proceedings or in the potential award of costs.

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

Courts have no power to compel the parties to mediate insurance or reinsurance disputes.

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

Mediation is voluntary and refusal to mediate bears no consequences.

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 tointervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

Chilean courts recognise and uphold arbitration. The arbitration process and the autonomy of the parties to resort to arbitration are respected by higher courts. Courts intervene if the parties have not renounced their right to appeal before the appellate courts and, in such cases, they may revoke the arbitral decision if it does not conform to the law.

If the parties have renounced to appeal, higher courts can intervene only if there has been a clear grave fault or abuse of powers by the arbitrator. They can also nullify a sentence in case of lack of competence or *ultra petita* (the arbitrator exceeds that which was claimed).

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?

A particular form of wording is not required in Chile in order to ensure the enforceability of an arbitration clause.

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 quantum of the dispute is less than 10,000 "*Unidades de Fomento*" (USD 409,680 at exchange rates of 28 November 2014), the insured may opt to bring his claim to ordinary courts.

The parties cannot designate the person of the arbitration before the loss or claim occurs. Once the loss takes place, if the parties do not agree in the name of the arbitrator, he or she shall be appointed by ordinary courts.

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

Courts have the power to make orders before and during arbitration proceeding, but any compelling order can only be executed through ordinary courts.

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 tribunal is bound to give a reasoned award unless the parties have agreed an arbitration in equity.

The tribunal has to state in its award the reasons (regarding the facts and the law) that support the award. It also has to mention the laws or the principles of equity in accordance to which the award is given. If these requirements are not complied with, the higher court may annul the award.

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 parties can always appeal unless they have renounced to it. In general, the success of an award challenge would depend on the existence of a substantive legal rule, or a procedural rule regarding the establishment of the facts.

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Alejandro Acuña specialises in insurance, reinsurance, arbitration and litigation.

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He was President of the International Association of Insurance Law (AIDA-Chile) between 2007 and 2009. He is part of the panel of Arbitrators of the Arbitration and Mediation Centers of the Santiago Chamber of Commerce and the Valparaiso Chamber of Commerce.

He studied Law at the Catholic University of Valparaíso and thereafter obtained LL.M. and JSD degrees from Yale Law School, where he was awarded the Ambrose Gherini Prize. He has lectured in commercial and international law at the University of Chile, the Catholic University of Valparaiso and the Catholic University of Chile. He is Lloyd´s of London Attorney-in-Fact for Chile. He has been a senior partner at Estudio Carvallo, thereafter at Sahurie & Asociados and currently at Acuña, Sahurie, Hoetz & Cifuentes.

ACUÑA, SAHURIE,
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Specialist firm Acuña, Sahurie, Hoetz & Cifuentes, launched on 1 August 2014, is the continuator of Acuña & Cía. and Sahurie & Asociados. Alejandro Acuña has been described as "a highly regarded litigator, widely respected in the field". Mr. Acuña has been involved in the main insurance losses that have occurred in Chile in the last 27 years. Emilio Sahurie is well-known for his insurance & reinsurance (including regulatory aspects) maritime and aviation experience. Both have been recognised in 2012, 2013, 2014 and 2015 as leading insurance lawyers by Legal 500 and Chambers & Partners.

The merger promises to go far in the market with the inclusion of Felipe Hoetz, who has a solid reputation in insurance claims. He is President of the Chilean Association of Loss Adjusters (ALOSI) and the International Federation of Adjusting Associations (IFAA) based in London. Luis Cifuentes has a superb recognition as litigator.

The sum of these individuals equals a top team.

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