INSURANCE LAW AND REGULATION IN BRAZIL

1. Introduction

The Brazilian insurance market is regulated by two agencies that report to the Ministry of Finance. These are the Superintendence of Private Insurance (SUSEP) and the Private Insurance National Council (CNSP). The agencies were created by the enactment of Decree Law No. 73/1966. The role of SUSEP is to manage the operation of the insurance market in Brazil by supervising the activities of insurance and reinsurance companies. SUSEP carries out its functions by executing the policies determined by CNSP. CNSP's role is to provide strategic direction on insurance policy in Brazil. In its overarching capacity, CNSP formulates and adjudicates the guidelines for private insurance policies, determines the general features of insurance and reinsurance contracts and regulates those acting as brokers for insurance and reinsurance. CNSP carries out its regulation of the market function by issuing resolutions. CNSP also has the capacity to hear appeals on decisions made by SUSEP.

The insurance market is governed by Articles 757-802 of the Brazilian Civil Code (BCC), Commercial Code 1850 (only for maritime risks), Decree-law 73/66, Consumer Defense Code and CNSP resolutions. All contracts of insurance and reinsurance are regulated, with greater protection given to contracts of insurance with consumers. Where a contract of insurance between a business and a customer occurs, the automatic presumption is that consumers will have less bargaining power than businesses and as such, should receive greater protection. In matters of reinsurance, the contract will be negotiated business to business. In this situation, the presumption is that the parties will be on an equal footing when entering into contracts, so they do not require the additional protections afforded to consumers. As operators of the insurance market, insurers, reinsurers and brokers are also regulated. Prior to commencing operations, each must seek prior authorization to operate from SUSEP, as well as obtaining all applicable local business permits to operate in Brazil.

Until 2008, the reinsurance sector in Brazil was monopolized by the government-controlled IRB Brazil RE. The enactment of Complementary Law No. 126/2007 opened up the reinsurance sector in Brazil to private enterprise. The reinsurance market in Brazil is still subject to prescriptive controls on the movement of premiums intergroup and caps on local reinsurance requirements. Resolution No. 325 sets the limit on premiums that can be contracted intergroup, at 30% until 31 December 2017. This percentage will be increased by 15% a year, up to a maximum of 75%, from 1 January 2020. Similarly, the resolution also requires that a minimum percentage of each reinsurance contract be ceded to local reinsurers. The percentage stands at 30% until the end of 2017, and will decrease by 5%, to a minimum percentage of 15%, from 1 January 2020.

The issuance of all types of insurance products in Brazil is another component of the market that is highly regulated. Insurance companies have the freedom to draft

custom contracts. However, the clauses drafted must not operate in an adverse manner to those set out by SUSEP in its standard conditions. Once an insurance product of any type has been prepared, it must be approved by SUSEP before it can be offered to the public. Any subsequent amendment to the product must be resubmitted to SUSEP for approval, before it can be offered to the public.

Insurance law in Brazil may be subject to significant change in the coming years if Statute Project n. 8.290/2014 is accepted by Congress. If passed, it would become the first specific Brazilian Insurance Law. The draft of this project was initiated back in 2004 (through Statute Project n. 3555/2004) and has subsequently been under discussion and evaluation by the market and relevant authorities for a considerable period of time. If approved, the new law would come into force one year after the date of its publication.

2. Effect of misrepresentation and/or non-disclosure

Article 765 of BCC provides that insurers and insured parties must conduct dealings in line with the principle of utmost good faith, both before and after agreeing to the contract. In accordance with article 766 of BCC, the effect of a material misrepresentation or non-disclosure is that the insured shall lose the right to indemnification when the insured party omits circumstances or provides incorrect information that might influence the insurer's acceptance of the risk or valuation of the premium.

Although insurers can rely on the concept of utmost good faith, ambiguities and imbalances in contracts of insurance should be avoided as judicial interpretation of clauses tends to favour the insured rather than the insurer. Additionally, Brazilian courts have previously found that only a willful omission made in bad faith can trigger the insurer's right to decline payment of cover. Further, art. 762 of BCC establishes that a contract guaranteeing a risk arising out of a willful act of the insured shall be annulled. Art. 768 of BCC also states that the insured shall lose the right to indemnification when they intentionally aggravate the risk.

When seeking to contest the omission, the insurer will bear the burden of proof to demonstrate that the insured has not acted in utmost good faith.

3. Effect of breach of warranty and condition precedent

Conditions precedent and warranties are not specifically provided for under Brazilian law. Breaches of policy conditions will entitle the insured to seek damages for the loss, provided that this is proven, and subject to the general rules of contractual law.

4. Consequences of late notification

Where an insured suffers loss as a result of an insured event occurring, subject to loss of their right to be indemnified, the insured should make a claim as soon as they become aware of the occurrence of the loss (art. 771 of BCC). Failure to do so may lead to the insured losing the right to be indemnified for the loss. Art. 771 of BCC does not expressly set out a longstop deadline by which a claim should be notified to the insurer. Consequently, the Brazilian courts will only enforce the

forfeiture of the insured's rights where the insurer proves that the impact of the late notification led to an increase in the insured's loss. The loss may be considered amplified where the claims adjuster is no longer able to properly handle the claim. Alternatively, where the late notification of the loss hinders or prevents the insurer's investigation this may also result in the insurer validly refusing to pay the coverage.

5. Entitlement to bring a claim against an insurer

At the current time, there is no statutory provision in Brazil which provides third parties with a legal right to sue insurers directly and exclusively in the context of non-compulsory contracts of insurance. For non-compulsory contracts of insurance in Brazil, a claim would be filed by the insured against the insurer, or by a third party against the insured, but not usually between a third party and the insurer.

In 2015, the Superior Tribunal of Justice (STJ) issued Súmula n. 529, a form of a non-binding but persuasive statement. In accordance with the Brazilian Civil Procedure Code (CPC), both judges and the courts are required to observe the Súmulas and statements of the STJ. The effect of Súmula 529 has been to prevent third parties who have suffered injury, in cases involving facultative civil liability insurance, from directly and exclusively filing a suit against the insurer. The basis of the judgment given in Súmula n. 529 is that an insurer will only be obliged to indemnify the insured party for damages owing to a third party where the insured has been found liable. Consequently, without the involvement of the insured in a direct claim against an insurer by a third party, the proceedings would likely fail. Failure to include the insured would most likely breach the principles of Due Legal Process and Full Defense, which are provided for in the Brazilian Federal Constitution (art. 5, LV). It is especially likely that a breach of these principles would occur where, without the insured being available, the insurer would only have access to limited information about the underlying incident. This may prevent the insurer from providing an adequate defense to any allegations made in a third-parties statement of claim. It is, however, possible at the current time to join an insurer as co-defendant in a suit brought by a third party against an insured party.

The position of third parties will be amended, if and when, Statute Project 8.290 of 2014 ultimately passes. Paragraph 1 of art. 107 of the proposed legislation would provide third parties with a right to make a direct claim against insurers, within the cap on liability established in the contract of insurance. The same article gives the claimant the option to summon the insured as co-defendant.

6. Entitlement to damages from an insurer for late payment of claim

SUSEP regulates the maximum time period for the claims adjustment proceedings to take place. The time limit varies depending on the type of insurance product under which the claim is being brought. Insurers usually have a period of thirty days in which to carry out the claims adjustment procedure. The thirty days commences on the date which the insurer receives documents requested from the insured or the beneficiary of the insurance. During the claims adjustment proceedings, the previously noted window will be suspended for a one-off period commencing, when the insurer requests further documentation and ending when

these documents are supplied to the insurer. According to the BCC the insured can claim extra contractual damages (such as loss of profit and interest) arising from late payment, as long as such delay is considered unlawful.

7. General rules concerning the limitation period for claims

The general time limit to file an insurance claim is one year (art. 206, BCC). The first exception for claims relates to air transportation risks, as per the Brazilian Aeronautical Code. The start date from which this normal thirty-day limitation period runs from is unclear as it is not formally set out in the BCC. In cases where an insurer formally declines coverage, the limitation period starts from this point. In almost all other cases, the time limit runs from the time that the insured has knowledge of the loss. There are however, exceptions made to claims related to civil liability. In these cases, time runs from the date the insured is summoned to respond to the third-party claim, or from the date the insured indemnifies the third-party, duly authorized by the insurance company. A special period of three years applies to claims brought by (i) a beneficiary or (ii) third parties in compulsory liability insurance. For cases involving life insurance, the time limit is extended to five years.

In what is considered a somewhat controversial decision of the STJ, contracts of reinsurance were held to be contracts of insurance and therefore subject to the same one-year limitation period as detailed above (Special Appeal 1.170.057/MG).

8. Policy triggers with respect to third-party liability insurance

The general rule is that occurrence of the loss to the insured triggers the claim. In civil liability insurance, identification of the trigger can be more complex. The time at which knowledge of the insured is determined to have occurred may rest on circumstances outside of the insured's control. Equally, it can be hard to correctly predict, or quantify the extent of the damage the insured has suffered immediately. Therefore, in practice, policies are agreed on a claims-made basis with limitation periods. It should be noted that the concept of claims-made basis is still a relatively recent introduction to Brazil. In May 2017, SUSEP issued a Circular (553) requiring D&O policies to be issued on a claims-made basis. Insurers in Brazil are now explicitly prohibited from issuing D&O policies triggered by occurrence/event.

9. Recoverability of defense costs

The insured can recover defense costs when these are covered by the policy. Before Circular SUSEP 553, the Brazilian regulatory authority required defence costs to be provided in addition to D&O coverage. This created uncertainty in relation to the possibility of offering this coverage independently from the indemnity coverage. After Circular 553, coverage for defence costs may be provided in the basic coverage of D&O policies; thus, clarifying the point on the possibility of providing coverage for defence costs only.

Insurers in Brazil have historically faced difficulties when trying to recover amounts advanced to cover defence costs. Circular 553 now expressly requires that when defence costs coverage is provided, the policy shall provide the insurer with the

right to subrogate against the insured, in situations where the damages result from a wilful act or when the insured acknowledges his liability.

10. Insurability of penalties and fines

Before Circular 553, SUSEP's understanding was that coverage for fines and penalties would eliminate the disciplinary nature of such sanctions. In practice, the market used to consider such prohibition only in case of willful acts, meaning there would not be any impediments to indemnify an insured party against the non-intentional acts. The most relevant and debatable change introduced by SUSEP Circular 553 relates to the authorization of D&O coverage for civil and administrative fines and penalties, provided they relate to non-intentional acts.