Contributed by: *Leonel Pereznieto, María José Pinillos and Carlo Romero,* ***Creel, García-Cuéllar, Aiza y Enríquez, S.C.***

1. Basis of Insurance and Reinsurance Law

1.1 Sources of Insurance and Reinsurance Law

Insurance and reinsurance in Mexico are preempted by Federal law, which means that the States of the Mexican Federation cannot legislate on insurance and reinsurance matters.

There are three Federal statutes that are applicable to insurance and reinsurance:

- the Insurance and Bonding Companies Law (*Ley de Instituciones de Seguros y de Fianzas* or LISF), published on 4 April 2013 and effective since 5 April 2015, which focuses on the regulatory aspects of insurers and reinsurers;
- the Insurance Contract Law (*Ley sobre el Contrato de Seguro* or LCS), published on 31 August 1935 and amended several times, that focuses on the contractual aspects of insurance law; and
- the Navigation and Maritime Commerce Law (*Ley de Navegación y Comercio Marítimos*) published 1 June 2006, which contains statutory provisions applicable to marine insurance.

The LISF is supported by a detailed consolidated regulatory framework contained in the Unified Regulations on Insurance and Bonds (*Circular Única de Seguros y Fianzas* or CUSF).

Federal Regulator

The National Insurance and Bonding Commission (*Comisión Nacional de Seguros y Fianzas* or CNSF) is the Federal insurance regulator also issues guidelines that lay out policy directives. One example of this guidelines were the recommendations issued by the CNSF during the COVID-19 pandemic by which insurance companies should refrain from paying dividends to their shareholders - or any other mechanisms tending to reward shareholders (ie, assume an irrevocable commitment to pay dividends for the fiscal years 2019 and 2020).

Interpretation and Implementation

Because the LCS is a statute enacted in 1935 and was drafted following the traditional civil law of laying out general precepts, it leaves much room for interpretation. Thus, a fair number of reported decisions by Federal courts are available for interpreting some of the provisions of the LCS.

Under Mexican law, case law is binding only when a decision either at the Federal Circuit Court or the Federal Supreme Court level is confirmed uninterruptedly on five occasions, thus constituting what is referred under Mexican law as "jurisprudencia", namely binding case law. As can be expected, there is a small number of binding precedents on insurance and reinsurance, but there is a larger number of non-binding precedents that serve as persuasive authority.

2. Regulation of Insurance and Reinsurance

2.1 Insurance and Reinsurance Regulatory Bodies and Legislative Guidance

Regulatory Bodies

The CNSF holds most of the regulatory authority and is responsible for the authorisation of Mexican insurance companies, supervising their day-to-day operations and issuing specialised administrative secondary rules.

Mexico's Treasury Department (*Secretaría de Hacienda y Crédito Público* or SHCP), through its Insurance, Social Security and Pension Funds Unit, has the authority to design policies for the insurance industry, including AML/CFT.

The CNSF is directed by a governing board (*Junta de Gobierno*). The governing boardhas a bimonthly agenda of sessions with a quorum of at least eight of its members, and is in charge of the most relevant authorisation processes, for example:

- granting, modifying or revoking the authorisations to act as an insurance company;
- authorising the assignment of the portfolio of insurance companies; and
- authorising the merger and spin-off of insurance companies, among others.

The Governing Board is integrated by members appointed by several financial regulators:

- CNSF's President (who is also the chairman of the governing board);
- three Vice-Presidents appointed by the CNSF's President;
- four members appointed by the SHCP;
- one member appointed by the National Banking and Securities Commission (*Comisión Nacional Bancaria y de Valores* or CNBV);
- one member appointed by the National Commission of the Retirement Savings System(*Comisión Nacional del Sistema de Ahorro para el Retiro*);
- one member appointed by the Mexican Central Bank (Banco de México); and
- two independent members appointed by the SHCP.

The National Commission for the Protection and Defense of Financial Services Users (*Comisión Nacional para la Protección y Defensa de los Usuarios de Servicios Financieros* or CONDUSEF)

is the agency responsible for receiving complaints from financial services consumers (including insurance matters), and gather information about the behaviour of insurance companies, their claims history, administrative fines and other basic financial information.

Mexico's Central Bank issues monetary policies regarding insurance activities.

Legislative Guidance

Please refer to **1.1 Sources of Insurance and Reinsurance Law**.

Reinsurance contracts are subject to the law agreed by the parties. However, as the underlying insurance policies are governed by Mexican law, it is commonly agreed that the Mexican law should be the applicable law to reduce possible inconsistencies between the insurance and reinsurance contracts.

Additionally, it is possible to include arbitration clauses in both the insurance and reinsurance agreement to consolidate the proceedings rules.

2.2 The Writing of Insurance and Reinsurance

Only Mexican insurance companies are authorised by the LISF to carry out insurance and reinsurance activities within their authorised lines of business. This authorisation may be limited to reinsurance activities. As a rule, foreign insurance companies are prohibited from offering and selling insurance products in Mexico, therefore, only authorised Mexican insurance companies are entitled to underwrite business in Mexico. Two exceptions are:

- if the insurance offered or provided by the foreign insurer is not otherwise available in the Mexican insurance market; and
- if a waiver is obtained by the foreign insurer to offer insurance in Mexico that provides cover to losses that may only occur in the country where the foreign insurer is authorised to conduct its business.

Depending on the lines of business specifically reserved to Mexican insurers, applicable provisions of the LISF can be read to allow participation of insurers in non-reserved aspects. For example, life insurance products covering individuals can only be underwritten by Mexican insurers when the insured is present in Mexico at the time the insurance contract is formed. Accordingly, the insured can obtain life insurance from a non-Mexican insurer when the insured is not physically in Mexico at the time the insurance contract is formed.

Conversely, the reinsurance business in Mexico is open to foreign reinsurers provided they are registered with the General Registry of Foreign Reinsurers. The registry process is regulated in the CUSF and must be renewed on a yearly basis by providing evidence of a satisfactory credit rating to the CNSF.

Licensed Mexican reinsurers are subject to essentially the same regulatory framework as Mexican licensed insurers.

Standardised Insurance

In accordance with the LISF, non-negotiable insurance offered to the general consumer must be registered with the CNSF prior to marketing. The CNSF verifies that the insurance products comply with the requirements set forth by the LISF. The registration process requires the filing of a technical note, the contractual documentation, a legal opinion and a congruency opinion.

The technical notes must be prepared in accordance with the actuarial practice standards set forth by the CNSF. Therefore, the technical notes are prepared by a certified actuary who must have the knowledge required to prepare such documents.

The contractual documentation must be clear and precise as to its scope, terms, conditions, exclusions, limitations, franchises or deductibles and any other modality established in the coverage or plans offered by the insurance company, accordingly, the contractual documentation is subject to a legal opinion to certify its compliance with the LISF and its regulations. As a result, the contractual documentation and the technical note are the subject of a congruence opinion signed by both the actuary in charge of preparing the technical note and a lawyer registered with the CNSF.

As of November 2016, non-negotiable insurances must be registered in the Registry for Insurance Adhesion Contracts (*Registro de Contratos de Adhesión de Seguros*) which is administered by CONDUSEF.

Insurance companies may also underwrite insurance that are not subject to such standardized registered texts offered to the general public (ie. SME insurance and corporate insurance).

Foreign Ownership

An amendment to the foreign investment law effective on 2014 allows any foreign party to invest up to 100% in a Mexican insurance company, subject to the compliance of applicable provisions of the LISF and the authorisation of the CNSF. Prior to such amendment, only affiliates of foreign financial entities established in a country with which Mexico has a trade agreement allowing the establishment of affiliates could be established in Mexico.

Foreign governments are banned from participating in the capital of Mexican insurance companies, except where:

- direct or indirect investments made as a prudential temporary measure, subject to the approval from the CNSF; or
- direct or indirect investment from foreign governments that involves taking control of the Mexican insurance company through official companies, such as funds and development governmental entities, subject to the discretionary authorisation from the CNSF.

Restrictions to ownership by Mexican financial entities

Additionally, the following Mexican entities cannot participate, directly or indirectly, in the capital stock of a Mexican insurance company:

- banks;
- mutual and insurance companies;
- brokerage firms;
- ancillary credit organisations;
- investment funds managers;
- pension fund administrators and pension investment funds;
- savings and loans entities; and
- money exchange companies.

Ownership by some of such financial entities is permitted if the participation is a result of a Financial Group (*Grupo Financiero*) in accordance with the Financial Groups Law (*Ley para Regular las Agrupaciones Financieras*).

Solvency

The LISF sets forth a mandatory solvency regime for all insurance companies that underwrite business in Mexico, similar to Solvency II.

Insurance companies must comply with three regulatory solvency requirements:

- the minimum paid-in capital that must be kept in compliance with the annual minimums published by the CNSF;
- the coverage of the technical reserves; and
- the capital solvency requirement.

The capital solvency requirement should allow insurance companies to have funds to:

- pay the liabilities assumed;
- face the financial risks for their investments; and
- extraordinary situations due to its operations or the market.

Currently, the capital solvency requirement of all Mexican insurance companies is calculated monthly and reported quarterly based on an actuarial model set forth by the CNSF. Regulations allow each insurance company to design an internal actuarial model to calculate the solvency capital requirement and implement internal controls to detect any change or alteration to such requirement, subject to the CNSF's approval.

Reinsurance

There are not specific rules that apply to the underwriting of excess layers in reinsurance contracts. Mexican insurance companies should fix their maximum retention limits on a yearly basis.

There is no minimum retention limit, so Mexican insurance may cede 100% of the risks via reinsurance as described in **3.2 Fronting**.

2.3 The Taxation of Premium

Insurance Premium

The Value Added Tax Law (*Ley del Impuesto al Valor Agregado*, or "VAT Law") sets forth that companies that carry independent services are obliged to pay VAT at the rate of 16%. Accordingly, the VAT Law specifies that insurance activities are comprised as independent services.

In light of the above, insurance premiums and broker fees are subject to VAT payment; excluding life, financial warranty, agricultural and mortgage insurances, if the requirements set forth on Article 15, Section IX, of the VAT Law are met.

Reinsurance Activities

Reinsurance activities are subject to a 0% VAT rate.

According to the Income Tax Law (*Ley de Impuesto sobre la Renta*) foreign reinsurers are subject to income tax on reinsurance premiums calculated by applying a withholding rate of 2% on the gross amount paid, without any deductions, except there is an applicable double taxation in place eliminating such withholding rate.

3. Overseas Firms Doing Business in the Jurisdiction

3.1 Overseas-Based Insurers or Reinsurers

See **2.2 The Writing of Insurance and Reinsurance**. It is not foreseen that any changes will occur following Brexit.

3.2 Fronting

Reinsurance Agreements

The LISF and the CUSF provide that insurance companies shall diversify and disperse the risks and liabilities they assume upon conducting their insurance operations through reinsurance agreements. Pursuant to Article 260 of the LISF and Chapter 9 of the CUSF, insurance companies shall annually determine a maximum retention limit for each authorised line of business. This is calculated with an actuarial formula set forth in the CUSF, which considers, among other factors, the insured sums and the quality of underwritten risks based on the loss ratio and the insurer's capitalisation level.

Risks and liabilities over the maximum retention limit shall be ceded through reinsurance agreements to other Mexican insurance companies or to foreign reinsurers. Under Mexican laws and regulations there are no limits on reinsurance (ie, up to 100% of the risk can be reinsured), accordingly "fronting" structures are permitted in Mexico. As previously mentioned, such reinsurers must be duly registered in the General Registry of Foreign Reinsurers.

Other Reinsurance Clauses

"Reverse Pay-as-Paid" clauses in the insurance agreement are not allowed in accordance with Mexican insurance laws and regulations. Article 18 of the LCS provides that the insurance company is solely responsible for any claim regardless if such insurance company reinsured the risks. In addition, as the LCS requires that the local insurer be solely responsible party for any loss vis-a-vis the insured and establishes that direct insurance and reinsurance relationships are independent, "cut-through" provisions are not permitted either.

4. Transaction Activity

4.1 M&A Activities Relating to Insurance Companies

Mergers and acquisitions of Mexican insurance companies are regulated in the LISF.

Acquisitions

Direct or indirect changes in ownership of 5% of the capital stock or more of a Mexican insurance company require to obtain the prior approval of the CNSF which is granted on a discretionary basis. If the acquisition represents more than 20% of the capital stock, the authorisation process is subject to additional scrutiny from the CNSF. This authorisation process is required by the LISF regardless of the levels above the Mexican insurance company in which the change of control occurs or the type of investor.

The transfer of insurance portfolios requires the prior approval from the CNSF.

Mergers

Mergers of insurance companies require:

- the prior authorisation of the CNSF;
- the favourable opinion of the Federal Commission of Economic Competition (*Comisión Federal de Competencia Económica*); and
- that the insurance companies have compatibility in their business lines.

Currently, there are no foreseeable regulatory factors that will affect mergers and acquisitions activities in the future. Upon the coming into effect of the LISF, it was expected that massive M&A transactions could occur as a result of the regulatory requirements but instead the market has kept active, but no significant increase has occurred.

5. Distribution

5.1 Distribution of Insurance and Reinsurance Products

Insurance Brokers

The LISF sets forth that insurance contracts can only be intermediated by insurance brokers. The prior authorisation of the CNSF is needed to act as an insurance broker.

Insurance brokers may be:

- individuals employed by the insurance company;
- individuals that act in accordance with the agency agreements entered with the insurance companies; and
- limited liability stock company incorporated in Mexico to carry out specifically insurance broker's activities.

Intermediation activities consist in the exchange of proposals and acceptances between clients and insurance companies, commercialisation and consultation of the terms of insurance contracts, their conservation, amendment, renewal or cancellation.

The authorisation to act as an insurance broker is granted according to the Insurance and Bonds Agents Regulations (*Reglamento the Agentes de Seguros y de Fianzas*).

Bank Insurance Model (BIM) and Other Legal Entities

As an exception to the above, standardised insurances (excluding pension insurances under social security laws and to guar-

antee insurances (*seguros de caución*)) can be purchased from legal entities, without the intervention of an insurance broker.

To do so, the insurance company must execute a service agreement with such legal entities which text must be previously registered with the CNSF. These operations are subject to the inspection and surveillance of the CNSF. The personnel of the legal entities that are involved in the promotion and commercialisation of the insurance policies must receive training/certifications in accordance with requirements set forth on the CUSF and the LISF, except for microinsurance or if the insurance distributor is a financial entity that only distributes insurance for one insurance company.

Reinsurance Intermediaries

Reinsurance intermediaries must be authorised by the CNSF, incorporated in Mexico as a limited liability stock company and have its corporate domicile in Mexico.

6. Making an Insurance Contract

6.1 Obligations of the Insured and Insurer

Disclosure of Information

When entering an insurance agreement, the insured or the contracting party has the obligation to disclose – in the questionnaire that must be completed for the insurance company – all the relevant facts of the risk that is to be insured so the insurer can assess it correctly.

Because, the duty of utmost good faith in Mexico is limited to the questions that the insurance company poses in terms of the relevant questionnaire, it is up to the insurance companies to be as exhaustive, clear and comprehensive as possible when preparing their form questionnaires.

These rules apply to insurance policies on a general basis, for both consumer and commercial contracts.

6.2 Failure to Comply with Obligations of an Insurance Contract

In accordance with the LCS, the omission or misrepresentation by the insured in the questionnaires, entitles the insurance company to terminate the insurance contract within 30 days after having knowledge of such omission or misrepresentation.

In spite of the omission or misrepresentation, the insurance company may not terminate the contract if:

- the insurer caused the omission or misrepresentation;
- the insurer knew or should have known the fact that was not declared;
- the insurer knew or should have known exactly the fact that has been inaccurately represented;
- the insurer waived the right to terminate the contract for such reason; and/or
- the insured does not answer one of the questions and yet the insurer enters the agreement.

6.3 Intermediary Involvement in an Insurance Contract

In accordance with the Insurance and Bonds Agents Regulations, the intermediation duty of an insurance broker comprises not only the exchange of the insurance proposal and its acceptance, but also in providing consulting services to the insured regarding the actual terms and conditions of the insurance agreement so that its expectations are accurately met.

Accordingly, insurance brokers must maintain an E&O policy that provide coverage for the liabilities that they may incur before the insureds due to its intermediation activities.

6.4 Legal Requirements and Distinguishing Features of an Insurance Contract

In accordance with the LCS, an insurance agreement is effective from the moment the insured has knowledge of the acceptance of the insurance proposal by the insurer. Said knowledge generally occurs upon the issuance of the insurance policy – although the issuance of the insurance policy or the payment of the premium are not conditions for the validity of the insurance contract. The LCS also provides that the insurance agreement, as well as any additions and amendments thereto should be documented in writing.

Unlike other jurisdictions, the existence of the insurance agreement can only be demonstrated in trial by the insurance policy issued by the insurer or by its acknowledgement by the insurer. Certificates of insurance, cover certificates or other similar documents issued by insurance brokers are not acceptable evidence to demonstrate the existence of an insurance agreement.

Legal Requirements

There are several legal requirements set forth in different laws and rulings regarding the content of the contractual documentation for insurance (LCS, LISF, CUSF, CONDUSEF's law and rulings, among others). The applicable legal requirements also vary depending on the line of business. However, Article 20 of the LCS, requires that all insurance policies must contain at least the following:

- name and address of the contracting party;
- signature of the insurance company;
- appointment of the insured object or person;
- the nature of the covered risks;

- validity;
- insured sums;
- premium; and
- if applicable, it must expressly state if it is a compulsory insurance.

Commencement and Insurable Interest

Although the parties can agree to subject the commencement of the insurance agreement to a certain term, regarding life insurance such period may not exceed 30 days as of the date of the medical examination, if necessary, or from the date of the insurance proposal if medical examination is not required.

It is important to consider that, if the contents of the insurance policy is different from the insurance proposal, the insured may request the correspondent rectification within 30 days after receiving the policy. Once this period has elapsed, the insurance policy is deemed to have been accepted by the insured.

Finally, it is important to consider that insurable risks require the existence of an insurable interest, which comprise:

- that the covered events are possible and uncertain;
- that the covered risk is lawful;
- the possibility of the damages to be financially compensated; and
- that the insured does not profit from the indemnity paid.

6.5 Multiple Insured or Potential Beneficiaries

Non-insured parties can be named as beneficiaries of an insurance policy. Such designation is usually made through an endorsement issued by the insurance company.

There can be multiple beneficiaries under the same insurance policy; however, it is important that the endorsement clearly specifies the interest and priority of each beneficiary.

Regarding liability insurance, insurers do not require to issue beneficiary endorsements as, in accordance with Article 147 of the LCS, third parties that suffer the loss are considered beneficiaries.

In accordance with AML regulations, insurance companies have the obligation to identify the beneficiary and comply with its internal KYC policies before making the insurance payment.

6.6 Consumer Contracts or Reinsurance Contracts

In Mexico, the rights and interests of the public who use financial services (including insurance contracts) have a special protection in comparison to other commercial relations. This protection is part of Mexican law as there is a public policy acknowledgment of the asymmetrical relationship between consumers of financial services and financial institutions.

Accordingly, the CONDUSEF was created with the purpose of:

- promoting, advising, protecting and defending the rights and interests of the users before financial institutions;
- mediating and arbitrating their differences; and
- regulating certain contractual aspects that financial institutions must met (ie, avoid abusive clauses).

It is considered that reinsurance contracts are entered between sophisticated parties and an asymmetrical relationship cannot be implied. Reinsurance contracts are subject to commercial laws. The Mexican Code of Commerce provides that the parties to a commercial agreement are bound in the manner and upon the terms that they have agreed to be bound by.

7. Alternative Risk Transfer

7.1 ART Transactions

As of 2015, insurance companies are authorised to securitise risks (ie, transfer some of the risks in their portfolio to the securities market). Such operations fall within the classification of alternate risk transfer mechanisms and require the prior approval of the CNSF. The insurance risk (ie, the risk of paying a claim) is made available to investors via an insurance special purpose vehicle (ISPV) set-up as a Mexican trust, therefore it is not a reinsurance operation.

The risk is transferred in the form of a bond (an insurance linked security), issued by the ISPV into the capital markets which requires the approval of the CNBV and a credit opinion from a ratings agency. The likelihood that the risks occur, is the metric used to assess the risk of the instrument.

The insurance company receives the money to pay for claims by the ISPV if the agreed trigger occurs.

Alternate risk transfer (ART) transactions are registered similar to reinsurance for solvency purposes. ART structures have been largely unexplored in the Mexican insurance market which leaves much room for development and further delineating of rules and criteria by the regulator.

7.2 Foreign ART Transactions

There are no rules regarding ART transactions written in other jurisdictions and no criteria has been laid out by the regulator.

8. Interpreting an Insurance Contract

8.1 Interpretation of Insurance Contracts and Use of Extraneous Evidence

Compliance with the LCS is mandatory and, therefore, any agreement contravening its terms is null and void, unless the LCS specifically allows contracting out from the relevant statutory provision.

Special conditions and endorsements take precedence over general insurance conditions and exclusions should be drafted in a precise and restrictive manner by listing all applicable cases. In case the exclusion is not exactly applicable, coverage should be granted. Otherwise, the rules for the interpretation of insurance contracts are those contemplated in the Federal Civil Code for all contracts.

To establish the intention of the parties, the questionnaire and correspondence can be taken into consideration. The duty of utmost good faith is applicable to insurance contract under Mexican law but is limited to what the insurer asks in terms of the relevant questionnaire.

Standardised contracts are granted with a special protective regime to balance the natural gap between insureds and insurance companies, allowing the placing of the insured in a more favourable condition. In the event a clause is not clear, as conditions are set unilaterally by insurers, following the contra proferentem principle, an interpretation should favour the insured. Accordingly, any ambiguities in an insurance contract should be interpreted by Mexican courts in their favour and the scope of exclusions are to be strictly limited to the express provisions agreed within the policies.

8.2 Warranties

Warranties or similar risk mitigation terms can be stipulated in the insurance contract. The breach of a warranty will give the insurer the right to be released from its contractual obligations related to such warranty. Specifically, the insurer cannot claim that a breach of warranty has released it from its obligations in the event the breach is not connected to the actual loss that has occurred or if the breach does not have an effect on the corresponding obligation assumed by the insurer.

8.3 Conditions Precedent

Pursuant to the LCS, neither the payment of premium nor the delivery of the insurance policy can be used as conditions precedent for the insurer coming on risk or its liability to pay a claim.

Conditions precedent triggered by events other than payment of premium or delivery of the policy can be stipulated without the need of being expressly described as such. While the consequences of breach of a condition precedent will depend on the precise words used, the insurer may rely on the breach to reject a particular claim, but not affect the cover.

9. Insurance Disputes

9.1 Insurance Disputes over Coverage

When the insured expectations are not fully met within the claims process, the insured may voluntarily file a request for payment before:

- the special attention unit (*Unidad Especializada* or UNE) that each insurance company must have put in place; or
- the procedure before CONDUSEF seeks conciliation between the parties and no final decision is issued unless the parties submit to arbitration (which normally does not occur).

This mechanism is only for claims that do not exceed 6 million Investment Units (*unidades de inversion* or UDIS).

If an insurer does not attend to the conciliation hearings or does not file certain documents requested by CONDUSEF, a penalty fee will be imposed, and the insured may have the right to request the issuance of assessment on the case that may be used in court as supporting evidence.

An insured may also seek payment directly through litigation, see **9.3 Litigation Process**.

Statute of Limitations

Insurance claims are subject to a two-year statute of limitations, excepting claims related to death benefits of life insurances, which are subject to a five-year time bar period. The filing of a request before the UNE suspends the statute of limitations while the CONDUSEF claim interrupts the statute of limitations so the statute of limitations is set for a new term.

In all cases, such periods start counting "as of the date of the event that gave rise to them"; such expression is subject to a case to case basis. In some cases, it can be determined as of the date of the loss, in others when the loss payee acknowledge the right to the benefits of the insurance policy, or when the insurance company rejects a claim. The ambiguity of the law is a source of constant conflicts between insureds and insurers.

Reinsurance disputes are subject to state or federal courts or to arbitration, as referred to in **2.1 Insurance of Reinsurance Regulatory Bodies and Legislative Guidance**.

Third parties that suffer a loss are considered as loss payees of liability insurance as of the date of the loss and can enforce the insurer to comply with its obligations under the insurance agreement.

9.2 Insurance Disputes over Jurisdiction and Choice of Law

According to the LISF direct insurance operations entered within Mexican territory are subject to Mexican law and the jurisdiction to file a claim before Mexican courts may be chosen by the plaintiff.

Regarding reinsurance disputes, cedants and reinsurers have no limitation to agree a specific foreign law. According to the private international principles set in the Federal Civil Code, the law applicable to contracts is the law of the place of their execution, unless the parties have validly chosen another law. Accordingly, the choice of foreign law is permitted.

A foreign law will be applied by Mexican courts as it would be applied by a foreign court, that is, with best efforts to consistently apply the foreign law. Mexican courts will respect the choice of law selected by the parties to a commercial agreement, except:

- when fundamental principles of Mexican law are circumvented; and,
- when the provisions of foreign law, or the result of its application, is contrary to Mexico's public order (*orden público*).

Local courts respect the choice of jurisdiction in commercial contracts such as reinsurance agreements. See **9.4 The Enforcement of Judgments**.

9.3 Litigation Process

The insured may start litigation without any of the prior non-judicial alternatives described in **9.1 Insurance Disputes over Coverage**.

Litigation has the following sequence:

- filing of lawsuit;
- reply to the lawsuit (and counterclaim if any);
- submission of evidence;
- closing arguments; and
- judgment.

Commercial matters are federal, however due to the burden of federal courts it was ruled that local civil judges can also resolve commercial disputes. Commercial matters are normally are brought before local courts.

Following amendments to the Commerce Code, as of 26 January 2020, all commercial disputes should be processed through the commercial oral proceeding, regardless its amount. However, if the amount is not quantified, the case should be solved by means of commercial litigation.

9.4 The Enforcement of Judgments

Judgment enforcement is a matter of public order. If the order refers to a monetary payment to the insurance company, according to the LISF, the court is entitled to request within 72 hours evidence of payment. Lack of compliance entitles the court to request the insurance company securities intermediary to sell the insurance company's securities without requiring its consent to obtain the amount due.

Foreign Judgments

Foreign judgments are recognised and can be enforced in Mexico.

Mexico is a signatory to the Inter-American Convention on Letters Rogatory and the Inter-American Convention of Montevideo. Mexico also affirmed the 1971 Hague Convention for the Recognition and enforcement of foreign judgments.

A final and conclusive judgment (not subject to appeal) of foreign courts for the payment of money rendered against a Mexican, will be recognised by the courts of Mexico; provided, that a lengthy list of requirements is complied with, including for example, that the foreign court had jurisdiction or that process was personally served on the defendant.

9.5 The Enforcement of Arbitration Clauses

The right to resort to alternative dispute resolution (ADR) mechanisms, such as arbitration, is included in Article 17 of the Mexican Constitution. An arbitration procedure derives from the parties' clear consent to enter into arbitration. An arbitration agreement can be an independent agreement or included as a clause in the main substantive agreement. The Commerce Code (*Código de Comercio*) recognises arbitration's basic principles (party autonomy, competence-competence, and limited court interventions).

Under the Commerce Code, an arbitration clause included in a contract is deemed to be an agreement that is independent from the other stipulations of the contract. If the arbitral tribunal declares the main contract to be null and void, this does not entail the nullity of the arbitration clause.

Consent limits the scope of the arbitration to the parties that agreed to the arbitration. In such regard, parties that did not consent to the arbitration cannot be involved in the arbitration

even if there are other agreements related to the agreement that has an arbitration clause (ie, reinsurance).

Court Proceedings

In case a court proceeding is initiated despite the existence of an arbitration agreement, the judge before whom such proceeding has been initiated (if either party requests so) shall remit the parties to arbitration. The only exceptions set forth in the Commerce Code to the enforcement of an arbitration agreement is if it is proven that the agreement to arbitrate is null and void, ineffective or impossible to perform. The request must be made in the first written motion filed by the party requesting the remittance to arbitration regarding the merits of the dispute.

9.6 The Enforcement of Awards

Mexico is an arbitration friendly jurisdiction. Arbitral awards are final and binding for the parties and are not subject to appeal and courts have ruled in favour of the enforcement of national and international arbitral awards (with few exceptions). Mexican courts can only deny the recognition and enforcement of an arbitral award for reasons listed in the Commerce Code, which are based in Article V of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards to which Mexico is party since 1971 and Article 36 of the UNCITRAL Model Law. Such limited cases do not allow an award to be rejected on grounds relating to the merits of the award.

Awards should be submitted at court for its recognition and further enforcement (exequatur), even if issued domestically. As member of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, foreign determinations are presumed valid and enforceable in Mexico if issued in a country member of said Convention.

Regardless of the country in which an arbitral award has been issued, it shall be deemed valid and binding and shall be enforced upon written request to the judge. The Mexican arbitration law was amended in 2011 to include, inter alia, a specific summary procedure for setting aside or recognising and enforcing arbitral awards. In order to initiate enforcement proceedings under such summary proceedings, the party seeking enforcement must provide an original (or certified copies) of both the arbitration agreement and the award. The award and the arbitration agreement must be apostilled (or legalised) and translated if their original language is not Spanish Once recognised, awards are deemed to be equal effective and enforceable as a judgement.

9.7 Alternative Dispute Resolution

ADR methods are increasingly used in insurance and reinsurance matters in Mexico due to the burden of local courts and to the specialised knowledge that insurance claims often require.

Almost all the states within Mexico have a mediation law that generally regulates: the requirements to act as a certificated private mediator, matters that are subject to mediation (commercial acts are included), and requirements that the settlements agreements must met to be considered res judicata.

In addition, insureds also have the right to mediate its disputes with the insurance company through CONDUSEF's proceedings described in **9.1 Insurance Disputes over Coverage**.

9.8 Penalties for Late Payment of Claims

In accordance with the LCS, the payment of claims must be made within 30 days after the date on which the insurance company has received the documents and information that allows it to know the grounds of the claim.

In accordance with the LISF, if payment is not made within such period default interests are due. Special formulas are regulated in the LISF but basically the amount due should be updated and a special interest rate is applied to such amount. Accordingly, the insurance company must pay the insured the following penalty:

- default interests; and
- updated amount of the indemnity.

Even when this is a mandatory provision, insureds do not usually request its payment.

9.9 Insurers' Rights of Subrogation

Following the payment of a claim, the insurance company is subrogated up to the amount paid in all the rights and actions of the insured against third parties that caused the damages. However, subrogation would not occur if such third parties are related with the insured by blood or affinity up to the second degree, by a marital/civil relationship or if the insured is legally responsible for such third party.

If the insured carries out any action or omission that prevents the subrogation to take place, the insurance company may be released from its obligations under the insurance agreement.

10. Insurtech

10.1 Insurtech Developments

Digital solutions are being developed to take care of the needs of the insureds and to enhance its insurance experience (ie, the online distribution of insurance.) The use of telematics for the tracking of vehicles data including usage, location and driving patterns for insurance is also being implemented. Insurtech is

also seen as a mechanism to seek financial inclusion as smartphones are increasingly being used by the population.

New solutions are being developed by start-ups for underwriting and claims management; however, the insurance core activity has not been modified.

10.2 Regulatory

The CNSF issued on 26 March 2019 the sandbox rules under the novelty models (*modelos novedosos*) established in the Fintech Law (*Ley para Regular las Instituciones de Tecnología Financiera*). The insurance regulatory sandbox purpose is to set a scenario to carry out licensed operations under a temporary authorisation and protect both the consumers and the market environment. Temporary licences are valid for one year and may be extended for an additional year.

To obtain the temporary licence, it is required to submit to the CNSF, inter alia, the business model, including the products, services and operations as well as the target customers, the distribution channels, the technological infrastructure and the risk assessment for AML purposes,

The request for authorisation should state:

- what are the legal impediments that would not allow the novelty model to be possible under current regulations;
- the exit strategy in case the permanent license is not obtained; and
- indemnity mechanisms.

It is considered that temporary licences for insurance companies would be too burdensome to obtain due to complex and robust requirements coupled with the time-consuming processes before the CNSF. Upon receipt of the temporary licence there would be little time to try the performance of the products before the full licence should to be requested. Building up the insureds for a new company is not an easy task so it is likely to require capital contributions. Start-ups tend to be funded with private equity that would require a lot of time for the CNSF to assess before authorising such kind of direct or indirect ownership, so funding might not be as dynamic as it would probably be required to keep the operations up and running.

11. Emerging Risks and New Products

11.1 Emerging Risks Affecting the Insurance Market

There are enhanced cyberthreats due to human error or malicious attacks. The accelerated reliance on digital technologies prompted by the COVID-19 pandemic and home networks with different security standards comes with digital security and privacy protection risks. As an example, as recently as November of this year the CNSF issued a press release informing the occurrence of a cybersecurity incident that affected its operative continuity.

Due to its geography, Mexico is a permanent vulnerable target for natural catastrophes, including earthquakes and hurricanes.

Increased life expectancy, chronical illnesses and the continuous increase in medical expenses affect medical expenses insurance business.

11.2 New Products or Alternative Solutions

While not a substitute for investing in cybersecurity (and therefore reducing the risk of being affected by an incident), insurance coverage for cyber-risk provides a means for companies and individuals to transfer a portion of their financial exposure to the insurance market. Financial lines continue to adapt focused on mitigating the increasingly complex liability risks.

The occurrence of two major earthquakes in Mexico in 2017 triggered the launching of a new parametric insurance product against earthquakes for homeowners and renters living in Mexico City. It offers a completely new approach to insure against earthquakes as a fast paying, no-adjuster solution to a dramatic underinsurance gap (only 6.5% of homes are insured in Mexico).

New healthcare solutions focusing more on prevention are being developed.

12. Recent and Forthcoming Legal Developments

12.1 Developments Impacting on Insurers or Insurance Products

The CNSF suspended most of the regulatory terms for four months and enhanced solvency reporting was requested to insurers. The delivery of official communications to the CNSF via e-mail was set in place for certain procedures.

Following the lockdown ordered by the sanitary authorities, on 20 April 2020, the CNSF accepted that the companies could increase the term for the payment of premiums for not losing coverage due to the lack of payment in time by issuing an endorsement to the policies. Reduced KYC measures have been temporarily allowed for the payment of claims.

Insurance companies took some measures as a result of the pandemic such as the elimination of waiting periods and the decision to not apply the exclusion of coverage during a pandemic.

The insurance companies as a symbol of solidarity are providing economic support to the families of health providers that died due to COVID-19 from 1 April 2020, to 30 August 2020. There have been no other changes to insurance regulations in light of COVID-19.

13. Other Developments in Insurance Law

13.1 Additional Market Developments

On 19 November 2020 the new anti-money laundering (AML) provisions stemming from the LISF were enacted after five years of the coming into effect of the LISF. A differentiated AML/CFT framework from banks was expected to be put in place as insurance activities are categorised as low risk for money laundering and terrorism financing purposes. However, the new AML measures follow almost the same rules set for other financial intermediaries such as banks and seek compliance to international standards.

The most relevant actions arising from the new AML provisions include:

- update to the AML Manual and policies;
- implement the new AML Manual including the KYC requirements;
- adjustments to automated systems;
- design and implement a risk evaluation methodology considering the identification, measurement and mitigation of AML risks;
- consider Blocked persons list to be issued by the SHCP; and
- on-line contracting by using geolocation technology (pending upon the relevant provisions have been issued by the CNSF).

The insurance and bonding sectors expected new AML obligations to become effective in stages however most of them will become effective as soon as 31 December 2020, without considering the time required for the implementation and training of enhanced obligations.

Also, there have been discussions between the AMIS and the Tax Administration Service (*Servicio de Administración Tributaria*) with respect to the lawfulness of Value Added Tax deductions made by insurance companies when indemnification obligations are fulfilled by paying directly to providers.

Creel, García-Cuéllar, Aiza y Enríquez, S.C. is a leading full-service corporate law firm with more than 80 years of experience. The firm has an established reputation for delivering creative, specialised and responsive legal advice on the most complex and innovative matters in Mexico for the most sophisticated and demanding clients. The insurance and reinsurance practice brings together the talent of six professionals located in the Mexico City offices with substantial experience in the transactional, regulatory and contentious aspects of insurance and reinsurance. The goal is to become a strategic service provider by offering the type of legal advice that gives clients certainty and peace of mind. The team was counsel to the Mexican government on the Joint Multi-Country Floating Rate Earthquake-Linked Capital at Risk Notes, in the first-of-its-kind catastrophic risk transfer transaction resulting in the issuance of floating rate earthquake-linked capital at risk notes.

Authors



Leonel Pereznieto is a partner of the firm. Leonel brings together a unique insight into Mexican laws and a global outlook driven by a demanding international clientele. His broad expertise in insurance – including marine insurance – cuts through contentious, transactional and regulatory aspects, with an emphasis on creating structures for innovative business arrangements. He represents reinsurers in connection with contentious and contractual issues in Mexico and in other Latin American countries as well as global reinsurance brokers on their regional business. Leonel is admitted to practise in Mexico and New York and is a member of the Insurance Committee of the IBA.



Carlo Romero is an associate of the insurance and reinsurance practice group of the firm. He obtained his law degree and master's degree in private law at Escuela Libre de Derecho. His practice specialises in the insurtech ecosystem development; insurance coverage analysis, including financial lines and cyber; insurance distribution; and financial consumers protection. He also provides regulatory and corporate advice to domestic and foreign insurers and has participated in licensing processes and corporate reorganisations before various Mexican regulation agencies, such as the Mexican Insurance and Bonding Commission. Carlo's experience includes advice in insurance and reinsurance claims and complex coverage disputes.



María José Pinillos is counsel and co-head of the firm's insurance and reinsurance practice group. Her practice focuses on the representation of insurers, reinsurers and other insurance-related entities, including brokers. She has extensively advised and assisted insurance companies in a broad array of matters, including applications to obtain business licences, M&A, corporate reorganisations, transfer of portfolio and liquidation, as well as day-to-day regulatory compliance and registration of insurance policies. María José has been involved in the implementation of and compliance with Solvency II regulations. She is a member of the Insurance Committee of the IBA and the Mexican Insurance and Bonding Companies Association (AMEDESEF).

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

Torre Virreyes
Pedregal 24, 24th floor
Molino del Rey
11040
México City
Mexico

Tel: +52 55 4748 0614
Fax: +52 55 4748 0690
Email: leonel.pereznieto@creel.mx
Web: www.creel.mx

