Insurance & Reinsurance 2021

Contributing editors
Marion Leydier, Mark F Rosenberg and William D Torchiana

© Law Business Research 2021

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

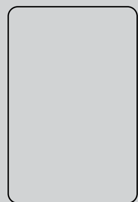
Senior business development manager
Adam Sargent
adam.sargent@gettingthedealthrough.com

Published by
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer–client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between April and May 2021. Be advised that this is a developing area.

© Law Business Research Ltd 2021
No photocopying without a CLA licence.
First published 2008
Fourteenth edition
ISBN 978-1-83862-674-7

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



Insurance & Reinsurance 2021

Contributing editors

Marion Leydier, Mark F Rosenberg and William D Torchiana
Sullivan & Cromwell LLP

Lexology Getting The Deal Through is delighted to publish the fourteenth edition of *Insurance & Reinsurance*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Spain.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Marion Leydier, Mark F Rosenberg and William D Torchiana of Sullivan & Cromwell LLP, for their continued assistance with this volume.

London
May 2021

Reproduced with permission from Law Business Research Ltd
This article was first published in June 2021
For further information please contact editorial@gettingthedealthrough.com

© Law Business Research 2021

Contents

Introduction 3
Marion Leydier, Mark F Rosenberg and William D Torchiana
Sullivan & Cromwell LLP

Austria 8
Thomas Böhm
CMS Reich-Rohrwig Hainz

China 18
Celia Luan, Elizabeth Lan Lan, Elsie Shi, George Hualiang Yu, Eileen Liu and Vicky Wei
Jincheng Tongda & Neal

Denmark 29
Henrik Nedergaard Thomsen, Sigrid Majlund Kjærulff, Amelie Brofeldt and Jens Laurbjerg Nielsen
Poul Schmith/Kammeradvokaten

European Union 37
Thomas Böhm
CMS Reich-Rohrwig Hainz

India 47
Neeraj Tuli and Celia Jenkins
Tuli & Co

Japan 59
Keitaro Oshimo
Nagashima Ohno & Tsunematsu

South Korea 66
Myung Soo Lee, Hwang Lim Jang, Hyun Suk Jung and Seung Jae Yeon
Yoon & Yang LLC

Spain 82
Luis Alfonso Fernández, Virginia Martínez, Teresa Repullo and Virginia Domínguez
Bird & Bird

Sweden 89
Per Sundin, Sandra Kaznova, Sigrid Törnsten and Fredrik Osvald
Advokatfirman Hammarskiöld

Switzerland 98
Lukas Morscher and Leo Rusterholz
Lenz & Staehelin

Turkey 108
Çağlar Coşkunsu and Burak Cavus
Cavus & Coskunsu Law Firm

United Kingdom 116
James C Scoville, Clare Swirski and Benjamin Lyon
Debevoise & Plimpton LLP

United States 127
William D Torchiana, Mark F Rosenberg and Marion Leydier
Sullivan & Cromwell LLP

© Law Business Research 2021

Spain

Luis Alfonso Fernández, Virginia Martínez, Teresa Repullo and Virginia Domínguez

Bird & Bird

REGULATION

Regulatory agencies

1 | Identify the regulatory agencies responsible for regulating insurance and reinsurance companies.

Under Law No. 20/2015 of 14 July, on the regulation, supervision and solvency of insurance and reinsurance companies and under Royal Decree-Law No. 3/2020 implementing the Insurance Distribution Directive in Spain, insurance and reinsurance companies, intermediaries and underwriting agencies are regulated and supervised by the General Insurance and Pension Funds Directorate (DGSFP), which belongs and reports to the Ministry of Economy and Competitiveness.

Formation and licensing

2 | What are the requirements for formation and licensing of new insurance and reinsurance companies?

A company intending to conduct insurance and reinsurance business in Spain must obtain authorisation from the Ministry of Economy and Competitiveness. For these purposes, the entity shall file an application form with the DGSFP evidencing the fulfilment of the requirements established under Law No. 20/2015, which may be summarised as follows: the undertaking must adopt one of the legal forms legally established, limit its corporate purpose to insurance and reinsurance activities, stick to a programme of activities and fulfil the minimum capital requirement at all times. Also, its shareholders and the persons who, in effect, run the company or perform key functions making up the system of governance (risk management, compliance, internal audit and actuarial functions) shall meet certain requirements.

Other licences, authorisations and qualifications

3 | What licences, authorisations or qualifications are required for insurance and reinsurance companies to conduct business?

Insurance distribution is regarded as a separate regulated activity: entities and persons intending to carry out insurance and reinsurance distribution activities (different to insurance and reinsurance undertakings) shall apply to the DGSFP for permission to conduct such activities in Spain. The requirements to be fulfilled are set out under Royal Decree-Law No. 3/2020.

Officers and directors

4 | What are the minimum qualification requirements for officers and directors of insurance and reinsurance companies?

Officers and directors (and any other person who, in effect, runs the insurance or reinsurance company) and those persons performing key functions (risk management, compliance, internal audit and actuarial function) must have professional qualifications, the knowledge and experience adequate to enable sound and prudent management (fit) and must be of good repute and integrity (proper).

Capital and surplus requirements

5 | What are the capital and surplus requirements for insurance and reinsurance companies?

The first pillar on which Directive 2009/138/EC (Solvency II) is based is the existence of uniform rules on capital requirements. These capital requirements have two levels: a Minimum Capital Requirement, representing the minimum level of security below which the number of financial resources should not fall; and the Solvency Capital Requirement, a risk-sensitive requirement based on a prospective calculation to ensure accurate and timely intervention by supervisory authorities.

Insurance and reinsurance companies shall calculate the Solvency Capital Requirement at least annually and shall communicate the results of this calculation to the DGSFP. Following the supervisory actions and on an exceptional basis, the DGSFP may impose a capital add-on to the Solvency Capital Requirement. The Minimum Capital Requirement shall be no less than 25 per cent and no more than 45 per cent of the Solvency Capital Requirement, including any additional Solvency Capital Requirement required. It shall, in any case, have the certain absolute minimum amounts legally established.

Reserves

6 | What are the requirements with respect to reserves maintained by insurance and reinsurance companies?

Insurance and reinsurance undertakings shall establish adequate technical provisions to allow them to meet their commitments towards policyholders and beneficiaries. The value of technical provisions should correspond to the amount the insurance or reinsurance company would have to pay if it transferred its contractual rights and obligations immediately to another undertaking. The calculation of technical provisions shall be consistent with the valuation of assets and other liabilities, market-consistent and in line with international information generally available regarding the risks underwritten. Technical provisions shall be measured prudently, reliably and objectively.

Product regulation

7 | What are the regulatory requirements with respect to insurance products offered for sale? Are some products regulated by multiple agencies?

Insurers need not seek regulatory approval and need not register the insurance products with the DGSFP before offering them for sale. However, the DGSFP may require insurance companies, if appropriate,

© Law Business Research 2021

the submission of contractual terms and conditions, policy templates, premium rates and technical bases, to check that they comply with the actuarial conditions and any applicable legal requirements. The regulator may prohibit the use of policies and premium rates that do not comply with the applicable legal requirements.

Regulatory examinations

8 | What are the frequency, types and scope of financial, market conduct or other periodic examinations of insurance and reinsurance companies?

Supervision is based on a prospective and risk-based approach. It includes the verification continuously of the proper operation of the insurance or reinsurance business and the compliance with supervisory provisions by insurance and reinsurance companies. Supervision of insurance and reinsurance companies in Spain is exercised by the DGSFP through a combination of reporting obligations and inspections (both off-site and on-site). The inspections may be carried out with the frequency decided by the regulator. Such inspections may cover the market practices, the legal, technical, financial or solvency situation of the undertaking or the conditions in which the company conducts its business and may refer to either general or specific issues.

Investments

9 | What are the rules on the kinds and amounts of investments that insurance and reinsurance companies may make?

Insurance and reinsurance companies must invest all their assets under the prudent person principle. Also, the investments must comply with the requirements provided for under articles 89 and 90 of Royal Decree No. 1060/2015. Among other things, insurance and reinsurance companies:

- shall only invest in assets and instruments whose risks they can properly identify, measure, monitor, manage, control and report;
- they shall invest in such a way to ensure the liquidity, safety and profitability of the overall asset portfolio;
- they shall invest the assets representing the technical provisions in a manner consistent with the nature and duration of the obligations arising out of the insurance and reinsurance contracts and in the general interest of all policyholders and beneficiaries; and
- assets shall be appropriately diversified.

Change of control

10 | What are the regulatory requirements on a change of control of insurance and reinsurance companies? Are officers, directors and controlling persons of the acquirer subject to background investigations?

The direct or indirect acquisition of a significant shareholding in an insurance or reinsurance company shall not be opposed by the DGSFP. 'Significant shareholding' shall be understood as the acquisition or increase of the shareholding in such a way that the proportion of the voting rights or shareholding reaches or exceeds the limits of 20 per cent, 30 per cent or 50 per cent or results in the control of the insurance or reinsurance company. Both the proposed acquirer and the insurance or reinsurance company from which the shareholding will be acquired or increased shall communicate to the DGSFP the amount of the shareholding acquired or increased, the terms and conditions of the acquisition and the maximum term in which it is intended to execute the transaction and shall provide certain information and documents that enable the regulator to assess the suitability of the proposed acquirer and the acquisition itself.

In particular, the submission of information about the directors, officers and controlling persons of the proposed acquirer is required. Also, the DGSFP shall assess and approve the fit and proper requirements regarding any person willing to hold management positions or be part of the governing body in the target insurance or reinsurance company.

Financing of an acquisition

11 | What are the requirements and restrictions regarding financing of the acquisition of an insurance or reinsurance company?

Spanish law sets out no specific requirements or restrictions regarding financing of the acquisition of an insurance or reinsurance company. However, when assessing the proposed acquisition of a significant shareholding in an insurance or reinsurance company, the DGSFP requires information on the financing of said acquisition (eg, information on the own resources used by the acquirer for the acquisition, details of other possible sources of capitalisation, details regarding the use of borrowed funds and information about the means of payment, etc) to decide on the authorisation of the proposed acquisition.

Minority interest

12 | What are the regulatory requirements and restrictions on investors acquiring a minority interest in an insurance or reinsurance company?

Voting rights or shareholding less than 5 per cent are not subject to regulatory requirements and restrictions unless the acquisition results in the control of the insurance or reinsurance company. The direct or indirect acquisition of a shareholding in an insurance or reinsurance company in such a way that the voting rights or shareholding is equal or exceeds 5 per cent (up to 20 per cent) shall be communicated to the DGSFP within a 10 working-day term from the time of the acquisition for information purposes.

Foreign ownership

13 | What are the regulatory requirements and restrictions concerning the investment in an insurance or reinsurance company by foreign citizens, companies or governments?

There are no specific regulatory requirements or restrictions under Spanish law on investment in an insurance or reinsurance company by foreign citizens, companies or governments.

Group supervision and capital requirements

14 | What is the supervisory framework for groups of companies containing an insurer or reinsurer in a holding company system? What are the enterprise risk assessment and reporting requirements for an insurer or reinsurer and its holding company? What holding company or group capital requirements exist in addition to individual legal entity capital requirements for insurers and reinsurers?

Solvency II, which introduced new provisions concerning group supervision and capital requirements, was partially incorporated into Spanish law by Law No. 20/2015. According to this Law, the DGSFP is the group supervisor when all the group's entities or its ultimate parent company has its registered address in Spain. These entities must disclose all the information that may be relevant for DGSFP supervision purposes.

Moreover, insurance and reinsurance companies must publish annual solvency and financial situation reports. This obligation also affects insurance holding companies and mixed-activity insurance

© Law Business Research 2021

holding companies that must publish an annual solvency and financial situation report at group level.

As for group solvency, solvency capital requirements of the group must be calculated following the accounting consolidation method. However, the DGSFP may agree to the application of the deduction and aggregation method, or a combination of both, when the consolidation method is not deemed appropriate. The mandatory capital requirement of the group shall be calculated based on either a standard formula or an internal model.

Reinsurance agreements

15 | What are the regulatory requirements with respect to reinsurance agreements between insurance and reinsurance companies domiciled in your jurisdiction?

Reinsurance agreements are vaguely regulated in Law No. 50/1980 of 5 October, on the Insurance Contract. These provisions set out two rules:

- the reinsurance agreement will not affect the insured, who, as a general rule, may not claim any amount directly to the reinsurer; and
- the amendments in the insured sum and the conditions of the underlying insurance contract must be communicated to the reinsurer in the form and term provided in the reinsurance agreement.

Apart from this, there is freedom between the parties to regulate the contract as they see fit.

Ceded reinsurance and retention of risk

16 | What requirements and restrictions govern the amount of ceded reinsurance and retention of risk by insurers?

Spanish law regulates no specific requirements or restrictions in the amount of ceded reinsurance and retention of risk by insurers. Thus, insurers may transfer all the risk and act as a pure fronting.

Insurers (regardless of whether they retain or transfer the risk) and reinsurers are required to establish and maintain the appropriate technical provisions concerning all of their insurance and reinsurance obligations towards policyholders and beneficiaries of insurance or reinsurance contracts (as provided in article 69 of Law No. 20/2015).

Collateral

17 | What are the collateral requirements for reinsurers in a reinsurance transaction?

There are no requirements for collateral to be put up by reinsurers under Spanish law. However, it is a general practice in relevant reinsurance transactions to include a form of collateral between the cedent and the reinsurer.

Credit for reinsurance

18 | What are the regulatory requirements for cedents to obtain credit for reinsurance on their financial statements?

The ability of the cedent to take credit for reinsurance will depend on the effective transfer of the risk to the reinsurers. Royal Decree No. 1060/2015 provides that any amount that may be recovered from the reinsurer may be computed among the assets of the cedent. Such amounts must be valued under the technical provision's requirements for direct insurance with some particularities. Moreover, Commission Delegated Regulation (EU) No. 2015/35 should also be considered, as it regulates the requirements that a reinsurance contract should meet to be eligible as a risk mitigant under Solvency II.

Insolvent and financially troubled companies

19 | What laws govern insolvent or financially troubled insurance and reinsurance companies?

Two relevant laws govern insolvent or financially troubled insurance and reinsurance companies in Spain. The first, and more general, is Royal Legislative Decree No. 1/2020 of 5 May on Insolvency. This Decree regulates insolvency proceedings in general, regardless of the identity of the insolvent company. Nevertheless, it contains certain special provisions regarding insolvent insurance and reinsurance companies (for instance, the mandatory communication by the Judicial Secretary of the insolvency to the DGSFP, or the identity of the insolvency trustee). The second, and more specific, is Law No. 20/2015, which regulates situations of financial deterioration, special control measures, revocation of the administrative authorisation, dissolution and liquidation of insurance and reinsurance companies.

Claim priority in insolvency

20 | What is the priority of claims (insurance and otherwise) against an insurance or reinsurance company in an insolvency proceeding?

Law No. 20/2015 provides that insurance contract credits (as defined in said Law) shall be considered as credits with special privilege over the following assets:

- assets assigned to technical provisions and those assigned to the mandatory capital requirements of the insurance entity; and
- assets in respect of which a special control measure of prohibition of disposal has been adopted.

The fact that these credits have a special privilege over the mentioned assets means that their payment will be made, pro rata, with a charge to them, with preference over any other credit.

For the remaining credits against an insolvent insurance or reinsurance company, the applicable priority system is that foreseen in Royal Legislative Decree No. 1/2020 on insolvency, which differentiates between privileged (with special or general privilege, depending on whether they affect certain assets of the insolvent company), ordinary and subordinated credits.

Intermediaries

21 | What are the licensing requirements for intermediaries representing insurance and reinsurance companies?

Under the Royal Decree-Law No. 3/2020, all intermediaries (insurance intermediaries (agents and brokers), ancillary insurance intermediaries and reinsurance brokers domiciled in Spain) must be registered before the administrative registry of the DGSFP before initiating their commercial activities. Intermediaries domiciled in other EU member states and that operate on freedom of services or freedom of establishment must also be registered before the DGSFP, but only for informative purposes.

Together with the registration request, intermediaries representing insurance and reinsurance companies must file the information and documents specifically provided in the mentioned Royal Decree-Law No. 3/2020, as well as in Law No. 20/2015.

© Law Business Research 2021

INSURANCE CLAIMS AND COVERAGE

Third-party actions

22 | Can a third party bring a direct action against an insurer for coverage?

Third parties may bring proceedings against the insured, the insurer or both.

According to the Insurance Contract Act, in a civil liability insurance, a third party (aggrieved party or his or her heirs) with a claim against an insured has a direct action against the insurer (ie, it can sue the insurer directly, without having to sue the insured as well).

Late notice of claim

23 | Can an insurer deny coverage based on late notice of claim without demonstrating prejudice?

According to the Insurance Contract Act, the policyholder, insured or beneficiary must give notice to the insurer of the loss within a maximum of seven days since the loss was known (allowing for the policy to provide a longer term). However, the breach of this term does not, on its own, grant the insurer the possibility of denying coverage. What the insurer can do in case of late notice (and only if the insurer did not know the loss through other means) is to claim the damages caused by such late notice. The main issue that arises then, in practice, is the assessment, quantification and proof of such damages.

Late notice may, nevertheless, lead to a breach of the insured's obligation to give the insurer all the necessary information regarding the circumstances and consequences of the loss which, in case of wilful intent or gross negligence, allows the insurer to deny coverage. This is foreseen in article 16, paragraph 3 of the Insurance Contract Act, which is applied by Spanish courts in a very restrictive way.

Wrongful denial of claim

24 | Is an insurer subject to extra-contractual exposure for wrongful denial of a claim?

Article 20 of the Insurance Contract Act grants damages to the policyholder, the insured or the aggrieved party in case of default in the performance of the insurer's obligations (which would include the wrongful denial of a claim). These damages consist of the payment of an annual interest equal to the legal interest rate in force at the time it accrues, increased by 50 per cent. After two years since the loss, the interest rate rises to 20 per cent.

Defence of claim

25 | What triggers a liability insurer's duty to defend a claim?

The insurer's duty to defend a claim is triggered when a notified loss falls within the policy's scope of coverage.

Indemnity policies

26 | For indemnity policies, what triggers the insurer's payment obligations?

Article 73 of the Insurance Contract Act provides that, in civil liability insurance, the insurer undertakes to cover the risk of the insured's obligation to indemnify a third party for damages caused by an event foreseen in the insured contract for whose consequences the insured is civilly liable.

Although there has been much discussion on when the loss has deemed to have occurred (discussion referred to whether the occurrence of the loss coincides with the production of the damage, with the claim by the aggrieved party against the insured or the insurer (direct action) or with the judicial declaration or private acknowledgement of liability), the insurer shall pay the corresponding indemnity when the insured's liability is unarguably established either by a judicial resolution (which has to be final, ie, against which no appeal may be filed) or by the acknowledgement of liability of the insured. Yet, this does not apply to the defence costs. In civil liability policies, the insurer is entitled to take over the defence of the insured. In that scenario, the insurer's payment obligations are triggered with the claim brought against the insured by a third party since the insurer shall advance the legal defence costs incurred or to be incurred in the defence of the insured.

Incontestability

27 | Is there a period beyond which a life insurer cannot contest coverage based on misrepresentation in the application?

In life insurance contracts, article 89 of the Insurance Contract Act provides that the insurer may not challenge the insurance contract after the expiry of a period of one year from the date of its conclusion, unless the parties have fixed a shorter term in the policy and, in any case, unless the policyholder has acted fraudulently.

The above rule does not apply in case the inaccuracy in the application relates to the age of the insured. In that scenario, article 90 of the Insurance Contract Act provides that the insurer may only challenge the contract if the true age of the insured at the time of the entry into force of the contract exceeds the admission limits established by the insurer. Otherwise, if as a result of an inaccurate declaration of age, the premium paid is lower than that which would be payable, the insurer's benefit shall be reduced in proportion to the premium received. If, on the other hand, the premium paid is higher than that which should have been paid, the insurer is obliged to reimburse the excess of the premiums received without interest.

Punitive damages

28 | Are punitive damages insurable?

Punitive damages are not provided for in the Spanish legal system. Yet, it is common that Spanish insurance policies expressly exclude punitive or exemplary damages, and particularly, when the policy covers risks in other jurisdictions, for instance, the United States or Canada.

However, there is a figure that has a punitive nature (or at least, hybrid, punitive and compensatory): the benefits surcharge. This surcharge over the public compensations paid to the workers is imposed on companies to cover labour accidents when they commit a breach of the rules regarding health and safety at work. Article 164 of Royal Legislative Decree No. 8/2015 forbids the insurability of this surcharge, although this prohibition is being challenged by many scholars and it can be possible to find policies in the market that cover, at least partially, this risk.

Excess insurer obligations

29 | What is the obligation of an excess insurer to 'drop down and defend', and pay a claim, if the primary insurer is insolvent or its coverage is otherwise unavailable without full exhaustion of primary limits?

Subject to a contractual provision to the contrary, an excess insurer will not be under a duty to 'drop down and defend' or pay the claim unless the first-layer insurer's limit of cover is fully exhausted.

© Law Business Research 2021

Self-insurance default

30 | What is an insurer's obligation if the policy provides that the insured has a self-insured retention or deductible and is insolvent and unable to pay it?

The insurer has no obligation regarding self-insured retentions or deductibles in any event. Spanish law does not provide specific obligations for insurers in case that the insured is unable to pay the self-insured retention or deductible. A deductible is considered by the case law as delimitative clauses of the insurance contract and, therefore, the insurer may allege the same against third parties.

Claim priority

31 | What is the order of priority for payment when there are multiple claims under the same policy?

There is no particular order of priority for the payment of claims where multiple claims are presented under the same policy set out in the Spanish regulation. This will depend on the wording of the policy in each case. Notwithstanding the above, the market practice in Spain evidences that claims are usually paid in chronological order, frequently to avoid the insurer's default in the payment of the corresponding indemnity and, thus, the accrual of interests.

Allocation of payment

32 | How are payments allocated among multiple policies triggered by the same claim?

This would depend on the terms of the insurance policy and, particularly, on the definition of 'loss' or 'claim' provided therein. It is also very important the temporary cover definition, especially in claims-made policies.

It is usual that insurance policies include the clause 'unique loss (or claim)' or 'sole loss (or claim)', according to which all losses or claims deriving from the same occurrence, regardless of the number of losses, claims or claimants, shall be considered a sole and unique loss (or claim), and such loss (or claim) shall be deemed to have occurred (or, in the case of claims, shall be deemed to be brought) during the policy period in which the first loss occurred (or when the first claim was made).

Disgorgement or restitution

33 | Are disgorgement or restitution claims insurable losses?

Disgorgement or restitution claims are not expressly foreseen in the Spanish insurance regulation. However, in liability insurance, article 76 of the Insurance Contract Act establishes that insurers shall indemnify the aggrieved parties from the damages caused by the insured, even when he or she acted with wilful intent, but in that case, the insurer could ask the insured for the reimbursement of the compensation paid. If the insured, who acted with wilful intent, indemnifies the aggrieved party, the insurer may allege his or her malice in order not to reimburse the amount paid by that malicious insured.

Definition of occurrence

34 | How do courts determine whether a single event resulting in multiple injuries or claims constitutes more than one occurrence under an insurance policy?

This depends on the policy's wording and, especially, on the definition of 'loss' or 'claim' and on whether the policy includes the clause 'unique loss (or claim)' or 'sole loss (or claim)'.

In the latter case, courts have determined that only those events or series of harmful events that are due to the same original cause can be considered as one and unique loss. This does not mean that whenever several harmful results occur there will be a unity of loss just because the cause of each of them is identical or similar to that which determines each of the others. For this, it is necessary that between several equal causes a patent relationship can be established (eg. Judgment No. 217/2020 of 22 May 2020, issued by the Criminal Chamber of the Supreme Court).

Rescission based on misstatements

35 | Under what circumstances can misstatements in the application be the basis for rescission?

Article 10 of the Insurance Contract Act provides that in case of misstatements in the insurance application, the insurer may cancel the insurance contract through a declaration addressed to the policyholder within one month of becoming aware of the policyholder's reservation or inaccuracy in the insurance application. This month-term may not be interrupted, contrary to limitation periods.

The case law does not establish specific requirements for the referred reservation or inaccuracy for the insurer to exercise its right to cancel the insurance policy. It would suffice that the reservation or inaccuracy incurred by the policyholder in the application refers to circumstances that may influence the assessment of the risk.

REINSURANCE DISPUTES AND ARBITRATION

Reinsurance disputes

36 | Are formal reinsurance disputes common, or do insurers and reinsurers tend to prefer business solutions for their disputes without formal proceedings?

Reinsurance disputes are very rare in Spain since insurers and reinsurers usually settle their disputes without having recourse to formal dispute resolution proceedings. However, if a settlement may not be reached, the parties usually tend to resort to an arbitral tribunal with experience in reinsurance disputes since Spanish courts do not have extensive experience in dealing with reinsurance disputes (evidenced by the lack of relevant case law on the subject).

Common dispute issues

37 | What are the most common issues that arise in reinsurance disputes?

Reinsurance disputes often refer to the decisions made by the cedent when settling a claim and the consideration of the payments made by the insurer to an insured as ex gratia or commercial payments. Inconsistencies between the wording of an insurance policy and the reinsurance slip (coverage gaps or mismatching) are also a source of conflicts.

Arbitration awards

38 | Do reinsurance arbitration awards typically include the reasoning for the decision?

Article 37.4 of the Spanish Arbitration Act provides that awards shall always be reasoned. This obligation is imperative and may not be modified by the parties in the arbitration agreement and applies to arbitration awards in equity or law but not to awards on agreed terms.

© Law Business Research 2021

Power of arbitrators

39 | What powers do reinsurance arbitrators have over non-parties to the arbitration agreement?

The effects of the arbitration agreement may be extended to non-signatories, albeit only when the involvement of the latter in the execution of the contract containing the arbitration clause is established beyond any doubt (in other words, when it may be evidenced the 'unequivocal will' of the non-signatory to be subject to the arbitration agreement).

Appeal of arbitration awards

40 | Can parties to reinsurance arbitrations seek to vacate, modify or confirm arbitration awards through the judicial system? What level of deference does the judiciary give to arbitral awards?

Parties can challenge the validity of the arbitration award through a nullity claim before the competent Superior Court of Justice. The reasons for challenging the validity of the award are very few and of restrictive interpretation. Recent several decisions coming from the Spanish Constitutional Court (judgments dated 15 June 2020, 15 February and 15 March 2021) have ratified that judicial courts reviewing the validity of the award cannot enter into the merits of the dispute or into the assessment of the evidence made by the arbitrators, which gives more legal security to the arbitration award.

REINSURANCE PRINCIPLES AND PRACTICES

Obligation to follow cedent

41 | Does a reinsurer have an obligation to follow its cedent's underwriting fortunes and claims payments or settlements in the absence of an express contractual provision? Where such an obligation exists, what is the scope of the obligation, and what defences are available to a reinsurer?

The Spanish regulation regarding reinsurance contract is very limited (just articles 77, 78 and 79 of the Insurance Contract Act) and none of them establishes that there is a follow-the-fortunes or a follow-the-settlements principle that must be applied even when the specific reinsurance agreement does not contain it expressly. So, in general terms, it would be necessary that the parties agree to introduce a clause in the contract in that sense. Nevertheless, the follow-the-fortunes principle is so well-known that some scholars consider that it would be applicable even when the contract does not include that clause.

The scope of the obligation and the defences available to the reinsurer will be determined by the terms of the contract, but a general defence argument will be that the reinsurer will not be forced to follow the fortunes or follow the settlements when the cedent has acted in bad faith or when the payment made by the insurer to the original insured is an ex gratia or commercial payment.

Good faith

42 | Is a duty of utmost good faith implied in reinsurance agreements? If so, please describe that duty in comparison to the duty of good faith applicable to other commercial agreements.

Yes, the duty of good faith is implied in reinsurance agreements and, theoretically, it is more important in reinsurance agreements than in other commercial contracts, although there is not a specific consequence for the breach of this duty, but that the reinsurer can reject cover in case that the insurer has acted in bad faith when paying the indemnity to the original insured.

Facultative reinsurance and treaty reinsurance

43 | Is there a different set of laws for facultative reinsurance and treaty reinsurance?

No, facultative and treaty reinsurance are regulated by the same set of laws.

Third-party action

44 | Can a policyholder or non-signatory to a reinsurance agreement bring a direct action against a reinsurer for coverage?

According to article 78 of the Insurance Contract Act, the insured cannot ask the reinsurer for an indemnity or compensation. However, the parties of the reinsurance agreement can freely agree to introduce cut-through clauses, so the insured, who would not have a direct action against the reinsurer, is contractually entitled to file that direct claim. This is a kind of personal guarantee, so the reinsurer is jointly and severally liable before the insured (together with the direct insurer), who has a credit or guarantee right against the reinsurer.

Insolvent insurer

45 | What is the obligation of a reinsurer to pay a policyholder's claim where the insurer is insolvent and cannot pay?

In general terms, the insured or policyholder is not entitled to ask the reinsurer for the payment of an indemnity (he or she will not have a direct action against the reinsurer). However, article 78.1 of the Insurance Contract Act establishes that in the case of liquidation of the insurer, there will be a special privilege on the credit balance of the account between the insurer and the reinsurer. Spanish scholars consider that this privilege is not individual, but a collective privilege of all the insureds, that will only exist in case that there is a positive balance for the insurer (there will be no privilege if the reinsurer has a credit balance against the insurer).

If the reinsurance contract contains a cut-through clause, some scholars consider that the insured has a personal guarantee against the reinsurer that can be assimilated to a bond contract, so the insured can claim the payment from the guarantor that it is not involved in an insolvency proceeding (ie, the reinsurer).

Notice and information

46 | What type of notice and information must a cedent typically provide its reinsurer with respect to an underlying claim? If the cedent fails to provide timely or sufficient notice, what remedies are available to a reinsurer and how does the language of a reinsurance contract affect the availability of such remedies?

Notice and information requirements must be freely agreed upon between the cedent and reinsurer. There are no general rules applicable to these issues. The consequences of the failure of the cedent to provide timely or sufficient notice must also be agreed upon, but it is hard to think that this would entitle the reinsurer to refuse the cedent´s claim. Damages would be the most likely remedy for the breach of these duties by the cedent.

© Law Business Research 2021

Allocation of underlying claim payments or settlements

47 Where an underlying loss or claim provides for payment under multiple underlying reinsured policies, how does the reinsured allocate its claims or settlement payments among those policies? Do the reinsured's allocations to the underlying policies have to be mirrored in its allocations to the applicable reinsurance agreements?

Reinsureds cannot freely allocate underlying losses, settlement payments or claims. This must be done according to the terms of the reinsurance agreements signed.

Review

48 What type of review does the governing law afford reinsurers with respect to a cedent's claims handling, and settlement and allocation decisions?

Reinsurance treaties usually contain clauses that regulate the inspection right of the reinsurer, who will be entitled to check the fulfilment of the reinsured´s duties regarding pricing, premium payment and claims handling, etc. To do that, the cedent will have the obligation to show the reinsurer the documents and files requested, according to the terms of the reinsurance agreement. Some scholars consider that this inspection right exists even when the reinsurance contract does not contain that clause expressly, because it is a natural consequence of the reinsurance relationship.

Reimbursement of commutation payments

49 What type of obligation does a reinsurer have to reimburse a cedent for commutation payments made to the cedent's policyholders? Must a reinsurer indemnify its cedent for 'incurred but not reported' claims?

If the cedent reaches a commutation agreement with their underlying policyholder, the obligations of the reinsurer will be determined by the terms of each specific reinsurance agreement. There is no regulation concerning this matter, but we understand that if the reinsurance agreement contains a follow-the-fortunes or a follow-the-settlements clause and the commutation payment cannot be considered as an ex-gratia payment or if the cedent has not acted with bad faith, the general rule should be that the reinsurer will have to reimburse the commutation payments.

The response regarding incurred but not reported claims (IBNRs) should be the same: the reinsurer will have to reimburse the payment made by the cedent or not depending on the terms of the reinsurance agreement. The commutation agreement reached with the policyholder will probably contain an assessment of the IBNRs, but since this is just an estimate of the claims that can be filed in the future, it could be a source of conflict with the reinsurer, that could have some room to reject cover by arguing that the valuation of the IBNRs is not adequate and its payment by the cedent owes to commercial reasons.

Extracontractual obligations (ECOs)

50 What is the obligation of a reinsurer to reimburse a cedent for ECOs?

Unusually, a cedent is considered liable outside the policy's boundaries. In any event, the obligation of the reinsurer to reimburse for ECOs will depend on the terms of the reinsurance agreement, but the general rule is that the reinsurer will not cover the compensation paid by the cedent in case of fraud or bad faith, event when the reinsurance contract includes follow the fortunes or follow the settlements clauses.

However, reinsurance contracts in Spain usually cover delay interests foreseen in article 20 of the Insurance Contract Act, even though they have a punitive nature and can be considered as an ECO. These interests are extremely high (20 per cent per year on the principal amount due from the second year after the loss occurrence) and penalise the delay in the payment to the insured. This is a very relevant issue in our market and reinsurers cannot deny its cover, even when the delay in the payment can be attributed to the cedent´s bad faith or is completely unjustified.

UPDATES & TRENDS

Key Developments

51 Are there any emerging trends or hot topics in insurance and reinsurance regulation in your jurisdiction?

The eventual impact on covid-19 on the insurance industry is currently the most relevant topic, together with the tightening of the market, especially on financial lines. In 2021, no relevant regulatory developments are foreseen except for the approval of the new Insurance Distribution Act (although Directive 2016/97/EU (Insurance Distribution Directive) was already implemented under Royal Decree-Law No. 3/2020 of February 2020).

Coronavirus

52 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

In 2020, the Spanish government issued its 'State of Alarm' emergency legislation to address the covid-19 pandemic, which indirectly affected the insurance sector.

Bird & Bird

Luis Alfonso Fernández
luisalfonso.fernandez@twobirds.com

Virginia Martínez
virginia.martinez@twobirds.com

Teresa Repullo
teresa.repullo@twobirds.com

Virginia Domínguez
virginia.dominguez@twobirds.com

Paseo de la Castellana 7, 7th floor
28046 Madrid
Spain
Tel: +34 91 790 6000
www.twobirds.com

© Law Business Research 2021

Other titles available in this series

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Business & Human Rights
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Defence & Security Procurement
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
Drone Regulation
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gaming
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
Healthcare M&A
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Litigation Funding
Loans & Secured Financing
Luxury & Fashion
M&A Litigation
Mediation
Merger Control
Mining
Oil Regulation
Partnerships
Patents
Pensions & Retirement Plans
Pharma & Medical Device Regulation
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public Procurement
Public-Private Partnerships
Rail Transport
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
Sovereign Immunity
Sports Law
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Technology M&A
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

lexology.com/gtdt

an LBR business

ISBN 978-1-83862-674-7

© Law Business Research 2021