

THE INSURANCE AND
REINSURANCE
LAW REVIEW

NINTH EDITION

Editor
Peter Rogan

THE LAWREVIEWS

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PREFACE

It is hard to overstate the importance of insurance in personal and commercial life. It is the key means by which individuals and businesses are able to reduce the financial impact of a risk occurring. Reinsurance is equally significant: it protects insurers against very large claims and helps to obtain an international spread of risk. Insurance and reinsurance play an important role in the world economy. It is an increasingly global industry, with emerging markets in Asia and Latin America developing apace.

Given the expanding reach of the industry, there is a need for a source of reference that analyses recent developments in the key jurisdictions on a comparative basis. This volume, to which leading insurance and reinsurance practitioners around the world have made valuable contributions, seeks to fulfil that need. I would like to thank all the contributors for their work in compiling this volume.

One of the defining features of 2020 has been the covid-19 pandemic, which has inflicted terrible human misery around the world. The insurance industry, like most other aspects of the economy, has been badly impacted by the pandemic. Although the financial loss to the industry seems likely to be manageable, it has undoubtedly raised issues about the suitability of a range of policy wordings for the modern commercial environment, while also raising a range of legal issues related to, for example, causation and the quantification of loss. The different jurisdictions represented in this book will have different responses to these developments so it is vital to hear from the lawyers in each of those countries on the factors that will govern the international response.

The year 2020 looks likely to have been a very bad year for insured losses from natural catastrophes, with record numbers of severe windstorms and wildfires. These losses reinforce the continuing concern that climate change will see a long-term increase in the number and severity of such losses. From a legal perspective, the changing nature of natural catastrophes will raise issues of policy construction in relation to, for example, aggregation clauses and the obligation on reinsurers to follow their insured's underlying settlements.

The past year also saw no respite in the number or scale of cyber events, including the data breaches at MGM Resorts and California University and global organisations such as the World Health Organization. Events such as these test not only insurers and reinsurers, but also the rigour of the law. Insurance and reinsurance disputes provide a never-ending array of complex legal issues and new points for the courts and arbitral tribunals to consider. Aggregation will also be an area of uncertainty in relation to the treatment of all losses of this kind, and again different jurisdictions are likely to provide different responses.

Most recently, the courts in England and Wales have held that cryptocurrencies such as bitcoin are 'property' for legal purposes.

Looking ahead, 2021 is likely to see new developments and new legal issues. In particular, the impact of insurtech on the way in which insurance is underwritten, serviced and distributed will continue to present challenges around the world. This is reflected in our chapter on artificial intelligence.

I hope that you find this volume of use in seeking to understand today's legal challenges, and I would like to thank once again all the contributors. Finally, I would like to thank Simon Cooper, a consultant at Ince and a colleague of many years, for his huge contribution to finalising this ninth edition of *The Insurance and Reinsurance Law Review*.

Peter Rogan

Ince

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April 2021

MEXICO

*Yves Hayaux-du-Tilly*¹

I INTRODUCTION

The year 2020 has been tainted by the disastrous effects of the covid-19 pandemic in all aspects of our lives. The Mexican insurance sector was no exception and the impact of the pandemic has had a tangible effect in the insurance sector in Mexico. On one hand, the sector has provided coverage to a large number of insureds in Mexico, proving the beneficial effects that insurance provides. On the other hand, the insurance sector's lack of penetration in Mexico has left a large number of families without any protection. That said, the Mexican social security system has been critical in granting protection to those of the population that have access to it and large numbers of families have benefited.

In general terms, the market responded swiftly and favourably to claims from insureds with health and life insurance cover. The insurance companies are now seeking to recover payments under their reinsurance programmes, where the response from the reinsurance market has not been so favourable to the insurance market.

As a general rule, those with property and casualty insurance cover have been denied business interruption coverage because these generally expressly require physical damage to trigger payment. Those with all risk insurance cover are pursuing claims against their insurers under these policies, which, by their nature, would not contain an exclusion for pandemics.

The pandemic has reinforced the trend for an expansion in health and medical expenses insurance and has seen an increase in demand for life insurance products. Other lines of business, such as automobile insurance, have declined.

Mexican insurance companies have remained financially stable and, in line with the measures imposed by the Mexican government, they have reacted swiftly to the claims arising from the pandemic. Despite this, there is discontent about the perceived lack of support from reinsurers for those claims brought by Mexican cedents.

The government provided limited assistance to the insurance sector during the year, with this support being limited to minor reliefs in relation to regulatory requirements and extensions of mandatory terms for collection of premiums. The regulator and various administrative agencies limited their services because of the pandemic and this has had an effect on the processing of applications by the regulator, resulting in delays.

¹ Yves Hayaux-du-Tilly is a partner at Nader, Hayaux & Goebel. The author is grateful to Juan Pablo Sainz of Nader, Hayaux & Goebel for his assistance in preparing this chapter.

Health insurance, major medical expenses and life insurance are the lines of business that have been most heavily affected by the covid-19 pandemic, in terms of claims. According to the Mexican Association of Insurance Companies (AMIS), the pandemic now ranks among the top 10 catastrophes to have affected the Mexican insurance market.

In general, the Insurance and Surety Companies Law of 4 April 2015 (LISF) and its implementing regulations, which include strong solvency standards and strict rules, have provided the Mexican insurance market with the financial stability and resilience required to withstand the pandemic.

The pandemic situation and the corresponding stress on the insurance market have deferred the profound challenges that would otherwise be faced by the country's insurance industry, such as improving insurance penetration.

The Mexican market continues to rely heavily on reinsurance and 'fronting' arrangements to cope with the complexity of new risks and the increase in additional lines of business that are capital-intensive or require added capacity, such as catastrophe insurance. There are no indications that this scenario will change.

The market reliance on reinsurance through fronting arrangements creates challenges in the adjustment and settlement of certain claims, as there are naturally disagreements between the reinsurance market and insureds because of inconsistencies in the placing of the underlying insurance and the terms of the reinsurance arrangements. These disagreements arise not only because of errors in the translation of reinsurance arrangements into direct insurance, but also because of differences between the law applicable to the direct insurance and the practices of the reinsurance market. There have been abusive practices by certain reinsurers, markets and their advisers and these have created additional tensions and concerns in the Mexican market; there is also raised awareness among the cedents of the enormous risks they face in permitting these fronting arrangements, which may seem profitable but bear high risks.

II REGULATION

i The insurance regulator

Insurance and reinsurance operations in Mexico are regulated by both the Ministry of the Treasury and Public Credit (SHCP) and the National Insurance and Surety Commission (CNSF). The SHCP has authority to interpret, implement and execute the provisions of the LISF for administrative purposes. The CNSF has authority to grant and revoke authorisations to incorporate and operate insurance companies in Mexico, and to register reinsurance companies with the General Registry of Foreign Reinsurance Companies to take Reinsurance and Rebonding from Mexico (the Reinsurance Registry) to take reinsurance from Mexican insurance companies. The CNSF is also responsible for supervising the operation of insurance and reinsurance companies and has authority to supervise, investigate and issue regulations applicable to the operations of Mexican insurance and reinsurance companies. All the applicable regulations issued by the CNSF are compiled in a single regulatory circular (the Circular).

ii Position of non-admitted insurers

Article 20 of the LISF provides that only those entities duly licensed by the Mexican federal government through the CNSF to operate as insurance companies may undertake active insurance operations within Mexican territory.²

If a non-licensed insurance company operates in Mexico on a non-admitted basis and carries out active insurance operations in Mexico, it shall be deemed to be breaching Mexican law and the transactions affected shall be null and void. Furthermore, this conduct would constitute criminal liability on the part of: (1) the non-admitted foreign insurer; (2) the insurance intermediaries (broker or agent); and (3) the officers, managers, directors, representatives and agents of the entities referred to at (1) and (2).

iii Position of brokers

As a general rule, insurance companies may only pay brokerage fees to insurance brokers duly authorised as such by the CNSF. Individual agents and entities require a licence to act as insurance brokers. To obtain the licence to act as an agent or broker, the individual or entity must file an application with the CNSF, which must comply with the requirements set out in the Regulation of Insurance and Surety Brokers (the Brokers Regulation). The legal provisions applicable to insurance brokers are contained in Chapter 32 of the Circular.

Reinsurance intermediaries are entities licensed to provide reinsurance intermediation services.³ To incorporate and operate a reinsurance intermediary, the prior authorisation of the CNSF is required and to obtain the authorisation, an application must be filed with the CNSF. The application must comply with the requirements set out in the Rules on the Authorisation and Operation of Reinsurance Intermediaries (the Intermediaries Rules). Reinsurance intermediaries must be incorporated as limited liability stock companies and have their corporate domicile in Mexican territory. The legal provisions applicable to reinsurance intermediaries are contained in Chapters 9, 32 and 35 of the Circular.

iv Requirements for authorisation

Pursuant to the LISF, to incorporate and operate an insurance company in Mexico, an application must be filed with the CNSF. The application must comply with the requirements set out in Article 41 of the LISF. The CNSF has discretionary authority to grant or deny the authorisation. These authorisations are regulated in Chapter 2 of the Circular.

An insurance company must start operations within three months of receiving the relevant authorisation from the CNSF. Before starting its operations, the CNSF must carry out an inspection visit and confirm that the insurance company has the infrastructure, procedures and systems required to operate according to Article 47 of the LISF.

Under the LISF, Mexican insurance and reinsurance companies and foreign reinsurance companies registered with the Reinsurance Registry may cede or take risks in reinsurance to and from Mexican insurance companies. Pursuant to the Circular, foreign reinsurance companies may not take reinsurance in Mexico when they intend, or when they effectively carry out, on a majority or exclusive basis, reinsurance operations with Mexican insurance

2 Article 20, Paragraph 2 of the LISF defines active insurance operations as those in which, upon the occurrence of a future and uncertain event agreed upon by the parties, one party agrees to directly or indirectly indemnify or pay an amount of money to the other party, in exchange for a premium.

3 Article 106, LISF.

companies with whom they have financial or business ties. Although it is not clearly explained in the LISF, the 'majority or exclusive' operations referred to in this provision refer to the global reinsurance activities undertaken by foreign reinsurance companies and not only their reinsurance activities in Mexico. The reason for this provision is to prevent the proliferation of captive reinsurance companies.

Insurance companies authorised in Mexico are allowed to carry out reinsurance operations in the same lines of business for which they have a licence to take insurance. However, a licence to operate exclusively reinsurance business can also be obtained. There are currently only two Mexican insurance companies authorised to exclusively operate reinsurance: Reaseguradora Patria and Der Neue Horizont Re.

The registration of foreign reinsurance companies with the Reinsurance Registry is governed by the LISF and the Circular. To register with the Reinsurance Registry, foreign reinsurance companies must file an application with the CNSF in the terms set out in Article 107 of the LISF and Chapter 34.1 of the Circular. The CNSF may grant or deny this registration on a discretionary basis. The registration of foreign reinsurance companies is valid until 31 December of the year of registration and must be renewed every year.

v Regulation of individuals employed by insurers

Title 3, Chapter 1, Section II of the LISF and Chapter 3.7 of the Circular provide basic requirements of experience, expertise and knowledge in finance, law, administration or insurance for the eligibility of directors, officers and statutory examiners within an insurance company, and they state which individuals are proscribed from appointment to these roles. Insurance companies must give notice to the CNSF of any such appointment and provide sufficient evidence to the CNSF that the individual complies with the requirements under the LISF to serve in the relevant capacity. The insurance company must maintain a file for each individual with supporting documentation and evidence of the individual's qualifications and representations and must confirm to the CNSF annually that its directors and officers comply with the requirements to serve in their respective positions as set out in the LISF and the Circular.

vi The distribution of products

Pursuant to the LISF and Chapter 4 of the Circular, standard-form contracts, collective and group contracts and surety insurance must be registered with the CNSF.

Insurance products registration must comply with the following documentation requirements (contractual documentation): general conditions and model contracts, containing the general and particular conditions under which the insurance product will be commercialised; a technical note, containing the technical and financial hypothesis for the calculation of the premium and the ongoing risk reserve; a legal opinion, certifying that the insurance product complies with all applicable legal provisions; and a 'congruency opinion' that certifies that both the technical note and the legal opinion are consistent.

Insurance companies may use, sell and distribute insurance products immediately upon their registration. The CNSF may at any time suspend the registration of an insurance product if, in its opinion, the insurance product does not comply with applicable laws and regulations.

The LISF requires that standard-form insurance contracts are filed with the National Commission for the Defence and Protection of Financial Services Consumers (Condusef), for their registration with the Standard-Form Contracts Registry.

vii Compulsory insurance

The main difference between compulsory insurance and other insurance products, other than the fact that the former is required by law, is that compulsory insurance contracts must continue in full force and effect until their termination and may not be terminated, even when the corresponding premium is not paid when due or within the cure period set out in the LISF. Compulsory insurance premiums may not be paid in instalments.

Compulsory insurance includes social security (e.g., life, health and disability), which is mandatory for employers with respect to their employees; professional liability insurance to practise certain professions; and automobile insurance to circulate on roads and highways under federal jurisdiction and in some Mexican states.

viii Taxation of premiums

Insurance companies are subject to income tax and value added tax. Income tax is levied at 30 per cent on insurance companies' accrued income less authorised deductions. The Income Tax Law provides special rules for deductions applicable to insurance companies.

Value added tax is levied at 16 per cent on all insurance services paid for by customers, except for agricultural insurance, mortgage and financial guarantee insurance and life insurance.

Mexican reinsurance companies receive the same tax treatment as insurance companies. Income tax is applicable to foreign reinsurance companies when they receive premiums from a Mexican resident or from a foreign resident with a permanent establishment in Mexico. The income tax is calculated by applying a 2 per cent withholding rate on the gross amount paid to reinsurers with no deductions.

The person paying the premium to the reinsurers must withhold and pay the income tax at the applicable rate. Depending on the jurisdiction in which the reinsurance company is incorporated, there might be a double taxation treaty that applies to the payment of premiums to foreign reinsurance companies and that supersedes the general provisions referred to herein.

Insurance and reinsurance brokers are subject to the same taxes and to the same rates as insurance companies but are not subject to special deductions applicable to insurance companies.

ix Other notable regulated aspects of the industry

Insurance companies must maintain a minimum paid-in capital stock. That minimum paid-in capital stock is regulated in Chapter 6 of the Circular.

The following are the (approximate) minimum paid-in capital requirements for each line of business applicable for 2021, until new capital requirements are issued by the CNSF, which should be before June 2021:

- a* Life: 45.21 million Mexican pesos.
- b* Pensions: 185.69 million pesos.
- c* Accidents and health:
 - personal accident or medical expenses: 11.30 million pesos; and
 - health, including personal accident or medical expenses: 11.30 million pesos.

- d* Property and casualty:
- one line: 33.90 million pesos;
 - two lines: 45.21 million pesos;
 - three or more lines: 56.51 million pesos;
 - mortgage insurance: 80.91 million pesos; and
 - financial guarantee insurance: 220.18 million pesos.

Insurance companies authorised exclusively for reinsurance operations are required to maintain 50 per cent of the applicable minimum paid-in amount, as listed above.

III INSURANCE AND REINSURANCE LAW

i Sources of law

Mexican insurance and reinsurance companies are governed by the LISF. The LISF was published in the Official Gazette of the Federation (DOF) on 4 April 2013 and entered into effect on 5 April 2015, repealing the General Insurance and Mutual Companies Law, which had been in effect since 1935.

The Insurance Contract Law (LCS), enacted by Decrees dated 29 December 1934 and 1 January 1935, also published in the DOF on 31 August 1935, is applicable to all insurance contracts subject to Mexican law, except for maritime insurance, which is governed by the Navigation and Maritime Commerce Law published in the DOF on 1 June 2006.

Reinsurance contracts are governed by the applicable law expressly agreed by the parties in the contract. Generally, the parties agree on Mexican law as the law governing the reinsurance contract.

ii Making the contract

Article 1 of the LCS defines insurance contracts as agreements in which an insurance company agrees to indemnify or pay for damage, or to pay an amount of money on the occurrence of a risk covered under the terms of the contract, in exchange for the payment of a premium.

The reinsurance contract is not a regulated contract, which generates many disputes in practice. A reinsurance contract is defined in Article 2, Section XXV of the LISF as a contract in which an insurance company assumes, totally or partially, a risk that is covered by another insurance company or the liability exceeding the amount insured by the direct insurer.

Article 25 of the LISF provides a general classification of insurance contracts as follows:

- a* Life.
- b* Accidents and health, including:
- personal accidents;
 - medical expenses; and
 - health.
- c* Property and casualty, including:
- civil liability and professional;
 - maritime and transportation;
 - fire;
 - agriculture and livestock;
 - automobiles (motor insurance);
 - credit insurance;
 - surety insurance;

- mortgage insurance;
- financial guarantee insurance;
- earthquake and other catastrophic risk;
- miscellaneous; and
- risks declared by the SHCP as specialty risks.

Essential elements of an insurance contract

Under the LCS, insurance policies must contain:

- a* the name and address of the contracting parties and the signature of the insurance company;
- b* a description of the insured asset or person;
- c* a description of the risks insured;
- d* the effective date of coverage and its duration;
- e* the amount insured;
- f* the insurance fees or premium; and
- g* any other clauses required by law or agreed by the parties.

It is common to find the following clauses in insurance policies:

- a* coverage limits and exclusions;
- b* form and terms under which the premium must be paid;
- c* insured's right to be informed about commissions paid to intermediaries;
- d* insured's right to revise the policy if its terms differ from the agreed terms;
- e* competence of Condusef and choice of jurisdiction clause; and
- f* special clauses required for specific lines of business.

Utmost good faith, disclosure and representations

The duty of utmost good faith is an implied principle applicable to all insurance contracts. This duty demands diligent and honest conduct from both parties, including the duty of the insured to disclose to the insurer any fact that may help the underwriter to evaluate the risks and determine the premium.

iii Interpreting the contract

General rules of interpretation

To the extent that the terms and conditions of the agreement are clear and there is no question about the intent of the parties, the insurance policy must be interpreted in accordance with its terms:

- a* if the terms of the insurance policy seem contrary to the evident intent of the parties, the intent of the parties shall prevail over the terms of the insurance policy;
- b* if the insurance policy is generic in its terms, its interpretation must be limited to the purposes of the insurance policy;
- c* if the insurance policy permits various interpretations, it must be interpreted in the most convenient manner for the insurance policy to be effective;
- d* the terms and conditions of an insurance policy, including those terms that are not clear, must be interpreted in a manner that is consistent with the interpretation of the insurance policy as a whole;

- e* the terms of an insurance policy that may have different meanings must be interpreted in a manner consistent with the nature and purposes of the insurance policy;
- f* ambiguities of the insurance policy may be interpreted taking into consideration the customs of the country; and
- g* if it is impossible to construe the insurance policy using the rules set out above, the insurance policy must be construed in favour of the interpretation that provides reciprocity of interests between the parties.

Incorporation of terms

Compliance with the LCS is mandatory, therefore any agreement contrary to the LCS is null and void, unless otherwise permitted under the LCS. Taking this into account, it is implied that insurance contracts are subject to the provisions of the LCS.

iv Intermediaries and the role of the broker

Conduct rules

Pursuant to Article 106 of the LISE, only reinsurance intermediaries are authorised to provide reinsurance intermediation services. Authorisation from the CNSF is required to incorporate and operate a reinsurance intermediary. To obtain this authorisation, an application must be filed with the CNSF. The Intermediaries Rules set out the requirements and information that the application for authorisation must contain. A reinsurance intermediary must be incorporated as a limited liability company with a residence in Mexico.

Agencies and contracting

As a general rule, intermediation of insurance products may only be carried out by insurance brokers certified and licensed by the CNSF. Insurance companies may only pay commission arising from the sale of insurance policies to insurance brokers.

How brokers operate in practice

To carry out brokerage services in Mexico, insurance brokers must be authorised by the CNSF. To this end, an application must be filed with the CNSF. The requirements and information that the application must contain is set out in the Brokers Regulation. The authorisation may be granted to individuals acting as employees of an insurance company or independent individuals operating with a service agreement with an insurance company; and to limited liability companies incorporated under Mexican law.

The authorisation to act as an insurance broker is granted for three years for individuals (renewable at the request of the insurance broker) and, in the case of legal entities, the CNSF can grant the authorisation for an indefinite period.

Article 12 of the Brokers Regulation lists entities and individuals that cannot participate, directly or indirectly, in the capital stock of an insurance broker legal entity; these include Mexican insurance companies and financial entities subject to approval by the corresponding Mexican authority; foreign governments or authorities; and foreign financial entities.

v Claims

A claim is triggered on the occurrence of a peril covered by the policy. Insurable interest is required to make a valid claim and demand payment under a policy.

The statute of limitations of claims is two years after the date of the occurrence of the loss, except for life insurance, where it is five years.⁴ The statute of limitations can be interrupted for the following reasons:

- a* on appointment of experts as a result of a loss;
- b* if a claim is filed with the specialised unit of the corresponding insurance company or Condusef;
- c* by initiating an action or proceeding before competent courts, on service of process to the insurance company; or
- d* by the express acknowledgment of the rights of the insured or its beneficiaries by the insurance company.

Good faith and claims

The LCS establishes the obligation of the insured (1) to give timely notice of the occurrence of the casualty; (2) regarding property and casualty insurance, to prevent or reduce the damage; and (3) not to modify the status of the assets. If, when acting in good faith, the insured omits to give timely notice of the occurrence of the casualty or to carry out reasonable actions to prevent or reduce the damage, or modifies the status of the insured asset, the insurance company may reduce the indemnity in proportion to the damage that could have been mitigated or avoided by the insured. If the insured were to act fraudulently, the insurance company would be released from its obligations under the policy.

The consequences of bad faith may:

- a* trigger the right to terminate the insurance contract;
- b* allow the parties to recover premiums paid or request payment of damages and loss of profit; and
- c* release the parties from their obligations under the insurance contract.

Set-off and funding

The parties can set off mutual debts and credit as long as both are due and payable.

Reinstatement

The LCS does not regulate reinstatement, but it may be included in the insurance contract. Reinstatement generally operates when the insured pays the outstanding premiums, provided the risk has not changed.

If any risk takes place prior to reinstatement of the insurance contract, the insured is not entitled to obtain any compensation, since he or she was not covered by the insurance.

Dispute resolution clauses

Clauses regarding choice of forum, jurisdiction and applicable law are valid and enforceable in Mexico in insurance and reinsurance contracts. Furthermore, the parties in insurance and reinsurance contracts can convene to solve potential disputes through an arbitration. Mexico

⁴ Article 81, LCS.

is a contracting state of the Hague Convention on Choice of Court Agreements (2005) and of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention 1958).

IV DISPUTE RESOLUTION

i Jurisdiction, choice of law and arbitration clauses

The parties in a reinsurance contract are free to agree the terms and conditions of the contract as long as they do not breach any mandatory legal provision or go against public policy. Arbitration clauses are enforceable in insurance and reinsurance agreements. The terms and conditions of an insurance contract are subject to and shall comply with the LCS, which is mandatory. As a general rule, agreements contravening the LCS shall be null and void.

ii Litigation

Insurance and reinsurance disputes are regulated by the Code of Commerce. If one of the parties breaches a contract, the non-defaulting party can initiate ordinary commercial proceedings. This judicial process has four basic stages: filing of the claim by the plaintiff and response from the defendant; submission and presentation of evidence of any kind; pleadings; and award.

The parties can appeal any ruling to a higher tribunal, unless the aggregate amount is less than 705,379.03 pesos.

Each party pays its own litigation costs and the losing party may be required to indemnify the winning party, including for attorneys' fees, subject to certain established thresholds and the decision of the court.

iii Arbitration

The insured and the insured's beneficiaries can file claims with the insurance company, Condusef and the Mexican courts.

Claims filed with Condusef or before a competent court interrupt the statute of limitations.

Condusef can act as a mediator in disputes resulting from an insurance contract if the amount in dispute is less than 6 million Mexican investment units (approximately 39.79 million pesos). Condusef can also act as an arbitrator if the dispute is not solved in a mediation process; however, the parties can choose a third party as an arbitrator.

The foregoing does not affect the right of the parties to bring a legal action before Mexican courts.

Mexico is a contracting state of the New York Convention and agreements to submit disputes arising from reinsurance policies to arbitration are valid and the resulting arbitral awards can be enforced by Mexican courts.

The Mexican chapter of the International Insurance Law Association, the Mexican Insurance and Bonding Law Association (AMEDESEF), together with the Arbitration Centre of Mexico (CAM), created the Mexican chapter of the Insurance and Reinsurance Arbitration Society (ARIAS Mexico). ARIAS Mexico, managed by the CAM with the technical assistance of AMEDESEF, promotes arbitration to resolve insurance and reinsurance disputes.

Reinsurance claims can be resolved in judicial proceedings through arbitration or through other alternative dispute resolution mechanisms, such as mediation and conciliation.

iv Mediation

There is an important increase in mediation as an alternative mechanism for settling international reinsurance disputes and claims involving Mexican cedents and the London market. Mediation has proven to be an efficient alternative.

v Alternative dispute resolution

Although Article 17 of the Mexican Constitution refers to means of alternative dispute resolution, there is no federal legislation regarding alternative dispute resolution processes. However, several Mexican states have enacted specific laws on this matter.

The most popular alternative dispute resolution procedures are arbitration and mediation (see Sections IV.iii and IV.iv).

V YEAR IN REVIEW

i The insurance sector

According to the CNSF, as at September 2020, the Mexican insurance sector comprises 101 insurance companies licensed to operate in Mexico (of which 57 are subsidiaries of foreign insurance companies) and 240 foreign reinsurance companies registered with the Reinsurance Registry, including Lloyd's of London. Ten atomic pools (nuclear insurance pools) were also registered with the Reinsurance Registry to take reinsurance in Mexico. Direct premiums in the insurance and surety sectors decreased had by 4.6 per cent by the end of September 2020 compared to the same period in 2019. Of the total amount of premiums by the end of September 2020, 97.7 per cent came from direct insurance and only 2.3 per cent came from reinsurance.

By the end of September 2020, life insurance had decreased by 3 per cent in real terms compared to the previous year; health insurance increased by 7.7 per cent; and property and casualty decreased by 10.8 per cent. Excluding motor insurance, the property and casualty line decreased by 8.9 per cent.

The penetration of insurance with respect to Mexico's gross domestic product is 2.3 per cent. The Mexican Association of Insurance Institutions and the CNSF are working on a strategy to increase penetration to 2.8 per cent by 2022.

ii Lloyd's

Probitas Syndicate 1492 and Newline Group are the only two Lloyd's syndicates with physical presence in Mexico. In the past few years, Lloyd's has changed its appetite for Latin American risk and we have seen a shift to other regions and products and in its strategy. As a consequence of these changes, Lloyd's appointed a new country manager for Mexico and established a hub in Miami to manage the Latin American business. It is still unclear how this will affect the business flow and capacity that was traditionally provided to the Mexican market by Lloyd's.

Two Mexican groups, Grupo Nacional Provincial and Reaseguradora Patria, currently have investments in Lloyd's.

iii CNSF

During 2019, CNSF was still adjusting to the changes introduced by the new administration of President Andrés Manuel López Obrador, who took office in December 2018. In 2020, we saw a better organised CNSF with a much more pragmatic approach to its performance, albeit with limited resources due to budget reductions and also facing the challenges arising from the pandemic, which required it to implement technological tools and systems to process applications and continue to fulfil its role as supervisor.

Ricardo Ernesto Ochoa Rodríguez continues to serve as president of the CNSF and his predecessor, Norma Alicia Rosas Rodríguez, was recently appointed chief executive officer of AMIS.

On 7 April 2020, as a response to the covid-19 pandemic the CNSF ordered suspensions and extensions of the terms for regulatory reports, actions, registrations and authorisation procedures that have been or will be filed with CNSF. The suspension were extended three times, until 31 July 2020, and affected transactions awaiting the CNSF's approval.

On 3 August 2020, the CNSF established a temporary procedure for the calculation of terms based on the level of contingency of the covid-19 pandemic (determined by the federal government), which will remain in place until the health authority declares the conclusion of the pandemic contingency.

VI OUTLOOK AND CONCLUSIONS

i Regulatory

The current government has implemented important changes in public policy. However, the CNSF has been less active than expected in improving the regulatory regime and conditions for the development of insurance solutions and risk management mechanisms to ensure financial inclusion and the protection of vulnerable groups.

With regard to catastrophic risk, in September 2020 the Chamber of Deputies of the Mexican Congress cancelled FONDEN, Mexico's national natural disaster fund, which since 1999 had been a reliable mechanism for protection of the population throughout the country against natural disasters. To replace the functions of FONDEN, Congress approved in December 2020 the General Law for Comprehensive Disaster Risk Management and Civil Protection, which relies on financial programmes managed by the federal government. The initiative sets out a basis for Mexican states to develop risk management programmes, including the purchase of private insurance coverage and requirements for accessing federal aid programmes in the event of a catastrophe. The draft bill for the new law is under discussion in the Senate and is expected to be approved and enter into effect in the first half of 2021.

There has been an increase in demand for political risk coverage, given the growing perception of the potential for damage to investors and companies as a result of political decisions by the current government, mainly in the infrastructure and the energy sectors.

While the regulators are aware of insurtech's potential to provide access to the benefits of insurance products for vulnerable groups, the present regulatory regime has unfortunately become a hurdle rather than an incentive for the development of products and projects, in this area. Coping with compliance and regulatory challenges, including a strict anti-money laundering (AML) regime, data protection and privacy regulations, makes it difficult for start-ups to flourish in this highly regulated industry. Notwithstanding this, new risks

continue to require innovative products, presenting new challenges to the regulators and although the country's industry is solid and well-capitalised, it nonetheless continues to disappoint in terms of penetration, inclusion and innovation.

On 31 December 2020, reforms to the AML and counter-terrorist financing regime applicable to insurance companies entered into effect. The reforms were based on the recommendations in the Financial Action Task Force's 2018 Mutual Evaluation Report for Mexico. The new regime establishes more rigorous measures for the prevention of AML and terrorism financing and introduces a risk-based approach, as well as rules for online transactions.

We have seen a growth in funds' appetite for working with insurance companies and benefiting from them as institutional investors. The insurance industry has not fully embraced its potential as a key institutional investor, with the exception of a few insurance companies actively investing in private equity, venture capital and other securities, such as development trusts and real estate trusts. There is interest in seeing regulators enhance and provide incentives to insurance companies and we still expect to see changes in insurance companies' investment programmes, in line with the current government's interest in financing long-term infrastructure projects.

ii Case law

We continue to see a growth in insurance and reinsurance-related disputes and related litigation, resulting in the development of court precedents on insurance and reinsurance related matters. The courts are very active in developing the concept of moral damages (similar to that of punitive damages) – the concept now forms part of most claims, with important consequences for the insurance industry.

The *contra proferentem* principle in insurance continues to be applied, affecting insurance claims that are being argued before the courts.

Ongoing cases related to violent acts that took place in the context of demonstrations and protests against the government that occurred in January 2018, as a consequence of a substantial rise in the price of petrol, are contributing to the judicial interpretation of the exclusion of the risk of terrorism (terrorism exclusion clause or endorsement) in insurance policies. These cases are relevant to the insurance industry as the Mexican precedents do not reflect international market practices. We have seen regional growth of these claims and the decisions currently pending in Mexican courts will be of relevance to ensure correct wording in terrorism and all risk policies.

By analysing the concept of *litisconsorcio* (joinder of parties), the courts have confirmed that insurance and reinsurance are two separate and independent contracts, and they have confirmed that direct insurance policyholders cannot take direct action against reinsurers.

iii Reinsurance claims

As previously identified, one of the main sources of disputes in reinsurance stems from fronting arrangements widely used in Mexico in the context of a legal framework where the insurance company maintains its liability to the insured despite the fact that, technically, it is just fronting the risk. This particular state of affairs – where reinsurers' lack of understanding of Mexican law and the lack of diligence in policy underwriting to ensure wording considers the effects of Mexican law with regard to English wording of reinsurance placements used in fronting arrangements – has consistently and continuously raised discrepancies between insurance and reinsurance policies and Mexican law, and is the origin of a number of disputes between the London and Mexican markets.

These inconsistencies are further exacerbated by abusive practices in the handling of claims by the reinsurance market, prejudicing the insurance companies that placed the business through fronting arrangements.

We have seen some interesting developments in the Mexican AML regime aligned with international standards and these may contribute to harmonising local placements with limitations of liability under international reinsurance programmes.

There is opportunity in Mexico to use effectively and promote alternative dispute resolution mechanisms specialised in insurance and reinsurance claims, including mediation and arbitration and the use of ARIAS Mexico. The inclusion of arbitration clauses in insurance and reinsurance agreements provides for the resolution of conflicts arising in reinsurance contracts through arbitration and also serves to prevent certain situations arising in global insurance programmes. However, the reinsurance market is still generally reluctant to include mediation and arbitration clauses in reinsurance policies.

In November 2019, the Principles of Reinsurance Contract Law (PRICL) were published by the Project Group (a joint venture set up by several universities and professors, primary insurance company representatives, reinsurance companies and reinsurance brokers and special advisers) in cooperation with the International Institute for the Unification of Private Law (known as UNIDROIT). The PRICL set specific reinsurance rules applicable to contract law, with a view to providing help in areas where reinsurance practitioners felt the need to improve legal certainty. The PRICL have been drafted as soft law, which means they will work as optional guidelines on reinsurance contract law when chosen by the parties, and for these principles to have binding effect, the contracting parties should choose to adopt them voluntarily. However, there is also the possibility that the PRICL may be applied by courts or arbitral tribunals, as the case may be, even in cases where the parties have not chosen to apply them.

The covid-19 pandemic has also raised conflicting views regarding life reinsurance coverage, with arbitration proceedings under way to resolve disputes between Mexican cedents and foreign reinsurers in relation to coverage during the pandemic.

iv Distribution

There have been no changes and the distribution channels in Mexico continue to be strictly regulated and extremely limited, resulting in a lack of penetration of insurance within small and medium-sized companies, which contributed around 52 per cent of the national gross domestic product during 2019. There is still no effective solution to the ongoing problem of enforcing mandatory automobile insurance and other mandatory insurance products.

Bancassurance is one of the most important areas of growth within the industry. With very few exceptions, most banking groups operating in Mexico have transferred their insurance business and operations to insurance groups and entered into exclusive distribution arrangements.

Insurance distribution through brokers is still the most common channel for distribution; however, there is an interest in developing insurtech products and shifting to online forms of distribution. Various projects aiming to exploit the untapped, and therefore underserved, health insurance market were launched during 2019.

v Consolidation

We have seen an active insurance market with various M&A transactions and joint ventures. We expect to see further consolidation or growth, or a combination of these, among the current market participants in Mexico. In particular, we expect health insurance to be a key driver of growth in the insurance industry in the years to come.

vi Product development

The interest in parametric insurance products for catastrophic risks keeps growing and there is extensive activity regarding developing and placing parametric insurance products in the insurance and reinsurance market in Mexico. We also expect to see an increase in the distribution of parametric insurance products for individuals.

The healthcare insurance business has been one of the main areas to see a growth trend in the past year, with new participants entering the market and the introduction of innovative products. The fact that Mexico has a vast population without medical insurance and that is unable or unwilling to purchase traditional healthcare insurance means the country is an attractive prospect for investors and for launching new products. New products in the area of telemedicine and those with a preventive approach have been successfully placed in the market and we see continuing interest from various participants in growing their stake in the healthcare insurance business.

There has been an increase in the premiums for providing cybercrime and professional liability coverage that does not reflect conditions in the Mexican market; this adjustment is in fact a result of international market conditions and it is evident from this that there is a lack of good underwriting practices for products of this kind being placed in Mexico.

In addition, there is constant development and innovation in the area of insurtech, with the launch of new products affecting distribution, underwriting, valuation, prevention, claims handling and risk distribution, among others. There is a growing demand for products focused on the digital customer experience.

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Yves Hayaux-du-Tilly is a partner at Mexican independent law firm Nader, Hayaux & Goebel, the only Mexican law firm with an office in London.

Yves specialises in insurance and reinsurance, in both contentious and non-contentious matters. Yves currently represents the following Mexican affiliate insurance companies on an ongoing basis in transactional work, mergers and acquisitions, product development and general regulatory, corporate governance and compliance-related matters: AXA Seguros Mexico, Assurant Daños Mexico, Assurant Vida Mexico, BBVA Seguros, BUPA Mexico, BNPP Cardif Mexico Seguros de Vida, BNPP Cardif Mexico Seguros Generales, Dentegra Seguros Dentales, Der Neue Horizont Re, Genworth, Grupo Nacional Provincial, Grupo Sudamericano de Inversiones (Grupo SURA), Mapfre Asistencia, MetLife Mexico, Panamerican Life Insurance Mexico, Seguros Azteca, Seguros Principal, Sofia Salud, Principal Pensiones, Prudential Seguros Mexico and Zurich Mexico.

Yves also represents Mexican and foreign insurance and reinsurance companies and has experience in arbitration and mediation.

Yves is a former chairman, vice chairman and board member of the Mexican chapter of the International Insurance Law Association (AIDA), former vice chairman of the Ibero-Latin American Committee of AIDA (CILA) and was responsible for establishing the Mexican chapter of the Insurance and Reinsurance Arbitration Society (ARIAS Mexico). He is also a member of the presidential council of AIDA and honorary member of the Commercial Bar Association.

Yves was the founder of the Mexican Chamber of Commerce in Great Britain and is the founder of Chapter Zero México – the Director’s Climate Forum.

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