

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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COLOMBIA

Neil Beresford, Raquel Rubio and Andrés García Arias¹

I INTRODUCTION

The Colombian insurance market grew by 0.9 per cent during 2020, maintaining a 10-year run of constant growth.² At the same time, the Colombian economy contracted by between 7.2 per cent and 7.5 per cent.³ Although economic growth is expected at a rate of between 4.2 per cent and 4.5 per cent during 2021,⁴ the economy has suffered from a hard shock.

The insurance market owes its continued strength to conservative regulatory standards and gradual improvements in law and regulation. During 2020, important advances were made to confirm the widespread acceptance of claims-made policies within the territory. No major regulatory changes affecting insurers are expected during 2021. Instead, the government is expected to focus its efforts on the economic recovery and the long overdue reform of the labour market and pensions. Premiums are expected to remain at levels similar to present levels.⁵

II REGULATION

i The insurance regulator

Insurers, reinsurers and brokers operating in Colombia are supervised by the Financial Superintendency (FS), an independent body attached to the Colombian Ministry of Finance and Public Credit.⁶

The main regulatory framework is contained in the Organic Statute of the Financial System (EOSF)⁷ and other regulations, including:

- a* Decree 2555/2010, which sets reserve and minimum asset requirements and contains the regime applicable to insurance intermediaries;

1 Neil Beresford is a partner, Raquel Rubio is a legal director and Andrés García Arias is an associate at Clyde & Co LLP.

2 Fitch Ratings, 'Perspectiva de Fitch Ratings 2021: Seguros en Colombia', 8 January 2021. Fasecolda, 'Industry Figures: November 2020', presentation, <https://fasecolda.com/cms/wp-content/uploads/2020/12/Cifras-noviembre-2020.pdf>.

3 World Bank, Global Economic Prospects, January 2021, <http://pubdocs.worldbank.org/en/411411599838740469/Global-Economic-Prospects-January-2021-Regional-Overview-LAC-SP.pdf>.

4 World Bank, Global Economic Prospects, January 2021, <http://pubdocs.worldbank.org/en/411411599838740469/Global-Economic-Prospects-January-2021-Regional-Overview-LAC-SP.pdf>.

5 Fitch Ratings, 'Perspectiva de Fitch Ratings 2021: Seguros en Colombia', 8 January 2021.

6 Article 325, Decree 663/93 EOSF and subsequent additions to the EOSF.

7 Decree 663/1993, EOSF.

- b* Law 1328/2009, which regulates access to the Colombian market by foreign non-domiciled insurers and contains consumer protection rules specific to financial products;
- c* Law 1480/2011 on general consumer protection;
- d* Law 1870/2017 on the regulation of financial conglomerates;
- e* Part I of External Circular 029/2014 of the FS, modified by External Circular 027/2019, which establishes the regime applicable to general insurance operations, some special lines of insurance, solvency requirements, risk management procedures and the registration rules for foreign non-domiciled insurers and reinsurers. Part 2 regulates brokers and agents; and
- f* the Commercial Code.

ii Position of non-admitted insurers

Unregulated insurance and reinsurance activity is prohibited.⁸ Contracts made with unauthorised entities are void and the unauthorised insurer may be required to return all premiums received.⁹ It may also be subject to further sanctions in the form of fines, compulsory dissolution and disqualification.

Colombian residents are generally free to purchase insurance outside Colombia, in which case the contract will fall outside the scope of Colombian regulation. Colombian insurers may cede 100 per cent of their written risks abroad by way of reinsurance. However, the following policies must be purchased from a regulated entity within Colombia:¹⁰

- a* insurance that is compulsory under Colombian law or is contingent upon compulsory coverage;
- b* insurance in the nature of social security such as life insurance, annuities and employers' liability insurance; and
- c* insurance issued to state entities.

iii Requirements for authorisation of insurers

Colombian law provides four options for insurance entities wishing to do business in Colombia: incorporated insurance or reinsurance companies; branch offices of foreign insurers; registered foreign insurers or reinsurers; and representative offices of foreign reinsurers.

Incorporated insurance and reinsurance companies

Insurers or reinsurers wishing to incorporate in Colombia require prior authorisation from the FS. The principal requirements for authorisation are as follows:

- a* the proposed entity must be structured as a limited company or a cooperative association;¹¹
- b* the proposed entity must satisfy a minimum capital requirement, of which 50 per cent is paid at the point of incorporation and the remainder within 12 months;¹² and

8 Articles 39 and 108, EOSE.

9 Article 108.3, EOSE.

10 Article 39, EOSE.

11 Article 53, EOSE.

12 Articles 80 and 81, EOSE.

- c* in addition to its minimum capital, the proposed entity must maintain assets,¹³ a solvency margin and minimum reserves¹⁴ according to law.¹⁵

Upon receipt of an application, the FS institutes a short period of public consultation. If no objections are received, and the FS is satisfied with the proposed entity, authorisation will be granted and incorporation may proceed.

Branch offices of foreign insurers

Foreign insurers (not including reinsurers) are able to access the Colombian market by establishing branch offices. These are treated as an extension of the parent company and must meet incorporation requirements similar to those of fully incorporated companies. However, branches are treated as regulated entities within the jurisdiction of the FS and they must comply with the same regulations that apply to incorporated entities.

Branch offices are subject to the following additional requirements:¹⁶

- a* minimum capital equivalent to the amount required of local insurance companies, which must be paid immediately upon establishment of the branch office;
- b* minimum assets located in Colombia; and
- c* the presence of a permanent local representative with professional credentials and moral standing.

Registered foreign insurers and reinsurers

Limited classes of insurance and reinsurance may be marketed in Colombia by foreign entities that are not regulated by the FS, on condition that they obtain local registration.

Marine and aviation transport insurance

Foreign insurers may issue transportation policies (marine and aviation transport (MAT) insurance), in respect of goods, vessels and associated liabilities arising in the course of international transportation by air and sea, including space launch.¹⁷

A foreign insurer wishing to issue MAT policies must apply to the FS for a place on the Register of Foreign Insurers offering Marine and Aviation Transport. The principal requirements are a minimum rating of BBB- by Standard & Poor's or equivalent and minimum capital, solvency levels and asset levels equal to those that are required of incorporated Colombian insurers.¹⁸

13 Article 2.31.1.1.1, Decree 2555/2010.

14 Articles 82 and 186, EOSF and Title I, Chapter 2, Book 31 of Decree 2555/2010 (as modified by Decree 2954 of 2010).

15 Decree 1349 of 2019, which establishes the amount of funds required by insurers to respond to unexpected losses.

16 Articles 65 and 66, Law 1328/2009.

17 Article 61, Law 1328/2009 and Article 39, EOSF.

18 Chapter V, Title II of Part I of External Circular 029/2014.

Agricultural insurance

Foreign insurers may also issue agricultural insurance policies¹⁹ by applying to the FS for a place on the Register of Foreign Insurers and Brokers of Agricultural Insurance. The principal requirements are similar to those that apply to MAT insurers, as set out above.²⁰ The government subsidises between 70 per cent and 90 per cent of individual agricultural insurance premiums for small landholders and between 50 per cent and 70 per cent for larger landholders through Finagro, Colombia's rural development bank.²¹ The government continues to explore reforms that would be required to promote the use of parametric insurance for agricultural crops.²²

Foreign reinsurers

Foreign entities may transact reinsurance business in Colombia.²³ Foreign reinsurers should apply to the FS for a place on the Register of Foreign Reinsurers and Reinsurance Brokers (REACOEX) and demonstrate compliance with requirements that are very similar to those that apply to MAT insurers.²⁴

Representative offices and subscription agencies of foreign reinsurers

A reinsurer that is included on the REACOEX register may also open a representative office in Colombia. Applications are made to the FS and require extensive documentation to be served in support.²⁵ Representative offices are subject to the control and supervision of the FS. Since November 2018, foreign reinsurers may also carry out business through subscription agencies that are in charge of placing reinsurance on behalf of foreign reinsurers. Subscription agencies must be registered in REACOEX and set out the business lines available through the agent.²⁶

iv Position of brokers

To operate in Colombia, insurance and reinsurance brokers must be authorised and regulated by the FS.²⁷

Incorporated entities

If a broker wishes to incorporate in Colombia, it must satisfy the following principal requirements:

- a If the proposed entity is an insurance broker, it must be incorporated as a limited company.²⁸ If a reinsurance broker, the proposed entity may be structured differently.²⁹

19 Article 74, Law 1450/2011.

20 Chapter IV, Title II of Part I of External Circular 029/2014.

21 Agricultural Insurance Incentive, <https://www.finagro.com.co/productos-y-servicios/incentivo-seguro-agropecuario>.

22 Law 1955 of 2019.

23 Article 94, EOSE.

24 Chapter III, Title II of Part I of External Circular 029/2014.

25 The list is specified in Article 4.1.1.1.4, Decree 2555/2010.

26 External Circular No. 20 of 3 October 2018, which created Articles 2.2.1.8, 3.2.1.9 and modified Article 3.1 of External Circular 029/2014.

27 Article 1351, Commercial Code.

28 Article 1347, Commercial Code and Article 101, Law 510 of 1999.

29 Article 44.1, EOSE.

- b The managing directors and administrators of the proposed entity must be approved by the FS and possess a minimum level of qualifications and personal standing. A candidate is presumed to be suitable if he or she can show they have sufficient experience in the brokerage industry and good business management records,³⁰ and
- c The proposed entity must satisfy a minimum capital requirement.³¹

Registered foreign brokers

Foreign brokers wishing to market agricultural insurance or reinsurance products in Colombia without establishing a local office may apply to the FS for inclusion on the relevant register. Registration for MAT brokers is effected through the relevant MAT insurer.

v Regulation of individuals employed by insurers

The names of the directors and senior management of an insurance entity must be disclosed to the FS as part of the authorisation process.³² Those individuals must demonstrate that they are fit and proper persons, and authorisation may be denied if they have criminal convictions or sanctions for breach of duty.

The directors and senior management of regulated entities are also subject to a code of conduct requiring that they act within the law, in good faith and in the advancement of the public interest.³³

vi The distribution of products

Regulated entities must submit their policy wording, including any schedules, amendments and premium models to the FS whenever they begin writing a new line of business.³⁴

The FS may disallow the use of wording that does not comply with Colombian insurance law and regulation or is insufficiently clear.³⁵ The FS may also prohibit the sale of a product if it determines that the proposed premium is unfair or unjustified by statistical evidence.

vii Compulsory insurance

There are more than 50 types of compulsory insurance, including various forms of motor liability, employers' liability, transportation liability, environmental liability and credit insurance in transactions involving international trade and state entities. Unfortunately, there is no single point of reference and it is beyond the scope of this chapter to list them all. However, reinsurance brokers are among a very small number of professions that are required to carry professional indemnity and fidelity insurance.³⁶ The legislature frequently adds new mandatory insurance requirements affecting different sectors. Developments in recent years include a bill requiring compulsory building guarantee insurance and liability policies for certain types of dangerous dogs.³⁷

30 Article 2.30.1.1.3, Decree 2555/2010.

31 Chapter III, Title IV of Part II of External Circular 029/2014.

32 Article 53, EOSF.

33 Article 72, EOSF.

34 Article 184.1, EOSF.

35 Article 184.4, EOSF.

36 Article 2.30.1.4.4, Decree 2555/2010.

37 Law 1796 of 2014 and Article 127, Law 1801 of 2016, Decree 282 of 21 February 2019.

viii Compensation and dispute resolution regimes within the financial services context

Law 1328/2009 requires regulated entities to set up (at their own expense) a customer complaints procedure known as a consumer attention system (SAC) and to offer the services of an independent adjudicator.³⁸ In theory, the procedure applies to all disputes involving any type of customer, line of business and magnitude of the claim. However, the adjudicator's decision will be binding only if the statutes of the regulated entity make provision for binding determination and prior agreement has been reached with the customer.

If the SAC fails to resolve the dispute, the customer can either refer it to the FS or pursue a claim in court. The FS has jurisdiction over all contractual claims brought against regulated entities.³⁹

The law does not provide for a statutory fund of last resort for customers of insurance or reinsurance firms. The solvency and reserving practices of these institutions are kept under continuous review by the FS.

ix Other notable regulated aspects of the industry

The FS must be notified of any proposed merger or acquisition involving a regulated entity,⁴⁰ or any transaction by which an investor will acquire 10 per cent or more of a regulated entity.⁴¹ The FS may object to such transactions for technical reasons⁴² or for the protection of the public interest. A transaction made without the approval of the FS is void.

III INSURANCE AND REINSURANCE LAW

i Sources of law

Colombian law is a civilian system with codified laws and a written political constitution.

The courts are subject to codified law but are allowed to use, at their discretion, ancillary tools such as jurisprudence, custom, doctrine, general principles of law and equity.⁴³ Although the lower courts are expected to follow the decisions of higher courts, there is no absolute doctrine of precedent and judges frequently depart from previous rulings on questions of law.

The basic rules of Colombian contract law are set out in the Civil Code and those that are specific to insurance law are contained in the Commercial Code.⁴⁴ The law has been supplemented by consumer protection legislation, some of which is specific to insurance contracts and some of which is of a more general nature.⁴⁵

38 Articles 8 and 13, Law 1328/2009.

39 See Article 57, Law 1480/2011 and Article 24, Law 1564/2012.

40 Article 56, EOSF and Article 2.36.12.2.4, Decree 2555/2010.

41 Article 88, EOSF.

42 See Articles 58 and 88.1, EOSF.

43 Article 230, Colombian Constitution.

44 Article 1036 et seq. for non-marine, Article 1703 et seq. for marine and Article 1900 et seq. for aviation insurance.

45 Laws 1328/2009 and 1480/2011.

ii Making the contract

Essential ingredients of an insurance contract

The essential elements of a valid insurance contract are as follows:

- a* an insurable interest, namely any lawful interest that can be subject to pecuniary valuation.⁴⁶ The courts have approached the question of insurable interest by asking whether the insured risk event would directly or indirectly affect the wealth of the policyholder;⁴⁷
- b* an insurable risk – non-fortuitous or impossible events do not constitute risks and are therefore uninsurable.⁴⁸ Wilful misconduct, gross negligence⁴⁹ and deliberate acts of the beneficiary are also uninsurable;⁵⁰
- c* the agreement on the part of the insured to pay a premium in exchange for the transfer of risk to the insurer; and
- d* the agreement on the part of the insurer to pay an indemnity upon the occurrence of an insured event.

Utmost good faith

Insurance contracts are subject to the duty of utmost good faith at inception. The insured is obliged to declare sincerely all facts and circumstances that are material to the risk.⁵¹ Material facts are those that, if known to the insurer, would have prevented it from entering the contract or caused it to apply more onerous terms.

The duty of disclosure applies in all cases. However, the insurer's remedy depends upon whether a proposal form is used – if it is, any incomplete or inaccurate answers result in the policy becoming voidable. If no proposal form is used, the policy is voidable if the insured gives incomplete or inaccurate information by reason of negligence or fraud. If the insured acts innocently, the policy is not voidable but a proportional remedy applies. In other words, if the misrepresentation or non-disclosure leads to the insured paying only 50 per cent of the correct premium, the insurer is required to pay only 50 per cent of the claim.

The law is silent on the question of severability. Directors' and officers' (D&O) insurers are therefore free to include severability provisions to address non-disclosure or misrepresentation on the part of individual directors. Provided the declarations are made on their own behalf and not on behalf of the company, there is no reason to prevent insurers from pursuing the partial avoidance of the policy.

No remedy will be granted if the undisclosed or misrepresented facts were known to the insurer, or ought to have been known to the insurer, at the date of inception.

The duty of good faith continues throughout the duration of the contract. The insured must notify the insurer in writing of any material increase in risk, whereupon the insurer may

46 Article 1083, Commercial Code (CCo). With the exception of one's own life in cases of life insurance (Article 1137).

47 Supreme Court, decision of 21 March 2003, exp. 6642, magistrate César Julio Valencia Copete.

48 Article 1054, CCo.

49 With the exception of liability insurance (Article 1127, CCo).

50 Article 1055, CCo.

51 Article 1058, CCo.

cancel the policy or vary its terms.⁵² If the risk has decreased, the insurer is legally obliged to reduce the premium.⁵³ If no notification is made, the contract is terminated automatically upon the increase in risk.

Recording of the contract

Insurers must issue written policy documentation within 15 days of concluding the agreement.⁵⁴ In the absence of any express terms and conditions, the standard wording that the insurer has deposited with the FS will be deemed to apply.⁵⁵

The proposal form and any attachments to it are considered part of the policy.⁵⁶

Consumer insurance policies are subject to a series of formal requirements. The policy document must be written using plain language and a clear typeface. In addition to the policy documents, the consumer must also be given a clear explanation of the cover. Failure to comply with these requirements is considered an abusive practice and may result in sanctions and penalties being imposed by the FS.⁵⁷

iii Interpreting the contract

General rules of interpretation

Insurance contracts are subject to the rules of interpretation set out in Articles 1618 to 1624 of the Civil Code, which apply to contracts generally.⁵⁸ The law operates even-handedly between the insurer and the insured: if the parties are of equal commercial strength they are treated as equal before the law.

The overriding principle is that the intention of the parties, when clearly known, will prevail over the literal meaning of the words in the contract.⁵⁹ Therefore, a high degree of emphasis is placed upon the evidence of those involved in the contracting process and the correspondence exchanged at the time of contracting. The parties' prior conduct may also be taken into account if they have entered into similar contracts or acted in a manner that is relevant to the contract under review.

The contract is interpreted in its entirety, such that each clause will be given the meaning that is most appropriate for the functioning of the contract as a whole. There is a presumption against any part of the contract being redundant, so preference is given to interpretations that produce effect.

Ambiguous clauses are interpreted *contra proferentem*,⁶⁰ a principle that is applied rigorously in the context of consumer insurance.⁶¹

52 Article 1060, CCo.

53 Article 1065, CCo.

54 Article 1046, CCo as amended by Article 3, Law 389/1997.

55 Article 1047, CCo as amended by Article 2, Law 389/1997.

56 Article 1048, CCo.

57 Articles 7 and 9 to 12, Law 1328/2009 and Articles 9 and 10, Chapter 6, Title 1 of External Circular 007/1996.

58 Article 822, CCo.

59 Article 1618, Civil Code.

60 Article 1624, Civil Code.

61 Supreme Court, decision of 27 August 2008, exp. 1997-14171. Magistrate William Namén Vargas. See also Article 34, Law 1480/2011.

The interpretation of the above principles might differ depending on the forum in which the claim is being heard. For instance, an insurance dispute might be heard before the administrative courts where principles of public law will be read into the contract. Equally, regulators such as the Office of the Controller General (the Controller's Office),⁶² a public body with discretion to commence quasi-judicial proceedings against private and public officials or entities involved in the management of public funds, might join their liability and bond insurers on the basis of inapplicable wording or multiple policy periods.

Mandatory rules

The parties to an insurance contract enjoy relatively wide freedom to set the terms of the agreement, subject to the limits of public policy and the mandatory rules of Colombian law.⁶³ Colombian law recognises two types of mandatory rule: those from which no departure is allowed and those that can be modified only in the insured's favour. A contract term that violates a mandatory rule will be declared void.⁶⁴

The list of mandatory rules is not closed. A rule may be declared mandatory either because it is expressed to be mandatory or a mandatory nature may be inferred from the general character of the rule.

The most important mandatory rules at the pre-contractual stage are as follows:

- a* the insured is under a general duty of good faith in the manner set out above;⁶⁵
- b* if a policy is issued for the benefit of multiple insured parties with different interests (e.g., a D&O policy), non-disclosure by one insured party will not affect the validity of the coverage issued to others;⁶⁶ and
- c* if the insured purchases a limit of indemnity in excess of its real interest, with a view to defrauding insurers, the policy is void.⁶⁷

The most important mandatory rules affecting the operation of a policy are as follows:

- a* a policy (other than a life policy) may provide for automatic termination in the event that premiums are paid late. In these cases, the insurer is entitled to claim from the insured the amount of premium for the risk incurred, together with its expenses and interest at a punitive 'moratorium' rate;⁶⁸
- b* the insured is under a continuing duty to inform the insurer of any material increases in risk and the insurer is obliged to reduce the premium if the insured gives notice of a reduction in the risk;⁶⁹
- c* the insured is under a duty to inform the insurer of any double insurance within 10 days of the duplicate cover being taken out. If the insured fails to give notice, the policy will be terminated automatically;⁷⁰ and

62 Law 610 of 2000 and Law 1474 of 2011.

63 The rules made mandatory by the Commercial Code are listed in Article 1162.

64 Article 899, CCo.

65 Article 1058, CCo.

66 Article 1064, CCo.

67 Article 1091, CCo.

68 Article 1068, CCo. Note that different rules are applicable to life insurance policies, pursuant to Article 1151, CCo.

69 Article 1065, CCo.

70 Article 1093, CCo.

- d* either party may effect cancellation by giving notice in writing, although, in the case of cancellation by the insurer, 10 days' notice is required.⁷¹ Following cancellation by either party, the insurer must return the unused part of the premium.⁷²

The most important mandatory rules affecting the claims process are as follows:

- a* the insurer may not characterise any claims condition as a condition precedent to its liability under the policy. The insurer's only remedy for breach of a claims condition is a claim in damages to the extent that prejudice has been caused;⁷³
- b* the insurer may not impose a notification requirement that is less than three days from the date on which the insured discovered, or ought reasonably to have discovered, the loss;⁷⁴
- c* in the case of double insurance, each insurer is required to pay a rateable proportion if the insured has acted in good faith;⁷⁵ and
- d* the insured will forfeit its right to indemnity if it acts in bad faith during the claims process.⁷⁶

The most important mandatory rules affecting the settlement of claims are as follows:

- a* the insurer must pay the indemnity within a month of the insured having proved its loss, failing which interest applies at the punitive moratorium rate;⁷⁷
- b* if the insured incurs genuine mitigation costs, the insurer is required to pay the costs even if they exceed the sum insured;⁷⁸ and
- c* in the case of liability policies, the two-year limitation period that applies to the insured's claim against the insurer does not begin to run until the third party makes a claim against the insured.⁷⁹

Conditions precedent

Colombian law does not use the language of conditions precedent. It neither prohibits nor endorses them. The effect of clauses that are expressed as conditions precedent must therefore be approached on an individual basis, in the context of the mandatory rules explained above.

The law may be summarised as follows:

- a* Some conditions precedent are prohibited by mandatory rules. For example, there is a general prohibition on expressing claims conditions as conditions precedent to an insurer's liability. Except in the case of fraud, the only remedy for breach of a claims condition is a claim in damages to the extent that the insurer has suffered prejudice.⁸⁰

71 Article 1071.

72 *ibid.*

73 Article 1078, CCo.

74 Article 1075, CCo.

75 Article 1092, CCo.

76 Article 1078, CCo.

77 Article 1080, CCo, although Article 185.1, EOSF provides that the period can be extended by agreement up to 60 working days provided that the insured is a company and the sum insured exceeds approximately US\$4.5 million.

78 Articles 1074, 1079 and 1089, CCo.

79 Article 1131, CCo.

80 Article 1078, CCo.

- b Some conditions precedent are positively reinforced by mandatory rules. For example, Article 1068 of the CCo contemplates that an insurer may make the payment of premium a condition precedent to its liability; and
- c Other conditions precedent are not touched upon by the law. If an insurer wishes to impose a condition precedent that does not contravene one of the mandatory rules, Colombian law will not prevent it. An example of a clause falling into this category would be a reasonable precautions clause or an unoccupancy condition.

Warranties

The law defines a warranty as:

*[A] promise by virtue of which the insured is obliged to do or not to do a certain thing, or to comply with a certain requirement, or by which [the insured] confirms or denies the existence of a factual situation.*⁸¹

To be valid, a warranty must be clearly expressed and indicate an unequivocal intention to impose a strict duty of compliance.

The insurer may rely upon a breach of warranty to terminate the policy from the date of breach, irrespective of its materiality to the risk or the eventual loss.

The integrity of the policy limit

It is important to be aware that claims under insurance policies will often be put at a level that exceeds the limit of indemnity. Two particular arguments are made.

The first is that insureds occasionally seek indexation of the policy limit. For example, if the rate of national inflation is 5 per cent, a policy limit of 500 million pesos issued in 2014 would be worth less than 400 million pesos in ‘real’ terms by 2021. Since litigation can take several years to resolve, the insured will sometimes ask a judge to make an award that reflects the real value of the original policy limit. This is generally regarded as heresy and, in 2009, the Supreme Court held that indexation of a premium would involve an illegitimate re-authoring of the policy. However, insurers and reinsurers should be aware of a small number of cases where Colombian courts have allowed the indexation of limits.

A second argument is that the defence costs of an insured under a liability policy are payable in addition to the limit, regardless of the wording of the policy. As mentioned above, the law requires that insurers pay reasonable mitigation costs in excess of the limit,⁸² and it is said that the costs of defending a third-party claim may be brought within this rule. The courts have yet to make any authoritative pronouncement on this important question.

iv Intermediaries and the role of the broker

Intermediaries

There are four types of insurance intermediary: agents, brokers, bancassurance and correspondents. Agents are contractors or employees of the insurer and act on the insurer’s behalf. Unless they are especially large, agents are regulated by the FS as part of the insurer for whom they act. Their precise rights and obligations depend upon the extent of their delegated

81 Article 1061, CCo.

82 Articles 1074, 1079 and 1089, CCo.

authority, although all agents have power to collect money, inspect the physical risk and assist in arranging the policy. Some agents have delegated underwriting and claims authority. Increased scrutiny has led the regulator to tighten regulation for agents. As of July 2017, all agents are required to register with the Insurance Intermediaries Registry⁸³ and undertake a training course before they are allowed to offer their services to the public.⁸⁴

A broker, on the other hand, is formally independent of either party to the transaction. Their role is defined in the following terms:

*A broker is a person who, by reason of his special knowledge of the markets, operates as an independent intermediary for the purpose of bringing together two or more persons to enter a commercial contract, without being linked to the parties by way of collaboration, dependency, mandate or representation.*⁸⁵

As a result of this privileged legal status, claims against brokers are rare. Only reinsurance brokers are required to carry professional indemnity insurance.⁸⁶

Most recently, the FS promoted alternative intermediation methods, including bancassurance, to increase the availability of insurance in the mass market. It also extends to other retailers acting as correspondents with allowances to offer consumer products, such as mandatory vehicle insurance or basic life insurance.⁸⁷

Code of conduct

All brokers and agents are subject to the same code of conduct that applies to regulated entities in general.⁸⁸ The specific duties of intermediaries include prohibitions on:

- a* misrepresenting the scope of cover or the terms of the contract;
- b* paying commission to the insured;
- c* interfering with the business of other brokers;
- d* competing unfairly; and
- e* acting without instructions.⁸⁹

A sufficiently serious breach of the code of conduct may result in the intermediary's authorisation being withdrawn.

In exchange for the services rendered, the broker is entitled to a commission, which will be freely determined between the parties and paid by the insurer.⁹⁰ The commission falls due as soon as the insurance contract is signed.⁹¹

83 Circular No. 50 of 28 December 2015.

84 Section 7, Chapter II, Title IV, Part II of Circular 029 of 2014. As modified by Circular No. 006 of 2018.

85 Article 1340 CCo.

86 Article 2.30.1.4.4 of Decree 2555/2010.

87 Articles 2.36.9.1.17 of Decree 2555 of 2010 as modified by Decree 2123 of 2018.

88 Article 72, EOSE.

89 Article 207.3, EOSE.

90 Article 2.30.1.1.4, Decree 2555/2010.

91 Article 1341, CCo.

v Claims

Notification

The parties to an insurance contract may agree upon whichever rules of notification they choose, subject to two mandatory rules as set out above. First, an insured must be given at least three days from the date of discovery to notify a loss.⁹² Second, duties of notification cannot be made conditions precedent to an insurer's liability.⁹³

The general limitation period for a claim by an insured against an insurer is two years from the date on which the insured knew or ought to have discovered the facts giving rise to the claim, up to a maximum of five years from the date when the cause of action arose.⁹⁴ The Controller's Office applies a 10-year limitation period based on its own procedural rules.

Good faith and the claims process

The duty of good faith subsists throughout the contract. In the claims context, the duty of good faith is reflected in Articles 1074 and 1079 of the CCo, which oblige the insured to mitigate loss⁹⁵ and oblige the insurer to meet the reasonable costs of mitigation, even if they exceed the eventual limit of indemnity.⁹⁶ Save in the case of subrogation,⁹⁷ the law does not impose on the insured any specific duties to cooperate with their insurers in the defence or adjustment of claims.

In practice, these rules can leave insurers with only limited control of claims. However, if an insured acts in bad faith in the claims process, it will forfeit the right to indemnity.⁹⁸

Claims by parties other than the insured

A liability insurer may be drawn into underlying proceedings in one of two ways. Either a third party with a claim against the insured may bring direct proceedings against the insurer,⁹⁹ or the insured or a regulator may bring the insurer into litigation by issuing a form of third-party notice known as a 'call-in-warranty'. The Controller's Office has the discretion to draw liability and bond insurers into a form of recovery proceedings as guarantors of their insured's potential liabilities.

In contrast, a reinsurer can be sued only by the reinsured: it is not legitimate for a third party or an original insured or a regulator to bring proceedings directly against a reinsurer.¹⁰⁰

Payment of indemnity

After receiving proof of loss, the insurer is legally required to pay the indemnity within a month, failing which interest applies at the punitive moratorium rate.¹⁰¹

92 Article 1075, CCo.

93 Article 1078, CCo.

94 Article 1081, CCo.

95 Article 1074, CCo.

96 Article 1079, CCo.

97 Article 1098, CCo.

98 Article 1078, CCo.

99 Article 1133, CCo.

100 Article 1135, CCo.

101 Article 1080, CCo.

However, for policies with a sum insured in excess of a determined threshold (currently US\$3.9 million) the payment period can be extended by agreement up to 60 working days.¹⁰² If the insurer fails to make payment within the appropriate time, liability for interest is extremely onerous. The moratorium rate is 150 per cent of the commercial lending rate and is sometimes assessed on a compound basis.

Subrogation

Insurers and reinsurers benefit from a general right of subrogation, supported by a positive duty that is imposed on the insured to assist the insurer in pursuing its rights of recovery.¹⁰³ However, the law imposes certain limitations upon the scope of subrogation rights arising from personal lines insurance. For example, an insurer is not entitled to subrogate against relatives of the insured.¹⁰⁴

IV DISPUTE RESOLUTION

i Jurisdiction, choice of law and arbitration clauses

Policies issued in Colombia are subject to the mandatory application of Colombian law and jurisdiction.¹⁰⁵ Policies issued outside Colombia may be subject to foreign law and jurisdiction.

ii Litigation

The judicial system is divided into four jurisdictions: ordinary, administrative, constitutional and special.¹⁰⁶ The roles of the courts follow this division according to subject matter:

- a* The courts of the ordinary jurisdiction hear commercial, civil, labour, family and criminal cases. This jurisdiction is headed by the Supreme Court. The conduct of proceedings is regulated by the General Procedure Code enacted in 2012 and fully in force since January 2016.¹⁰⁷
- b* The courts of the administrative jurisdiction attend to cases related to the responsibilities of the state or involving state entities or agents and they exercise judicial supervision over administrative acts and delegated legislation. The highest administrative court is the Council of State and the conduct of proceedings is regulated by the Administrative Procedure Code.¹⁰⁸
- c* The constitutional jurisdiction is overseen by the Constitutional Court, which decides upon the constitutionality of laws and has the last word in constitutional protection claims.
- d* Special jurisdictions include tribunals set up for the determination of indigenous rights, the supervision of the judiciary, military functions and for the enforcement of the peace agreement with the Revolutionary Armed Forces of Colombia.

102 Article 185.1, EOSF.

103 Article 1096, CCo.

104 Article 1099, CCo.

105 Article 869, CCo.

106 Article 11, Law 270/1996.

107 Law 1564/2012.

108 Law 1437/2011.

Insurance disputes may be heard in either the ordinary or administrative jurisdiction, according to the identity of the insured. Cases are heard by professional judges appointed by an independent government agency. Juries are not used in Colombia.

Traditionally, the court system has suffered badly from delays; the World Bank ranks the speed of Colombian justice at 177th in a survey of 190 countries.¹⁰⁹ In practice, a commercial case proceeding in the ordinary jurisdiction takes an average of three-and-a-half years to reach a first instance decision. Appeals can add a further three years. Administrative proceedings last substantially longer: it is not uncommon for a case before the courts of the administrative jurisdiction to run for more than a decade. During the covid-19 pandemic, the courts were closed between March and July 2020. After July 2020, the Colombian court system operated mostly virtually and underwent an important digital transformation, which has already had, and is likely to continue to have, a positive impact on the management and duration of court proceedings.¹¹⁰

Litigation stages

Commercial cases follow a particular sequence. The typical components of an action before the courts of the ordinary jurisdiction are explained below. The new measures set out during the pandemic have allowed for virtual hearings and more flexible service methods, making proceedings nimbler. This is a detailed explanation because in many respects it is also representative of the procedure followed in domestic arbitration and in the administrative jurisdiction:

- a* Before a claim is submitted, Colombian law requires the parties to participate in a mediation hearing, which suspends the statute of limitations.¹¹¹
- b* If mediation is unsuccessful, the claimant must file a formal complaint¹¹² within the limitation period. If the claim is formally valid, it is admitted by the judge and personal service is made on the defendant. The defendant has 20 days to answer the claim and detail any 'previous exceptions', such as lack of jurisdiction or breach of an arbitration clause.¹¹³
- c* Once the claim has been answered, the judge decides the previous exceptions, if any. If the exceptions are successful, the claim is returned to the claimant, otherwise a date is set for the initial hearing.
- d* Once pleadings have closed, the claimant may amend the pleadings on one occasion only. The defendant has no right to amend other than in response to a complaint by the claimant.
- e* The pleadings must include reference to any evidence that the party wishes to volunteer as part of its case. By virtue of a legislative reform in 2012,¹¹⁴ parties can adduce their own expert evidence.
- f* During the initial hearing, the judge makes concrete proposals that are intended to encourage a settlement between the parties. If no agreement is possible, the judge will

109 World Bank Group, *Doing Business 2020*, Colombia, <https://www.doingbusiness.org/en/rankings>.

110 Decree 806 /2020.

111 Article 35, Law 640/2001. A similar requirement now applies in many administrative cases by virtue of Law 1285/2009 and Law 1437/2011.

112 Articles 82 to 84, Law 1564/2012.

113 The content of the answer is determined by Article 96, Law 1564/2012.

114 Article 227, Law 1564/2012.

seek to establish the disputed facts and order the evidence in the case. The types of admissible evidence include statements of the parties, confessions, oaths, witnesses, experts' opinions, judicial inspections, documents, circumstantial evidence and reports.¹¹⁵ The evidence is not limited to material that the parties have requested: judges often order additional factual or expert evidence of their own accord.

- g* At the initial hearing, the parties may request the other side to disclose documents that are described by category. Disclosure takes place by the order of the judge. There are no developed rules governing legal professional privilege but parties commonly withhold documents containing legal advice on the basis of their constitutional right to a fair trial.
- h* Witness evidence is usually heard in person, without the use of witness statements. Courts may summon reluctant witnesses with the assistance of the Colombian police. Witnesses based abroad who are unwilling to travel to Colombia can be examined by video conference¹¹⁶ in their local Colombian consulate by a procedure involving letters rogatory. However, this is an intricate process and can take several months to negotiate.
- i* If expert evidence is required, the judge will normally appoint a single expert from an official court list. The expert's evidence is received in writing and the cost is met either by the party that requested the evidence or by the parties jointly, as appropriate. Since the General Procedure Code became fully enforceable in 2016, expert evidence may also be received verbally.
- j* Once the evidence is complete, the case moves to the conclusion hearing, at which the attorneys for each party have 20 minutes to make oral closing statements. The judge will take a decision in the case either immediately or at a separate judgment hearing.

Funding and costs

The costs of proceedings consist of an official tariff, lawyers' fees and miscellaneous costs such as expert evidence, administrative expenses and witnesses' expenses.

Contingency fees, conditional fees and third-party funding are all permitted by law. The law makes no obvious provision for security for costs.

The judge may order the losing party to pay the winner's fees and legal costs, although the amount is subject to a cap. In the case of commercial disputes, the losing party should not be required to pay more than 20 per cent of the judgment sum in costs.¹¹⁷

Rights of appeal

The law guarantees that judicial decisions have two instances: a first instance decision and a right of appeal.¹¹⁸

115 Article 165, Law 1564/2012.

116 Articles 171 and 182, Law 1564/2012.

117 Agreement 10554/2016.

118 Article 9, Law 1564/2012.

An appeal must be notified either orally at the judgment hearing or in writing within three days of service of the first instance decision.¹¹⁹ In exceptional circumstances, a direct right of appeal to the Supreme Court or the Council of State may exist.¹²⁰

Duration of proceedings

As mentioned above, delays in the court system are a significant and continuing problem. The General Procedure Code states that cases before the courts of the ordinary jurisdiction should take no more than a year to be resolved at first instance and no more than a further six months on appeal.¹²¹ It remains to be seen whether this objective will be achieved.

iii Arbitration

Arbitration is a well-established and relatively sophisticated mechanism of dispute resolution in Colombia. Arbitration clauses can be agreed in consumer contracts if the consumer expressly agrees to submit a dispute to arbitration, although arbitration clauses in standard consumer contracts are likely to be struck down as abusive.

Separate rules apply to domestic and international arbitrations. Both sets of rules are found in Law 1563/2012, which came into force in October 2012. A reform to Law 1563 has been widely discussed and is expected in the course of 2021; the reform will address the delays faced by arbitrations in their initial stages and other recurring issues. The domestic rules are closely modelled on the procedural rules that apply in the Colombian courts, while the international rules derive from the UNCITRAL Model Law on International Commercial Arbitration.

Format of insurance arbitrations

The arbitration agreement

The arbitration agreement must be in writing and may be incorporated in the policy as a clause or in a separate document that identifies the parties and the policy to which it applies.¹²² The parties may also submit an active dispute to arbitration by way of a submission agreement.¹²³

The relevant elements to take into account when drafting an arbitration clause or a submission agreement are as follows:

- a* whether the arbitration is a domestic or international arbitration and, if the latter, the applicable law and jurisdiction;
- b* whether the arbitration will be ad hoc or institutional and, if the latter, which arbitration centre should be used;
- c* the number of arbitrators and the method of appointment; and
- d* whether the tribunal should decide according to law or equity.

119 Article 322, Law 1564/2012.

120 For the ordinary jurisdiction, see Article 333–351, Law 1564/2012. For the administrative jurisdiction, see Law 1437/2011.

121 Law 1395/2010 and Article 121, Law 1564/2012.

122 Article 4, Law 1563/2012.

123 Article 6, Law 1563/2012.

Jurisdiction and choice of law

As indicated, Colombian insurance policies are subject to the mandatory application of Colombian law¹²⁴ and an arbitration involving a Colombian policy will always be of a domestic nature. For this reason, international arbitrations will mainly be relevant to reinsurers, whose policies may be subject to different jurisdiction and law.¹²⁵

An arbitration will be international if any of the following conditions are met:¹²⁶

- a* at the time of entering the arbitration agreement, the parties had their places of business in different states;
- b* the matters in dispute relate to international trade;
- c* a substantial part of the contract is performed outside the state in which the parties have their places of business; or
- d* the subject matter of the dispute is most closely connected with a place that is outside the state in which the parties have their places of business.

Ad hoc and institutional arbitration

Unless the arbitration agreement provides expressly to the contrary, domestic arbitrations are deemed to be institutional,¹²⁷ that is to say that they are administered by one of the many arbitration centres that exist across the country. Colombia has more than 100 arbitral institutions, although the majority of domestic arbitrations are heard in the Chambers of Commerce of Bogotá, Medellín, Barranquilla and Cali.

The arbitration centres have convenient locations and a generally high standard of facilities. The costs are generally set by reference to the sum in dispute.

The parties may agree to an ad hoc arbitration, which operates on a different costs scale and can be more cost-effective. However, ad hoc arbitration is not available in disputes involving state entities.¹²⁸ Moreover, the procedural rules of ad hoc arbitration are the same as those that apply to institutional arbitration.¹²⁹

For those reasons, the vast majority of arbitrations are carried out on an institutional basis.

Appointment of arbitrators

Unless provided for in the arbitration agreement, the law presumes that three arbitrators will hear a dispute. If the value of the claim is less than US\$100,000, it will be heard by one arbitrator.¹³⁰

In domestic arbitration, each of the arbitrators must be a Colombian-qualified lawyer with a valid practising certificate.¹³¹ Party-appointed arbitrators are not permitted and the parties must agree upon the choice of arbitrators. If no agreement is reached, the parties may

124 Article 869, CCo.

125 Articles 92 and 101, Law 1563/2012.

126 Article 62, Law 1563/2012.

127 Article 2, Law 1563/2012.

128 Article 2, Law 1563/2012.

129 Article 57, Law 1563/2012.

130 Articles 2 and 7, Law 1563/2012.

131 *ibid.*

delegate the selection to a third party or the arbitration centre, in which case the selection will be made by reference to the centre's list of registered arbitrators.¹³² Ultimately, the decision may be referred to the civil circuit judge.

International arbitration allows greater flexibility in the selection of arbitrators. Party arbitrators are permitted and the arbitrators may be of any nationality and background.¹³³

Procedural steps of a domestic arbitration

As stated, the format of a domestic arbitration is closely modelled on the general civil procedure explained above. Arbitrations did not stop during the lockdown. Arbitration centres have been well prepared to handle remote hearings since before the pandemic. Virtual proceedings are likely to continue to be used even after restrictions are lifted.

The principal differences from civil procedure are as follows:

- a* Mediation is not compulsory before the commencement of a claim.
- b* The process of commencing an arbitration involves some additional steps beyond those that are necessary to commence court proceedings. The arbitration procedure begins with the claimant filing the claim at the chosen arbitration centre or at the defendant's place of business. The claim must be accompanied by proof of the arbitration clause.¹³⁴ Once the claim is filed and notified to the defendant, the arbitration centre calls the parties for a meeting to appoint the arbitrators. This can be a drawn-out process as both parties look for tactical advantage in the negotiations. After the parties reach an agreement, the arbitrators meet for an installation hearing to nominate the president and appoint a secretary. At the first formal hearing, the arbitrators formally confirm their jurisdiction over the dispute.¹³⁵
- c* If the defendant to the arbitration is a state entity, the arbitration centre must notify the Agency for the Defence of the State¹³⁶ of the existence of the claim.¹³⁷ The Agency is entitled to intervene in the process as an interested party. Arbitrators may not be involved in more than three arbitrations where the state is involved.¹³⁸
- d* The arbitrators' fees are fixed during the early hearing, when the parties are encouraged to reach a resolution.¹³⁹

Rights of appeal

The factual determinations of arbitration tribunals cannot be challenged on appeal. However, appeals on points of law can be made in the ordinary or administrative jurisdictions on any of the following grounds:¹⁴⁰

- a* the invalidity or unenforceability of the arbitration award;
- b* lapse of limitation prior to issuing the claim;
- c* lack of jurisdiction on the part of the arbitration tribunal;

132 Article 8, Law 1563/2012.

133 Article 73, Law 1563/2012.

134 Article 12, Law 1563/2012.

135 Article 30, Law 1563/2012.

136 Law 1444/2011; www.defensajuridica.gov.co/Paginas/Default.aspx.

137 Article 12, Law 1563/2012.

138 Article 14, Law 1682/2013.

139 Article 25, Law 1563/2012.

140 Article 41, Law 1563/2012.

- d* the unlawful constitution of the arbitration tribunal;
- e* the failure of the tribunal to order or collect evidence requested by the parties;
- f* the failure of the tribunal to clarify the award in response to a question from the parties within the relevant time limits;
- g* an award that is wrongly based on equity and not rules of law;
- h* arithmetical errors in the decision;
- i* the failure of the tribunal to adjudicate solely on the points of dispute; or
- j* a technical defect in the service of the claim or the appointment of representation.

Some of these grounds are valid only if the appellant raised an objection in good time during the arbitration proceedings.

The procedure to be followed for making an appeal is to ask the tribunal to clarify the perceived errors¹⁴¹ and then to ask the tribunal itself to annul the award¹⁴² before approaching the relevant court.¹⁴³

A party may also petition the Constitutional Court for an order quashing an arbitration award if it feels that the tribunal infringed its rights to a fair hearing.

Costs

The arbitrators will determine the fees and expenses of the tribunal in accordance with the amount claimed. The maximum amount allowed by law to be charged by an arbitrator is currently US\$260,000 and up to half of this for the secretary's fees.¹⁴⁴ In theory, the parties can agree the fees between themselves and inform the arbitrators of what has been decided when they are designated. However, that option is not always open if the list of available candidates is short.

There are additional costs relating to the functioning of the tribunal in an arbitration centre. These are usually a fixed percentage of the sum in dispute. The arbitrators' fees and the sum paid to the centre are subject to a new 2 per cent arbitral tax for the financing of the ordinary courts.¹⁴⁵

iv Alternative dispute resolution

Mediation and third-party adjudication are both recognised by law.¹⁴⁶ As mentioned in Section IV.ii, mediation is a mandatory step before accessing the courts. Agreements obtained through alternative dispute resolution (ADR) are binding on the parties and enforceable before a judge.

v Other forums

Insurance disputes may also be heard before the Controller's Office, which has discretion to adjudicate on matters involving negligent or fraudulent misconduct on the part of public and private entities or individuals trusted with the management of public funds.

141 Article 39, Law 1563/2012.

142 Articles 40 to 43, Law 1563/2012.

143 Article 45, Law 1563/2012.

144 Article 26, Law 1563/2012.

145 Articles 16 to 22, Law 1743/2014.

146 Decree 1818/1998.

If it has grounds to suspect that public funds have been misused, the Controller's Office may pursue a recovery action, known as a fiscal liability proceeding (FLP), against any relevant entity or individual. It does not impose fines or penalties but seeks restitution, hence its relevance to insurers: not only does an investigation trigger defence costs but awards against individual or corporate entities may attract indemnity under D&O insurance, professional indemnity insurance, crime or bond policies. Insurers are frequently called to these proceedings to guarantee the obligations of their insureds.¹⁴⁷ The Controller's Office has no jurisdiction over insurers based abroad or reinsurers.¹⁴⁸ Insurers have the same rights of defence as their principals.

The Controller's Office has its own procedural rules, set out in Law 610/2000 and Decree Law 403/2020. They involve a two-stage process whereby the Controller's Office first carries out an audit and later presents charges. A final decision must be reached within five years of commencement of proceedings¹⁴⁹ and payment becomes enforceable within five days of a final decision. Liability is commonly imposed on a joint and several basis among the principals and severally across their insurers. Policy limits tend to be observed, but little regard is given to the policy wording or the nature of the cover. For example, it is not uncommon to see various claims-made policy periods involved on the basis that the irregularities occurred over a prolonged period.

In March 2020, the Controller's office issued Circular 005/2020, setting out how insurers should be treated in the course of an FLP and recognising the applicability of claims made as a basis of cover. This measure came about after a string of arbitrary decisions by the Controller's Office led local and international insurance markets to protest about the arbitrary approach and to suspend temporarily insurance availability for Colombian public entities and their directors. The new regime introduced by the Circular has yet to be tested.

The decisions of the Controller's Office may be challenged through judicial review in the administrative jurisdiction. In the event of a successful judicial review, any amounts paid to the Controller's Office will be returned. From 2022, Controller's Office decisions will automatically be referred to the Council of State for review.¹⁵⁰

V YEAR IN REVIEW

During 2020, the covid-19 pandemic affected all aspects of life in Colombia; its full impact is still difficult to predict. Insurers took a long-term view and in applying their strengths to address the challenges presented by the pandemic sought to improve the public's opinion of the sector. Employment risk insurers took on the task of providing personal protective equipment to healthcare workers and, by covering sick-leave payments, helped to ensure that employees did not spread the disease.¹⁵¹ The insurance market, through Fasecolda, provided a basic form of life insurance to cover 585,000 healthcare workers across the country.¹⁵²

147 Article 44, Law 610 of 2000.

148 Article 1135, CCo.

149 Article 9, Law 610 of 2000.

150 Law 2080 of 2021.

151 Javier Suárez, president of the board of Fasecolda, 'Convención Internacional de Seguros 2020', <https://fasecolda.com/eventos/convencion-internacional-de-seguros-2020/memorias/>.

152 Miguel Gómez Martínez, President of Fasecolda, 'Convención Internacional de Seguros 2020', <https://fasecolda.com/eventos/convencion-internacional-de-seguros-2020/memorias/>.

Motor insurers refunded part of their insurance premiums for the period between March and July 2020 upon the request of the FS and to reflect the reduction of risk due to the sharp decrease in car usage. Although a challenging year, insurers have made advances towards achieving their long-term objective of gaining consumer confidence.

The insurance market's premium income was almost a percentage point higher during 2020 than during 2019. Insurance companies were able to weather the downturn through solid capitalisation levels and conservative regulation. During the past few years, FS has been focused on the implementation of strict capital and reserving rules, to counter shocks such as the pandemic, and on the gradual implementation of risk-based regulation as set out by international organisations.¹⁵³ For the first time, the Colombian Central Bank extended emergency liquidity credit lines to insurers in need of cash during the pandemic.¹⁵⁴

In recent years, many insurers have been affected by the arbitrary and inconsistent treatment of insurers by the Controller's Office in the course of FLPs commenced for the benefit of the Colombian state. Its approach to claims made policies has been especially erratic, with multiple years of accounts being called to respond regardless of the dates of notification and the application of aggregating provisions. In December 2019, the Controller's Office held a conference to listen to insurers' concerns and, in Circular 005 of March 2020 (see Section IV.v), it sought to clarify its approach and confirm its respect for the rule of law. The Circular has been complemented by a draft decree published by the Ministry of Finance, setting out a detailed regulatory regime for D&O policies issued on a claims made basis. Insurers may therefore begin taking greater comfort that their policy terms will be respected.

The local insurance market has continued to face reduced profitability because of lower premiums, increased unemployment, historically low interest rates (1.75 per cent), local currency devaluation and a difficult reinsurance market. Market entries slowed down during 2020, but insurers continued to compete on new products and the digital transformation of operations. It is expected that smaller insurers will face difficulties competing with larger market participants since they have less funds to carry out modernisation of this kind.¹⁵⁵

The rate of growth of 0.9 per cent in premium sales was led by life insurance (5.3 per cent) and commercial lines (2.6 per cent). However, overall growth was affected by a decline in social security insurance (down 7.4 per cent) due to increased unemployment.¹⁵⁶ Although still a small part of the overall market, agricultural insurance benefited from an increase in government subsidy and total premiums grew by over 96 per cent; however, only 4 per cent of all crops are insured.

153 Unidad de Proyección Normativa y Estudios de Regulación Financiera, 'Updating insurance regulation: a URF promise', *Revista Fasescolda*, No. 176, 'Convención Internacional de Seguros 2019'.

154 Gerardo Hernández, co-director of Banco de la República, presentation, 'Convención Internacional de Seguros 2020', <https://fasescolda.com/eventos/convencion-internacional-de-seguros-2020/memorias/>.

155 Fitch Ratings, 'Perspectiva de Fitch Ratings 2020: Seguros en Colombia', 19 December 2020.

156 Fasescolda, 'Industry Figures: November 2020', presentation, <https://fasescolda.com/cms/wp-content/uploads/2020/12/Cifras-noviembre-2020.pdf>.

VI OUTLOOK AND CONCLUSIONS

The year 2021 is set to be a challenging one as the country picks itself up from the covid-19 pandemic. An unemployment rate of 15 per cent will adversely impact social security insurance, which has been a good source of growth in recent years. The strength of commercial lines and business from small and medium-sized enterprises, also in the ascendancy for many years, will depend greatly on the speed and scale of the recovery. A slow recovery, low interest rates and market volatility would adversely affect the insurance sector.

There is cause for optimism. Despite the general recession during 2020, the sector continued to grow. The Central Bank now forecasts that national economic growth in 2021 will rebound by 4.2 per cent, provided that no further restrictions are imposed on the economy. Commercial lines and construction will benefit from public investments in infrastructure and government-backed incentives given to the oil and gas, mining and construction sectors.

There also remains significant scope for growth among Colombian consumers. Insurers, intermediaries and the government are working hard to raise the profile of consumer rights, highlight the advantages of insurance cover and implement technological solutions to facilitate claims and the purchase of insurance. It is estimated that currently only 30 per cent of Colombian households have non-mandatory products.¹⁵⁷ Insurers' role during the pandemic has given them the opportunity to improve their image among consumers, which might help to stimulate the market.

On a technical level, the main areas of focus in 2021 and beyond are likely to be:¹⁵⁸

- a* the continued efforts of the FS to meet international standards and consolidate risk-based supervision methodologies through the gradual implementation of EU Solvency II regulations and International Financial Reporting Standards;¹⁵⁹
- b* pensions and social security reform, which will continue to be high on the government's agenda in an attempt to better redistribute wealth and make pensions savings available to people in a country where only one in four persons manages to retire;
- c* employment law reform, which has been widely discussed, to increase the flexibility of the Colombian labour market;¹⁶⁰
- d* a lower price for mandatory vehicle insurance (SOAT) due to fewer losses occurring during 2020; however, SOAT continues to be a source of leakage and fraud, with almost 50 per cent of vehicles in the country uninsured;¹⁶¹
- e* a widening of the consumer base and financial inclusion of the lower-income population;
- f* increasing sales of cybersecurity insurance policies due to an increase in working from home and awareness of cyber risks;
- g* an expansion of fintech insurance and the digital economy;

157 FS, Fasecolda and Banca de Oportunidades, 'Estudio de Demanda de Seguros', 2018, <https://fasecolda.com/servicios/publicaciones/libros/>.

158 Unidad de Proyección Normativa y Estudios de Regulación Financiera, 'Updating insurance regulation: a URF promise', *Revista Fasecolda*, No. 176, 'Convención Internacional de Seguros 2019'.

159 Jorge Castaño Gutiérrez, Financial Superintendent, 'Convención Internacional de Seguros 2020', <https://fasecolda.com/eventos/convencion-internacional-de-seguros-2020/memorias/>. See also External Circular No. 18 of 15 May 2020 on prudential rules for international solvency standards.

160 Sergio Clavijo, presentation, 'Convención Internacional de Seguros 2020', <https://fasecolda.com/eventos/convencion-internacional-de-seguros-2020/memorias/>; presentation at the Fasecolda convention, 2 October 2019, <https://youtu.be/YgYJvgGM7g0>.

161 Portafolio, 'SOAT rates will be reduced in 2021', 28 December 2020, <https://www.portafolio.co/economia/tarifas-del-soat-2021-bajaran-precios-del-soat-en-colombia-547871>.

- b* technologically based solutions such as pay-per-use vehicle insurance, modular cover, fully digital channels and social media platforms; and¹⁶²
- i* advances in agricultural insurance, as currently only 4 per cent of the country's total of 40 million hectares of cultivated land is insured.

162 La República, 26 September 2020, <https://www.larepublica.co/finanzas/seguros-bolivar-lanzo-linea-de-polizas-verdes-enfocadas-en-los-carros-electricos-e-hibridos-3065966>.

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