

Mexico



Ramiro Besil



Alvaro Adame

Adame Gonzalez de Castilla & Besil

1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

Insurers, reinsurers, brokers and other sector-related players are mainly regulated by the Mexican National Commission of Insurance and Bonding (“*Comision Nacional de Seguros y Fianzas*”, “CNSF”). This agency authorises their incorporation and oversees their operations in almost all regulatory aspects, such as minimum capital, reserves, corporate governance, etc. Insurers are also regulated by the Mexican Financial Ombudsman (“*Comision Nacional Para la Defensa de Usuarios de Servicios Financieros*”, “CONDUSEF”), which ensures that policies comply with certain minimum standards. CONDUSEF will also operate as a mediator between insureds/beneficiaries, and insurers when claims fall below a certain threshold.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

The Mexican Insurance and Bonding Companies Law (“*Ley de Instituciones de Seguros y Fianzas*”, “LISF”) provides that in order to set up a new insurance company in Mexico, the interested party must file a formal submission with the CNSF including relevant information/documentation of the insurance company to be incorporated, such as financial information, internal operation manuals, corporate governance information and a draft of the proposed by-laws of the company. The submission will be reviewed and approved by the CNSF Board; when approved, the CNSF will issue (and publish in the Mexican Official Gazette) a first preauthorisation document authorising the incorporation of the company as a Mexican stock company before a Notary Public. Once the company is incorporated, the interested party must submit the notarised by-laws to the CNSF for its final approval. The CNSF will issue its final authorisation document preventing the company from starting operations within the following 90 days, in which period the CNSF will supervise the start of operations. If the company meets the conditions to properly operate, the CNSF will formally authorise the company to operate as an insurance company.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Only Mexican insurers are permitted to provide insurance in Mexico, even to the extent that insuring risks in Mexico by non-authorised entities may be considered a crime, the contract

will be null and the insured and will be entitled to the reimbursement of the paid premiums.

However, the CNSF may grant a special authorisation to a Mexican person or company to retain insurance from a foreign insurer when none of the Mexican insurers will insure the relevant risk.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

Yes. There are a number of requirements and restrictions that insurance policies must comply with in all cases. Additionally, standard form contracts are subject to registration and approval by the CNSF and CONDUSEF.

1.5 Are companies permitted to indemnify directors and officers under local company law?

Companies are permitted to indemnify directors and officers under local law and such liability is subject to insurance coverage under D&O policies.

1.6 Are there any forms of compulsory insurance?

Yes, there are many cases in which compulsory insurance applies. Insurance and reinsurance brokers must carry E&O insurance. Aviation and marine insurance, port operation and the oil industry are examples where compulsory insurance applies.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

The substantive law regulating insurance in Mexico is balanced between insurers and insureds. Both parties are bound to act in good faith and have duties corresponding to their different allocation in the contractual relationship. For example, when a loss occurs, insureds are compelled to timely report insurers and in the meantime act diligently until the insurers provide instructions. Should the insured fail to timely report the loss to the insurers or to act diligently, insurers will be entitled to reduce the indemnity only to the extent that the failure from the insured negatively affected the extent of the loss. However, when the insured delays the report to hide from insurers the circumstances of the loss or deceives the insurers in respect of

certain facts that may exclude or limit coverage, insurers will be released from their indemnity obligations.

2.2 Can a third party bring a direct action against an insurer?

Yes. The most common case is liability insurance, under which the affected third parties can submit their claims directly against the liability insurers; however, there may be other exceptional cases.

2.3 Can an insured bring a direct action against a reinsurer?

No, this is not possible under Mexican law.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

At the time of contracting insurance, the insured or contracting party must provide insurers with the relevant facts that may impact the assessment of the risk to be insured, based on a questionnaire provided by the insurers. If the insured or the contracting party provides the insured with false warranties or concealed facts that are relevant to the assessment of the risk, the insurer will be entitled to terminate the insurance; however, the notice of termination must be tendered within 30 days from the date in which the insurer came to know the misrepresentation or concealment.

Moreover, if upon occurrence of the loss, the insured deceives the insurers in respect of certain facts that may exclude or limit coverage, insurers will be released from their indemnity obligations.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

In principle, the insured's only duty is to disclose the information requested in the insurer's questionnaire. Additionally, the insured must disclose any aggravation of the risk.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

There is an automatic right of subrogation upon payment of an indemnity by the insurer; however, it is customary to include a subrogation clause in the insurance releases.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

Insurance disputes may be brought before Federal or State Courts at the choice of the Plaintiffs, except for claims pertaining to marine insurance, which cannot always be brought before State Courts. State Courts are the most common choice for insureds.

Regarding jurisdiction, a court claim may be brought by the insured against the insurer before the courts where the insured's offices are located, or before the courts where any of the offices

of the Insurance Ombudsman are located, notwithstanding that said location has no connection with the domicile of the insurer or the insured, or the place where the loss took place.

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

No court fees are payable in Mexican court procedures.

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

The timeframe for the first instance under regular circumstances is between six to eight months. If the first instance judgment is contested, the procedure may be extended a further six months.

3.4 Does COVID-19 have, or continue to have, a significant effect on the operation of the courts, or litigation in general?

Yes. During the pandemic, procedures have been extended depending on the court and jurisdiction; for example, in Mexico City, local courts operate every other day, hence, the procedural timeframes have been extended up to double the regular time notwithstanding the newly implemented system that allows online submissions.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

A party to a procedure may offer as evidence a document that is in the possession of a third party, and provided certain formalities are met, the court will have the power to order the disclosure of the document to the extent of imposing fines or even the arrest of the disobeying party; however, courts are not always willing to fully enforce these powers.

The parties to the procedure can offer as evidence the inspection of the facilities or records of the opposing party or a third party and the court will have powers to order and enforce the disclosure; however, courts are not always willing to fully enforce these powers.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

A party to a commercial dispute can withhold from disclosing documents relating to advice given by lawyers or prepared in contemplation of litigation, as such documents are protected as professional secrets.

Documents produced in the course of settlement negotiations or attempts may be protected from being used as evidence in court when the settlement attempts were conducted under the specific procedures provided for in local laws or during mediation hearings, which take place in all commercial matters in Mexico. If the relevant document is not protected under the applicable procedures, the court may order the party in its possession to disclose it.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

Courts do have the power to require witnesses to give evidence by issuing summons ordering their appearance at a specific time and date; however, this rarely happens, and the assistance of witnesses is left to the party offering the witness.

4.4 Is evidence from witnesses allowed even if they are not present?

Only in exceptional cases. Ill individuals or people over 70 years old may provide their witness statements from their homes. The courts may allow witnesses located outside their jurisdiction to provide their testimony before their local courts by requesting the assistance through rogatory letters.

Also, when there is a risk that the witness will not be present at the time of the hearing, the court may allow the obtainment of witness evidence as a pre-trial procedure, provided that the offering party is able to demonstrate the urgency, an apparent right and the imminent court procedure.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

Expert witnesses are only admissible when the resolution of the controversy requires knowledge in science, art, craft, technique, or industry. Expert witnesses offered to demonstrate facts that have been proved in the file through other means of evidence will be dismissed. The experts must hold a degree in the relevant science, art, craft, technique, or industry unless a degree is not required for its practice or if there is no individual available with a degree.

Courts have lists of experts for specific subjects and can request the assistance of Government Agencies to provide expert opinions. It is the prerogative of the court to appoint experts in addition to the party-appointed experts when there is a substantial discrepancy in their opinions, but a court cannot appoint an expert in place of a party appointed or on behalf of one of the parties.

4.6 What sort of interim remedies are available from the courts?

The interim remedies available in the Mexican Commerce Code include: a) restriction to travel for an individual when there is a risk that the individual may leave the location where the proceedings are held without appointing a representative; and b) attachment of assets (which include freezing of bank accounts) when there is a risk of squandering or concealing, or when a defendant has no other assets to guarantee a possible award in favour of the Plaintiffs.

Additionally, note that insurers will have to create financial reserves to guarantee court claims.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

The final decisions from the first instance courts in commercial matters may be contested on the grounds that such decisions

breach the human rights of the contesting party by submitting a procedure called *amparo directo*. In principle, that is the only stage to contest a first instance decision.

Other interim decisions may be contested depending on the nature and effect of the decision on the basis that they breach the law negatively affecting the contesting party, or their human rights.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Interest is recoverable in insurance claims. It is calculated differently when the credit due is determined in Mexican Pesos or when it is determined in a foreign currency (usually US Dollars).

Pesos credits are converted to a Mexican index unit called UDIs at their value on the date in which the insurance credit became due, to be converted back to Pesos on the date the credit is settled. Unlike Pesos, UDIs are designed to maintain their value despite inflation; therefore, the amount of Pesos will most likely increase at the same rate as inflation rose in Mexico when the credit is converted back. Additionally, insurers must pay interest at a Mexican market-average rate for UDIs credits (*costo de captación a plazo de pasivos denominados en Unidades de Inversión*) plus 0.25.

In the case of credits determined in foreign currency, insurers must pay interest at a Mexican market-average rate for Dollars credits (*costo de captación a plazo de pasivos denominados en Dolares*) plus 0.25.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

Costs are regulated locally in each State; however, it is unlikely that they exceed 12% of the principal being claimed. The court will only award costs in specific cases: i) when a party submits frivolous claims with the purpose of delaying the process; ii) when a party fails to submit evidence to demonstrate disputed facts; iii) to a party submitting forged evidence; and iv) to the Plaintiffs when the procedure lapses due to lack of procedural activity.

There are no advantages in making an offer to settle prior to trial.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

Under the current procedural rules, a conciliatory hearing must take place before the trial commences and once in the hearing Judges must summon the parties to reach an agreement. Currently, Judges do put an effort to try to persuade the parties into reaching a settlement; however, the court cannot compel the parties to mediate or engage in any other form of ADR.

4.11 If a party refuses a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

There are no legal consequences when a party refuses to mediate or engage in other forms of ADR; however, failure of a party to attend the conciliatory hearing will result in a fine.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

In general terms, Mexican courts will honour arbitral clauses and agreements and will submit any dispute to arbitration upon the request of any of the parties to the dispute. This may not be the case in regarding standard form policies in which the insured is unable to negotiate the terms of the policy, as there is binding case law that considers it unconstitutional to unilaterally deprive an individual to the access of justice by courts.

Mexican law incorporates the UNCITRAL rules to the Commerce Code.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

There is no form of words required, provided that the parties clearly and undoubtedly renounce jurisdiction to the courts; however, using the arbitration clause of the intended administrator or the UNCITRAL model clause is advisable.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

Yes. Courts may refuse to enforce an arbitration clause when the clear and express submission to arbitration and renunciation of jurisdiction to the courts is unclear and open to

interpretation. Also, as pointed out in question 5.1 above, in the case of standard form policies, courts may consider that it is the right of the insured to be heard by a court.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

There are any number of forms of relief that can be obtained, mainly aimed at preserving the subject matter of the arbitration. The most common are attachment of assets and freezing of bank accounts; however, a court could order that the damaged goods are preserved in order to determine the origin and/or extent of the damages.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

Unless the parties to the arbitration agreed otherwise, the arbitral tribunal is bound to give detailed reasons for its award.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

There is no right to appeal the decision of an arbitral tribunal; however, parties may apply for the nullity of the award and resist the enforcement of the award.



Ramiro Besil has provided legal advice to clients involved in the Mexican insurance market (insurers, reinsurers and brokers), in marine, energy, aviation and non-marine areas, providing both advice and legal defence regarding liability, coverage and regulatory issues since 2005. Before founding AGB, Ramiro worked for more than 12 years for a major Mexican law firm, specialising in insurance/reinsurance law, oil and gas & transportation law, where he gained expertise in litigation and dispute before the Mexican Insurance Authorities, Federal Courts and State Courts regarding aviation and marine insurance, general liability and catastrophic risks issues, as well as providing legal advice and assistance to shipowners, charterers, P&I Clubs and hull underwriters in casualties within Mexican waters, legal advice and assistance to shipowners, charterers, P&I Clubs and cargo interests in respect of cargo issues and disputes.

Additionally, Ramiro provides legal advice and assistance to companies in the shipping and oil and gas sectors.

Adame Gonzalez de Castilla & Besil
Rio Marne 19 First Floor
Cuauhtémoc, México City, 06500
Mexico

Tel: +52 55 7155 8189
Email: ramiro.besil@agb.mx
URL: www.agb.mx



Alvaro Adame has since 2005 specialised in insurance/reinsurance law, regulatory matters, as well as corporate law, mergers and acquisitions, foreign investment, contracts and finance transactions and legal determination of coverage, claims-related matters, subrogation, product development.

Before founding AGB, Alvaro worked for two major Mexican law firms, specialising in insurance/reinsurance law, providing legal advice on the regulatory, organisational, operational and transactional requirements, product development and establishment of Mexican and foreign insurance and reinsurance companies in Mexico as well as advising and representing insurance and reinsurance companies in coverage and legal determination of coverage issues, claims-related matters and subrogation cases in the following areas: maritime; air; inland and railroad transportation; property; and fire insurance.

Additionally, Alvaro worked for a New Orleans, Louisiana-based insurance company providing legal advice, especially in individual life and health insurance, group life and health insurance, international major medical insurance, small business, estate and executive benefit plans.

Adame Gonzalez de Castilla & Besil
Rio Marne 19 First Floor
Cuauhtémoc, México City, 06500
Mexico

Tel: +52 55 7155 8189
Email: alvaro.adame@agb.mx
URL: www.agb.mx

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The firm provides legal determination of coverage, claims-related matters and subrogation cases in the following areas: maritime; air; inland and railroad transportation; property; and fire insurance.

The firm offers litigation and dispute resolution of insurance and reinsurance-related matters before the Mexican Insurance Authorities, Federal Courts and State Courts including general liability, products liability, fire, business interruption, directors' and officers', errors and omissions, professional liability and catastrophic risks issues.

The firm also provides legal advice on the regulatory, organisational, operational and transactional requirements, product development and establishment of Mexican and foreign insurance and reinsurance companies in Mexico.

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