

ICLG

The International Comparative Legal Guide to: **Insurance & Reinsurance 2018**

7th Edition

A practical cross-border insight into insurance and reinsurance law

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EDITORIAL

Welcome to the seventh edition of *The International Comparative Legal Guide to: Insurance & Reinsurance*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of insurance and reinsurance.

It is divided into two main sections:

Six general chapters. These are designed to provide readers with an overview of key issues affecting insurance and reinsurance work, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in insurance and reinsurance laws and regulations in 41 jurisdictions.

All chapters are written by leading insurance and reinsurance lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Jon Turnbull and Michelle Radom of Clyde & Co LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

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1 Regulatory

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

Pursuant to the *Insurance Market Regulatory Act* (also known as “*LRMS*”), the supervising entity with the legal authority to regulate insurance and reinsurance companies, as well as the insurance market in Costa Rica, is the General Insurance Superintendency (also known as “*SUGESE*”). *SUGESE* is an independent body which operates under the direction of the National Council for the Supervision of the Financial System (also known as “*CONASSIF*”).

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

The legal requirements and procedure for setting up an insurance company in Costa Rica are clearly established pursuant to *Accord SUGESE 01-08 Regulation regarding authorisation, registry and operating requirements for supervised entities* (also known as the “*Authorisation Regulation*”).

A new entity can submit a request before *SUGESE* in order to obtain an operating licence either as a personal insurance company (health, life, rent, accidents), as a general insurance company (property, auto and other vehicles, aviation, maritime, liability, credit, other), as a mixed use insurance company (both personal or general insurance company) or as a reinsurance company.

The requirements are extensive and are explicitly listed in *Schedule 2* of the *Authorisation Regulation*. Some of the requirements include a detailed corporate legal structure of the company, final shareholder information (final beneficiaries), a detailed list of the board of directors’ and key executives’ information and credentials, submission of an extensive and detailed business plan which shall include the background of the company, desired product lines and services, sources for funding, desired market sectors and share market, etc. In addition, the company should submit information related to accounting and IT information, projected financial information, corporate governance information and control systems, physical and IT security systems, etc. The company shall also deposit and keep free and clear a minimum capital stock which will vary depending on the type of insurance company it intends to operate (personal, general or mixed use).

The process is composed of two phases. Phase One is composed of the initial submission by the company to *SUGESE* containing all the regulatory requirements and information established in *Schedule 2* of the *Authorisation Regulation*. In this part of the process,

SUGESE conducts a detailed and extensive review of all documents and information and requests for clarifications and/or correction of any conflicting issues. Once the company answers all inquiries and/or corrects all issues addressed by *SUGESE*, the company is granted a conditional authorisation, which completes Phase One. Phase Two is composed of the subsequent steps which include incorporation of the company, deposit by its shareholders before the Central Bank of Costa Rica (“*BCCR*”) of the minimum capital stock and verification by *SUGESE* of all the operative requirements such as physical address, physical and IT security, adequate operative equipment and installations, among others.

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

As a general rule, foreign insurers are not authorised to write business directly in Costa Rica. The *LRMS* establishes that public offering of insurance and/or the realisation of insurance business is restricted to entities that have been authorised pursuant to the *LRMS* to do so. Public offering and realisation of insurance business is identified as promotion, marketing of any sort or by any means, providing information regarding the act of insuring people or goods or general presentations and commercial intermediation of insurance products. It also includes any acts which imply the activity normally conducted by an insurance company.

Notwithstanding the above, there is an exception to the above general rule, which is established in article 16 of the *LRMS*, which indicates that any person or company may contract trans-border insurance products with foreign insurers from countries that have signed an international commercial or trade agreement. Under this exception, only the trans-border insurance products expressly listed in the international commercial or trade agreement are authorised to be sold locally.

In addition, article 16 also expressly establishes that reinsurance and its intermediation or brokerage shall be considered an exception to the general rule and may be freely contracted by local insurance companies with foreign insurers (re-insurers). Thus, foreign reinsurance companies are not required to register and/or obtain an operating licence from *SUGESE* in order to conduct reinsurance business with local insurers.

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?

As a general rule, most insurance contracts are considered to be contracts that must be accepted by the consumer without negotiation;

thus, there are many provisions in the *Insurance Contract Regulatory Act* (also known as “LRCS”) as well as the *Consumer Protection Act* that restrict the parties’ freedom of contract. In this regard, these two laws establish certain extraneous terms which cannot be overridden by these contracts. In essence, both the LRCS and the Consumer Protection Act protect the weakest party in these type of insurance contracts: the consumer. These types of insurance contracts shall receive a form and substance analysis by SUGESE, and eventually shall be registered in order to be able to be sold.

As an exception to the general rule, there are some types of contracts, also known as joint discussion insurance contracts (“*Contratos Paritarios*”). These types of *Contratos Paritarios* can only be used between contracting parties that are considered sophisticated economic agents, and as a result, they can freely negotiate the terms of these contracts.

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

There are no legal restrictions on the indemnification of directors and officers under local company law.

1.6 Are there any forms of compulsory insurance?

Yes, article 2 of the *LRMS* clearly stipulates that there are several compulsory insurance systems in Costa Rica, which in fact are not included within the scope of the recently approved *LRMS* (this law was implemented in 2008 after more than 82 years of a State-owned monopoly). The compulsory insurance systems are: (i) the obligatory Social Security System which is operated by the *Caja Costarricense del Seguro Social* (also known as “*CCSS*”); (ii) the Workers Risk Insurance System (also known as “*RT*”) which is currently operated by the State-owned *Instituto Nacional de Seguros* (also known as “*INS*”), although almost any local private insurance company could eventually operate this type of insurance; and (iii) the obligatory Vehicle Accident Insurance System (also known as “*SOAT*”) which is currently operated by *INS*, although almost any local private insurance company could eventually operate this type of insurance.

2 (Re)insurance Claims

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

In general terms, since the insurance market monopoly was opened in July 2008 – after more than 82 years of a State-owned monopoly – all recent substantive law, including Congress-approved laws such as *LRMS* or *LRCS*, as well as all other regulations, accords and dispositions have been enacted to protect and favour insureds’ interests over insurers’ interests.

This pro-insured legal system is evidenced through article 5 of the *LRMS*, which stipulates in sub-article c) the *contra proferentem principle*. This article establishes that, with regards to insurance contracts, all insurers must abide by the applicable legislation and, in case there are any ambiguous terms or grounds for doubt, the insurer must always resolve its claims or interpret the meaning in favour of the consumer (*pro-insured*). This principle is applicable both in administrative and judicial cases.

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

There are limited cases in which a third party, with a particular interest in an insurance claim (i.e. beneficiary or SOAT insurance), may bring a direct action against an insurer. Nevertheless, the rule is that third parties are expressly prohibited from bringing a direct action against an insurer.

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

No, an insured cannot bring a direct action against a reinsurer on the grounds of breach of contract, as the insured does not have privity with the reinsurer. However, there is no substantive law which prevents the insured from bringing a direct action against the reinsurer for non-contractual issues or tort cases.

Notwithstanding the above, it is not common in Costa Rica to see this type of action against reinsurers, as there are no local reinsurers with legal domicile or established operating offices in Costa Rica (see question 1.3), thus making it difficult to file litigation or arbitration in Costa Rica.

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

Pursuant to articles 32 and 47 of the *LRCS*, in case there are cases of misrepresentation or non-disclosure by an insured regarding important facts or circumstances related to the insurance contract or claims procedure, there are several remedies that the insurer can seek. These remedies include (i) challenging the validity of the insurance contract (null and void contract), (ii) withholding any premiums paid by the insured, or (iii) extinguishing the insurer’s obligation to indemnify or pay the insured.

In addition, if the misrepresentation or non-disclosure by the insured is considered to be unintentional, the insurer can either submit a request to the insured to modify the terms and conditions of the insurance contract or terminate the insurance contract.

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?

Yes, article 31 of the *LRCS* specifically indicates that the insured must declare to the insurer all facts or circumstances known by him and that he may reasonably consider relevant regarding any particular insured risk.

Notwithstanding the above, this same article stipulates that, in case the insurer knows or reasonably should have known about that particular fact or circumstance, then the insured is released from its obligation to disclose. In this regard, recent case law has indicated that insurers should know the insurance business operation and, as a result, they should ask the insured the correct and specific questions prior to assuming any risks. As a result, in addition to the insured’s positive duty to disclose information, there has also been some burden on the insurer to proactively seek from the insured what might be considered material or not.

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?

Yes, article 49 of the *LRCS* grants an automatic right of subrogation upon payment of an indemnity by the insurer. This subrogation is limited to the amount paid against the person responsible for the loss. Notwithstanding the above, this subrogation right does not apply to personal insurance contracts (health, life, rent, accidents), unless payments were made by the insurer with the intent of compensation.

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?

This will depend on the type of litigation being initiated. If it is a dispute related to a breach or non-compliance with the terms and conditions of the insurance contract, then there will be declarative judicial proceedings (also known as “*Ordinario*”). This type of judicial proceeding shall be litigated before civil courts. The only exception to the above is when an insured is filing some sort of litigation against the State-owned company (also known as “*Instituto Nacional de Seguros*” or “*INS*”). Any litigation involving *INS* shall be brought before administrative courts.

Juries are not used in Costa Rica.

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

Assuming there are no major complications, commercial litigation can take anywhere from 18 months to four years. This shall depend on the type of case, the civil courthouse where the case was presented and the eventual appeals.

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?

The Costa Rican legal system does not include any sort of rules on discovery or disclosure of information; thus the parties may only disclose documents which support their case. As a result, it is not common for courts to request the disclosure of documents, unless these are public documents or evidence regarding a particular case, such as videos of an accident, recorded phone calls, and/or relevant financial information on a particular fraud or misrepresentation case.

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?

In Costa Rica, the client-attorney privilege may be extended to the party regarding their right to withhold from disclosing documents (a) relating to advice given by lawyers, (b) prepared in contemplation of

litigation, or (c) produced in the course of settlement negotiations/attempts. Nevertheless, while conducting settlement negotiations/attempts, the parties might produce evidence. For example, by informing the other party that a meeting will be recorded or by appointing a Notary Public during the negotiations/attempts to give faith through a notarial deed of what happened during the process.

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

Yes, if a party has offered a witness, the courts are entitled to summon them during the evidentiary stage by enforcing their subpoena powers. Also, in the event of an urgent matter and if a party requests it, the court may summon witnesses before the final hearing.

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

The general rule is that the witnesses must be present to testify. Nonetheless, there are several exceptions, such as illness and imminent death. Also, if a witness lives abroad, they may appear before the Consulate and answer questions previously sent by the interested parties. If so, the Consulate will issue a witness declaration that will be allowed as a written testimony.

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?

There are no restrictions on calling expert witnesses. Nevertheless, the judicial system has a detailed list of court-appointed experts, which are usually deemed to be more objective and have more expertise on certain topics. Based on the above, these court-appointed experts will be used by courts as a primary source of expert witnesses over party-appointed experts.

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

The Civil Procedures Code of Costa Rica has specific interim remedies available: reply to interrogatories; proof of witness; expert testimony; documentary evidence; deposition; inspections; and temporary injunctions in order to preserve the assets whilst the procedures are terminated.

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?

There is a right of appeal of the decision of the courts of first instance for the following resolutions: 1) a resolution denying a demand by a party; 2) a resolution deciding on competition; 3) a resolution denying an injunction; 4) a resolution rejecting evidence; 5) a resolution on sentencing; 6) a resolution approving or denying the liquidation of damages and the assessment of costs; and 7) a resolution decreeing a body’s compulsion to perform an action. Additionally, there is a right to appeal a sentence or final resolution before the Cassation Court. This appeal must be issued after the Appeals Court has issued a sentence and if the appeal is based on violations of procedures and/or violations of law.

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

Yes, interest is recoverable with regard to claims, specifically when the party has requested so in a complaint; nonetheless it is not officially declared by courts. The current rate is normally agreed between parties, but if it is not, the legal interest rate would be the prime rate for the United States dollar, and the Costa Rican currency for the basic interest rate, published by the Central Bank of Costa Rica.

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

Normally, parties request that their counterpart is condemned to pay the legal costs of the process, and the courts will grant this if the party has acted in bad faith. Legal costs must be evidenced and legal fees are calculated by the fee rates issued by the Costa Rican Legal Bar Association. The potential cost advantages in making an offer to settle prior to trial is that the parties might negotiate that each party will assume their own costs and legal fees.

4.10 Can the courts compel the parties to mediate disputes? If so, do they exercise such powers?

Courts can not compel parties to mediate disputes. Nevertheless, during the process and previous to the evidence stage, parties are summoned to a voluntary conciliation. If the parties are able to reach an agreement, the judicial process will be stopped.

4.11 If a party refuses to a request to mediate, what consequences may follow?

If there is a request to mediate and parties refuse to attend it, there are no legal consequences.

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?

As a general rule, the courts respect the principle of party autonomy; nevertheless, since most insurance contracts are considered to be contracts that must be accepted by the consumer without negotiation, recent consumer protection laws as well as case law has established that arbitration shall be optional to the parties involved in an agreement and shall not be used as a way for insurers to limit an insured's right to access justice through civil litigation. Thus,

the courts will analyse carefully what type of insurance contract is brought before them and the type of parties associated with them, in order to be able to determine whether or not to intervene in the conduct of an arbitration if there is a valid arbitration agreement.

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 specific wording required to enforce an arbitration clause. Notwithstanding the above, it is advisable to include the name of the arbitration centre that will be used and to state that the parties agree to submit to the regulations of said centre. See question 5.1.

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, there is a possibility that courts will refuse to enforce an arbitration clause depending on the type of insurance contract and the parties involved. See question 5.1.

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

Interim relief must be requested to the courts by the arbitral tribunal or the parties involved and there are no limitations regarding the forms of relief that can be obtained.

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?

Pursuant to article 58 of the Alternate Resolution Conflict Law number 7727 (also known as the "RAC Law"), the arbitral tribunal must give detailed reasons for its award, unless the parties have requested the arbitral tribunal to not support their reasoning.

Also, article 62 of the RAC Law states that, if the parties deem the reasoning is not duly supported, they may request the clarification, adoption or correction of the 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?

Yes, arbitrary awards may be appealed. Pursuant to article 65 of the RAC Law, any party may file an appeal for annulment within 15 days of the notice of the award. Also, any party may file an appeal for review based on the grounds listed in the Civil Procedure Code.

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