



**Latin America Claims
Handling Series**

Insurance Claims Handling in Mexico

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This is the second country-specific instalment of the [Locke Lord QuickStudy Series: An Introduction to \(Re\) Insurance Claims in Latin America](#). It focuses on Insurance Claims Handling in Mexico.

Mexico is a U.S. \$1.8 trillion economy constituted as a federal republic with 31 states and a federal district, Mexico City. Much of Mexico's economy is built around the North American Free Trade Agreement, with the U.S. as its main trading partner, and, having developed a large network of free trade agreements over the past 30 years, the current development focus is the reform of its energy industry.

Insurance Legal Framework

The business rules for the insurance and financial guarantee industries were amended in April 2013 with the enactment of a new Law on Insurance and Bonding Institutions ("LIBI"), which will become effective in April 2015. Until then, two separate statutes remain in force which regulate, respectively, the insurance and reinsurance industries Ley General de Instituciones y Sociedades Mutualistas de Seguros ("LGISMS") and the issuance of bond guarantees by financial institutions.

Once LIBI becomes effective, the Secretariat of Finance ("SHCP") will transfer its regulatory functions to the Comisión Nacional de Seguros y Fianzas ("CNSF") and, relevant to insurance claims handling, the activities of loss adjusters will be regulated and the financial services ombudsman ("CONDUSEF") will have powers to issue expert opinions to enable the courts to construe certain categories of insurance contracts.

Regulated Contracts

Insurers' standard policy wordings and endorsements are registered with the SHCP.

Whilst the substance of non-marine¹ insurance law in Mexico is the Insurance Contracts Act 1935 ("ICA") LGISMS also contains requirements for the issuance of insurance policies. LGISMS has also played an important role in the regulation of both insurance and reinsurance contracts and in recent case law concerning the burden of proof on policyholders when making an insurance claim.

The ICA contains mandatory provisions for the formation of insurance contracts and rules on two categories of insurance: indemnity and non-indemnity insurance, with some specific rules for subcategories such as fire and liability insurance. LIBI will introduce surety insurance as a sub-specie of indemnity insurance to the Mexican market, and such policies will be subject to special rules under ICA given that they will have the status of "documentary credits" (i.e. an indemnity can be obtained against the insurer in court without a loss adjustment).

Claims Handling

General claims handling rules are contained within the ICA's Title I, Chapters IV (Risks and Losses) and Chapter V (Limitation Periods), with Chapter IV also including rules on warranties, risk aggravation, and misrepresentation/non-disclosure.

Insureds have the choice of issuing court proceedings either in local or federal courts but, in both cases, the court procedure is set out in the 5th Book of the federal Commerce Code ("CC") (as opposed to the 32 local civil procedure codes).

Insurance litigators historically believed that the burden of proof was the general rule provided for in the CC: claimants ought to prove their case and defendants their defences. However in 2010 Mexico's Supreme Court determined in the case of Bissa² that the general rule does not apply to insurance contracts, and that instead, special rules contained in the ICA are applicable:

- a) Except for losses that arise from "certain events" that are specifically excluded in the policy insurers are liable for all covered losses ;³
- b) Insureds have 5 days to notify losses ;⁴
- c) 30 days after the provision by an insured to its insurer of information that should allow the insurer to "know the basis of its claim" the insured is deemed to be the creditor of the insurer to the extent of the indemnity owed;⁵

Policies cannot contain clauses providing that the debt is only actionable once the insurer has acknowledged it or conditional on its existence being proved at trial.

- d) Insurers can request from the insured "all types of information about the facts concerning the loss that may enable [insurers] to determine the circumstances of the [loss] and [the extent of the loss]."⁶ Courts have held that this right cannot be used arbitrarily, and as a result (alongside Art.71, described in c.) above), it is advisable for Mexican insurers to draft response letters with care, to include a reservation of rights and, within reason, requests for further information to delay the trigger of the 30 day period. If the 30-day period expires penalty interests begin to accrue.

With large losses in particular, which often require detailed adjustment, this should become standard practice. In the past, Mexican insurers did not consider it necessary to provide such a response letter when declining claims.

In Bissa, the Supreme Court held that the insured is only required to prove: (1) the existence of the insurance contract; (2) a prima facie case that a loss covered under the policy has occurred; (3) that it notified the insurer; and (4) that it has paid the premium.

The Supreme Court also acknowledged that, before the expiration of the 30 day period provided for in Article 71 of the ICA, insurers are entitled to set out in a response letter those defences that challenge the presumption that an indemnity is owed to the insured.

The insurer is entitled to raise new defences in court, as well as any that may have been advised in response letter(s) but, in turn, the insurer has the burden of proving "any [contractual] construction, appreciation or detail that is not clearly set out in the policy [relied on by the insurer]...and it is for the judge to consider whether the evidence submitted by the insured or beneficiary reasonably complies with what is provided

for in the policy, or if these are excessive requirements [by the insurer] that are unnecessary to prove [that the losses are covered under the policy] and their characteristics...”⁷

The decision by the Supreme Court in Bissa aims to place insureds and insurers on an equal procedural playing level. Parties to court proceedings in Mexico are unable to amend their particulars of claim once filed. Where an insured faces a situation where no reasons for denial of coverage have been provided by the insurer, the insured could be prejudiced were it required to prove that a loss is covered by the policy. Bear in mind that in Mexico, (a) the limitation period is 2 years for insurance claims, starting from the time of the occurrence of the loss; (b) all documentary evidence on which parties rely must be exhibited with the particulars of claim; and (c) that the period for filing a reply to the insurer’s defence is only 3 days.

Likewise in its Jurisprudencia 7/2011 (10a) the Supreme Court further held that insurers are not to be prejudiced in raising new defences at court which were not contained in pre-action correspondence, or by imperfections or omissions contained in such correspondence.

With contended indemnity claims, it is important for insurers to give careful consideration of such claims handling duties under the ICA during the pre-litigation stage in order to avoid incurring irrecoverable legal costs in protracted litigation. This is particularly the case in light of the judicial review procedure (“amparo”) which, despite recent amendments to its legislative framework, remains a widely used litigation tool to retry cases at appeal level. It is common for cases to go back and forth from the appeal court to the “amparo” courts, and sometimes more than one “amparo” can be run concurrently in the same case. The case of Bissa is a good example: it has not yet finished despite an “amparo” being decided by the Supreme Court in 2010.

CONDUSEF is empowered by statute to act as a conciliator in respect of claims that insureds may have against insurers, as long as their value is less than six million Mexican Investment Units (“UDIS”), approximately U.S. \$2.9 million, and the policyholder has legitimate grounds on which to base a complaint about the insurer’s dealings with the claim. However, in practice, CONDUSEF has been flexible with the application of this cap.

The advantage to policyholders of filing a complaint with CONDUSEF is that it suspends the 2 year limitation period for the commencement of court proceedings, until the compulsory conciliation process finalises. Local insurers do not give much importance to the conciliation in view that the maximum penalty for an insurer that chooses not to participate is approximately U.S. \$4 thousand.

Following an unsuccessful conciliation process CONDUSEF is empowered to issue a non-binding coverage determination (including aspects of quantum) if it considers that there is a valid claim.

An additional tool available to insurers in Mexico (which is rarely relied upon) concerns the insured’s duty under ICA to notify of material alterations to the insured risk during the course of the policy period.⁸ Insurers are entitled to cancel the policy as a result of material alterations to the insured risk, and the cancellation is effective 15 days after the insured is notified of this decision. If the insured fails to notify the insurer about the material alterations to the insured risk or if the alterations are the result of the insured’s own actions, the policy is deemed to be automatically cancelled unless the material alterations to the insured risk have no bearing on any subsequent losses suffered by the insured during the relevant policy period.

The new business rules that will regulate loss adjusters under LIBI from 2015 have not yet been published, but LIBI provides that any proposals to resolve indemnity claims made by loss adjusters will be binding on insurers, which is not currently the case under the LGISMS.



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Once LIBI becomes effective, insurers will have an obligation to pay agreed claims or judgment debts in one single tranche (cheque or bank transfer), to include any applicable penalty interest. If insurers do not comply and instead pay in instalments, penalty interest will continue to accrue and the instalments will be allocated against the debt in the following priority order: (a) penalty interest; (b) an amount to reflect any adverse inflation, which is adjusted with the conversion of pesos to UDIS;⁹ and (c) the indemnity owed for the agreed loss. LIBI also expedites the seizure and auctioning of insurers' assets for the purpose of enforcing a judgment or settlement agreement.

Penalty interest accrues on a daily basis from the time the 30 day period under Art. 71 of the ICA expires and the rate of interest is calculated by converting Mexican pesos into UDIS and the monthly UDIS interest rate published by the Bank of Mexico is multiplied by 1.25. Indemnities owed in a foreign currency are subject to the interest rate fixed by the Bank of Mexico for U.S. Dollars, also multiplied by 1.25.¹⁰

Reinsurers of Mexican interests can challenge a multimillion claim for penalty interest and legal costs on the basis that the underlying claim was not settled in a proper and businesslike manner by the cedant.

Whether or not all reinsurances of Mexican interests are subject to Mexican law and jurisdiction is a debatable topic; there are no specific statutes governing reinsurance contracts. The ICA arguably applies to those reinsurance contracts that are subject to Mexican law.

Whilst it has been suggested that a provision within bylaws for the registration in Mexico of foreign reinsurers, published in 1996 by SHCP, contains a requirement that reinsurance contracts must include a Mexican law and jurisdiction clause, the relevant provision referred to (Rule No. 5)¹¹ does not expressly say so. In any event, such a requirement would arguably be unconstitutional as it is not within the primary legislation, nor has the Mexican Congress empowered SHCP to determine this.¹²

Endnotes

- 1 *Marine insurance contracts are separately governed by the Navigation and Maritime Commerce Act 2006.*
- 2 *Amparo Directo 13/2010 - Transporte Especializado Bissa S.A. de C.V. v Seguros Comercial América S.A. de C.V. This criterion acquired the status of case law in 2011 with the issuance by the Supreme Court of Jurisprudence No. 7/2011 (10a). The Bissa case has been misreported in the London market as being a new legal presumption, when it is merely a restatement of insurance provisions codified since 1935.*
- 3 ICA Art. 59.
- 4 ICA Art. 66.
- 5 ICA Art. 71.
- 6 ICA Art. 69.
- 7 *Jurisprudence No. 7/2011 (10a).*
- 8 ICA Art. 52.
- 9 *The value of Mexican Investment Units, or UDIS, is published by the Bank of Mexico on a daily basis to take into account variations to the Retail Price Index.*
- 10 *The latest published interest rates for UDIS and USD are 4.25% and 3.78%, respectively.*
- 11 *Reglas Sobre el Registro General de Reaseguradoras Extranjeras para Tomar Reaseguro y Reafianzamiento del País of 1996, as amended.*
- 12 *Lloyd's published in 2003 Market Bulletin Y3099 stating that CNSF asked Lloyd's underwriters to "comply with the local jurisdiction requirement as required under [Rule No. 5]".*

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