Insurance and Reinsurance Claims in Latin America

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Introduction

The topic of insurance and reinsurance claims in Latin America is grandiosely wide. Not only does it embrace a large number of countries with differing legal and insurance regimes, but also a very large number of issues and topics.

I therefore have to be selective and reasonably brief. I am going to deal with a number of topics which have often given rise to concern at this end in the many cases that I have dealt with and am dealing with at the moment in the region. These topics are on the screen. Most points deal with the position locally as between insured and insurer but these will have an impact on the reinsurer. Others also deal directly with the position of the reinsurer locally. I am not proposing to deal in any detail with the general position of the reinsurer from an English law perspective, suffice it to say that in dealing with reinsurance claims in Latin America or elsewhere, such issues will often have to be considered.

Let’s look at the first one.

Law and Jurisdiction

Whichever type of claim you are dealing with, one invariably has to start with looking closely at the terms of cover up and down the line and the relevant law and jurisdiction applying to the particular claim.

In the very competitive environment as it is today, more and more local insureds and reinsureds are pressing for policies and contracts to be governed by local law, and may be also subject to local jurisdiction, and commercial reasons will often dictate that this be accepted.

There are a number of points which arise from this and indeed points of caution.
First, it is important to remember that many policies are designed to conform to English law, several clauses of which will not readily transfer to a local law system. For example, clauses containing warranties or conditions. Insurers here, may be used to breaches of warranties of whatever effect discharging them of all liability under the policy from the date of the breach. You may be surprised to find that this is not the effect of such a breach under some local laws. As an example, in Ecuador you will find that the breach only operates as a defence to the claim not to liability under the policy as a whole, and only if it is material to the loss; in Venezuela, you will find the same and only if the breach is material to the loss and to the risk; and so on.

There are many other examples where English designed clauses do not have the same effect under local law as you would expect in an English Court, or where different concepts apply generally e.g. where there is a recovery – and I’ll come on to this later - you may find that local law if prevailing doesn’t allow for top down reimbursement. In other words, in some jurisdictions reinsurers don’t necessarily get their full amount paid as priority but rather proportionately as if co-insurance. Watch out for Argentina here, for example.

Not only are local insureds and reinsureds pressing more and more for local law to prevail, but also, in some countries, and this has been the case for some time, insurers here are finding that clauses providing for English law are not being upheld when subjected to an analysis or construction under local law or in the local Courts. This can be particularly unsettling especially when the reinsurance is put in place before the insurance.

Thus, in Peru, I have had cases in the past where English law clauses as any other foreign law clause, are not upheld and rather, the claim is construed according to local law. In Mexico, the position also is such that if a local party, say the insured or reinsured, challenges a foreign or English law clause, then he may well be able to persuade the local Court instead to apply local law.

In Brazil, a relevant provision in the Civil Code says: “The contract shall be governed by the law of the Country in which the obligations were constituted. In theory, Brazilian Courts can apply foreign law clauses, but in practice often do not, either on the grounds that the obligations were not constituted there, or because of the alleged difficulties of applying a foreign law even with the help of foreign i.e English texts and witnesses. In one case I am currently dealing with, London Institute clauses with an English law clause were incorporated into a local policy. One of the points at issue is the construction of the words ‘loss or damage’ and whether this is restricted to physical loss or damage. Unfortunately the Brazilian insured is arguing strongly not only that English law is totally irrelevant even for interpretation purposes, but that the meaning of the equivalent word in Portuguese ‘danos’ encompasses consequential loss too.
There are some countries of course where English law clauses will usually prevail without difficulty. I would mention Argentina, Uruguay and Venezuela as examples.

Then we have the problem of managing locally to apply English law as the intended governing law, but not English jurisdiction - whether because this is not accepted by agreement in the policy or it is not accepted by the Courts even if in the policy. An example of the latter may be Brazil, where the Brazilian Civil Procedure Code stipulates that Brazilian Courts have jurisdiction when the fact or act which gave rise to the claim originated in Brazil. Further, Brazilian Courts have exclusive jurisdiction over certain matters, such as disputes relating to properties located in Brazil.

Another related problem that often arises in practice is where English policies or wordings are applied locally but in Spanish or Portuguese translated versions. Often the intended meaning will be lost or not quite precise enough and will give rise to difficulties of interpretation. We all know that even the finest of changes in translation or text, even the misplacing of a comma, can give rise to grounds for argument or challenge. I have already mentioned one example of a case I am dealing with in Brazil. In another case that I am dealing with in Colombia in respect of insurance of valuables and money against risk of armed robbery, the policy wording was an old translation of English clauses of 20 years ago. The strict position or intention under the English wording was that there should be no cover where robbery is committed by employees of the insured. However, the translation was very weak and left open a possible contrary interpretation.

Another thing to watch out for is where, in places like Brazil, a number of little known local insurance regulations may be applicable to the local policy and may have an effect on the question of liability under the local policy. This was the case e.g. in a hull aviation policy that I have recently been dealing with for London Reinsurers.

Finally, beware, in the case of liability policies in particular, that the basis of contractual and tortious (or extra-contractual) liabilities under local law is likely to be different from what you are accustomed to here. Civil Law notions of responsibility and measure of damage could give rise to a separate talk on its own. Let me just give you one example. In Chile, I am currently dealing with a claim under the UK Ship Repairers’ Liability clauses where a vessel became a CTL whilst under repair during a very heavy storm. The treatment under Chilean law of force majeure, Act of God, and the perils of the sea defences was rather different from that which would have applied under English law, with Chilean law holding that even though the storm was the proximate cause of loss, given that the repairers had delayed beyond the contractual repair period, they were liable. Furthermore, the claim was subject to a different determination on quantum than that which would have applied here.
The message thus is be careful. Try and avoid difficulties or surprises arising where confronting claims, by coming to terms beforehand with issues such as which law and jurisdiction will apply, and questions of coverage. This must be particularly so in the case of fronting arrangements where the intention is to have the wording as back to back as possible, but where in practice this may not be achieved, thus causing considerable problems for the Reinsurance.

Having made some general observations about terms of cover and law and jurisdiction, I want to tell you a little bit more about what the law actually is in some of the key countries.

One of the issues which often gives rise to major concern are the local rules relating to notification and acceptance or rejection of claims, a matter which is particularly relevant where control lies with the Reinsurer. Let me now deal with this and also the question of time bar.

Notification, acceptance and ‘rejection of’ claims and Time Bar

In Brazil, there is no specific time limit within which the insurer must notify the insured as to whether or not he is covered once a claim has been made. Nor, generally, is there any period of time within which the insurer must pay (save in the case of motor insurance). The time bar for the insured’s claim against the insurer is generally one year from the date the insured is aware of the occurrence of the risk covered, although this term is suspended pending adjustment of the claim. In the case of events or claims arising outside Brazil the time bar is 2 years. The same rules apply to reinsurance claims. Interest begins to accrue as from the date the insurer is summoned in legal proceedings by the insured.

Note that in Argentina according to the provisions of the Insurance Law, the insured has 3 days to notify the insurer of the event which will give rise to the claim. Once the insurer has received all the necessary information required to verify the claim, he must notify the insured in writing within 30 days as to whether or not the claim is covered. Insurers and their reinsurers should be aware that if he does not, the insurer is deemed to have accepted the claim. Any attempt at an agreement to exempt the insurer for delay is null and void. When the insurer has estimated the damage and recognised the right of the insured, the insured can claim a payment on account after the lapse of one month from the notification of the claim. If the insurer does not pay within 15 days following acceptance of the claim and agreement on the amount of the claim, the insured can sue. There are no additional sanctions levied for late payment. The insured must sue within one year, and this is not extendable. The time bar for reinsurance claims is not entirely clear. There have been decisions in the courts applying one year and five years.
The position in **Venezuela** is the following. The period in which the insured must notify the insurer of the claim following its occurrence depends on the actual policy provisions (in the absence of which, a short “reasonable” period may apply). Once the insurer has all the papers in support of the claim (this need not include an adjustment), he has to pay within 30 days or reject the claim. If he does not, there is no admission of liability, but the insurer is sanctioned with a small fine. Consequently most insurers do pay or formally reject within this period. The time bar for proceedings against an insurer is generally three years in the absence of anything else in the policy, although in the case of marine insurance it may be five years.

**Colombia** is interesting. The matter is governed by Article 1080 of the Commercial Code, which has just been modified by Law 510 of 1999. Essentially, the insurer is obliged to pay the claim within one month following the date on which the insured establishes his right to claim before the insurer. The insured is required to show the occurrence of the claim and the quantum of the loss. The onus is then on the insurer to demonstrate the facts or circumstances which may exclude his responsibility. If he does not so demonstrate, then upon the expiry of the one month period, there are two severe consequences of which insurers (and their reinsurers) ought to be aware; firstly, the insurer will be liable for so-called punitive delay interest on the principal sum, which can be in excess of 50% pa. Secondly, in the absence of a written communication to the insured rejecting the claim with grounds within the one month period, the insured will be entitled to invoke a ‘fast track’ procedural route to obtain judgment, and obtain security from the insurer. Time bar is 2 years or 5 years.

Before July 1998, Colombian law considered the casualty in the terms of occurrence, which was very inconvenient for insurers because the assured could claim from his insurer for something which had happened 20 years ago before the policy. In 1998 this criteria was changed and now the casualty is considered to be the claim itself in order to limit the insurer’s exposure i.e. policies are on a claims made basis.

In **Mexico** time bar for insurance and reinsurance claims is 2 years.

In **Chile**, the insured has to notify the insurer within 3 days of the event giving rise to the claim. He then has 2 years to bring suit.

In **Peru**, there are complicated provisions. Again, the insurer must pay within 30 days following “consent” to a claim. This is defined to mean when the insurance company approves or has not rejected the adjustment duly signed by the insured in a period not less than 10 days following its signature. If the insurer is not in agreement with the adjustment he can request a new adjustment in a period not greater than 30 days, in order to agree or reject the claim, determine a new amount or propose arbitration. For those cases where there is no adjustment agreement, the claim will be deemed “agreed” when the insurer has not pronounced on the amount claimed in a period not exceeding 30 days from the date all documentation in support of the claim is available. The insurer can request of the Superintendent of Insurance an additional period not exceeding 90 days. Note that in the case of delay, punitive delay interest is payable.
These are only a sample of some of the notification provisions that apply under local laws and which can impact seriously on insurer and reinsurer alike.

The next issue which gives rise to considerable concern at this end concerns the extent to which insurers (or even reinsurers) can be involved directly in local proceedings.

Involvement in local proceedings

The first question typically concerns whether when a third party has sued an insured, the insured can bring the insurer into the same proceedings as a third party, and also whether an insurer can bring in the reinsurer. We know these as ‘third party proceedings’. In Latin America this possibility is often referred to as ‘cita en garantia’ or ‘llamamiento en garantia’. The second question is whether (in liability cases) a non-insured claimant can sue the local insurer (and/or even reinsurer) direct in addition to the insured; and thirdly whether an insured can sue a reinsurer direct where for example there is a cut-through clause in the reinsurance.

The position depends largely on the local law and procedures, and varies from country to country. Without being exhaustive on all these points, the general position in the key countries is as follows.

In Brazil, a third party who has a claim against an insured may only sue the insurer direct in cases of compulsory insurance, such as motor and employer’s liability. On the other hand, The Local Code of Civil Procedure allows for the possibility of “third party” proceedings. In Brazil, this is called “denunciacao da lide”. It is by means of this procedure that an insured may and often does bring his insurer in to join proceedings against him, effectively as a co-defendant. Once the insurer has been brought in in this way, he must as things stand at the moment bring in the IRB as reinsurer. Equally, an insured suing its insurer under a property policy is entitled to sue IRB as the reinsurer direct, whether or not there is a “cut through” clause.

Where there is an arbitration clause in the relevant contract, the Brazilian Courts will decline jurisdiction, unless the Brazilian Consumer Code is considered to apply. This provides that Arbitration clauses in consumer contracts are null and void, although this is unlikely to be the case in many insurance policy scenarios. Up to now, foreign jurisdiction (or, for that matter, foreign arbitration) clauses in local Brazilian policies have been rare, if not non-existent, due to the IRB monopoly. My experience is that the Brazilian Courts may not automatically decline jurisdiction where there is a foreign jurisdiction or arbitration clause if the matters in dispute relate solely to Brazil.
All of this will assume more significance when the IRB eventually loses its monopoly. In principle, as things stand at the moment where for example a London reinsurer is the reinsurer (without IRB's involvement), it may be possible for the London i.e. foreign reinsurer to be brought in as a third party in the same way as the IRB today. I doubt that it will remain possible to sue the reinsurer direct. The existence of a foreign arbitration or jurisdiction clause in the reinsurance will certainly assist but as I have said not guarantee the foreign reinsurer in persuading the Brazilian Courts not to allow it to be brought into the proceedings in this way. A foreign law clause on its own would almost certainly not be sufficient protection.

It will be interesting to see how things develop post-IRB loss of monopoly, in terms of the increased extent to which foreign insurers and reinsurers may unwittingly become entangled in Brazilian proceedings.

In Argentina, the matter is governed by Sections 90-96 of the Procedural Code, and in Civil Liability Insurance contracts by Section 118 of the Insurance Act No. 17.418. Generally speaking, the insured is entitled to bring the insurer directly into any proceedings against him as a third party. In Argentina, this is called “citacion en garantia”. The law provides that any judgment will be enforceable against the insurer up to the limits of the insurance contract. Equally, the insurer can in theory bring the reinsurer into the same proceedings as a third party. This is called “citacion de terceros”, and has often been used in the past to bring in INDER. However, foreign jurisdiction and arbitration clauses are usually recognised in Argentina. Secondly, the injured third party generally has no direct right of action against the insurer, and nor does the insured have any direct right of action against a reinsurer. Thirdly, the insured cannot of course normally sue the reinsurer direct. What about cut-through clauses? Note that there have been cases in Argentina where these have been enforced. However, they will invariably be challenged where the insolvency of the insurer is involved and/or where there is a foreign jurisdiction clause in the reinsurance.

In Venezuela, there is no possibility of a third party suing an insurer direct other than in road transit cases. There is once again however a right for an insured to bring in an insurer by way of third party proceedings, and significantly in turn for an insurer to bring in a reinsurer. In one case in which I was recently involved, this took effect notwithstanding a foreign law and jurisdiction clause in the reinsurance contract, although normally speaking in Venezuela foreign law and jurisdiction clauses prevail.

In Colombia, briefly, there exist the concepts of “Llamamiento en garantia” and “Litiscosncordio necesario”. According to the first of these, a defendant has the right to bring in as a third party in the same proceedings any party against whom he has a claim, and this includes therefore the possibility of an insured bringing in an insurer and an insurer bringing in a reinsurer. My experience where there is a foreign jurisdiction clause is that this may not be upheld but foreign Arbitration clauses are more likely to be so. Note, very importantly, that Art.1133 of the Commercial Code provides for a direct right of action against an insurer by a third party. On the other hand, Art.1135 makes it clear that actions by an insured against a reinsurer are not possible, and so cut-through clauses are likely to have no effect.
In **Mexico**, there is no direct right of action by a non-insured against an insurer (nor on the part of the insured, against the reinsurer), but if an insurer appears in the action as a third party which is possible, and if liability is established against the insured, there is effectively a presumption of liability on the insurer. Where there are foreign jurisdiction or arbitration clauses, local proceedings may be challenged by the defendant insurer.

In **Chile**, it is interesting to note that the Chilean Commercial Code, which refers to liability insurance in marine matters, contemplates the possibility of direct action against liability insurers. Article 1.201 says that “only in the cases in which a liability insurer issues a guarantee to cover the liability of the insured can he be sued directly by the third party and in whose favour the said guarantee has been issued”. This rule is sometimes interpreted as an exception to the general rule that third parties do not have a direct action against a liability insurer.

In **Peru**, as in Colombia, unlike in most other countries, note that there is a general direct right of action against the insurer in civil liability cases. The insurer is “jointly liable” with the insured, and this gives rise in practice to some very interesting questions.

This then is just a brief overview of the situation and naturally does not cover all of the scenarios in any detail. Particularly since the insurer is often a local company, the effect of the foreign law or jurisdiction clause in a contract often does not need to be considered in the situations as discussed. But this is not necessarily the case where there may be an attempt to bring foreign insurers or even reinsurers into local proceedings.

The next topic I shall deal with is:

**Obligations of disclosure and good faith**

Often these give rise to defences under the reinsurance, whatever the position locally as between insured and insurer. What I want to cover here however is the local position i.e. specifically defences to insurers and reinsurers under local law based on breach of the duty of good faith e.g. non-disclosure or misrepresentation. We all know or should know what the relevant tests under English law are. But if your reinsureds or even yourselves as insurers or reinsurers are subject to local law, you may find that there is no defence at all, or more likely that the test for the defence applying, or the time period in which the insurers or reinsurer has to act and/or the remedy are all different to that which you have been accustomed here.
So what is the position under local law?

In Brazil, good faith is presumed at the moment the contract is entered into and throughout the period of the contract. In other words it is technically upon the insurer to prove otherwise. The test is a subjective test. The legal consequence of incorrect representations is that the claim fails, but the policy continues.

In Argentina, again the duty of good faith exists at the moment of the negotiations for and the execution of the insurance contract, and continues throughout the contractual relationship, including with regard to the handling of losses and presentation of claims. Again, it is presumed, such that the insurer has the onus of proving otherwise. In fact, he has to show intention or gross fault (‘dolo’ or ‘culpa grave’) in order to give rise to a defence.

In addition in Argentina there is a specific rule under art 5 of the Law of Insurance which provides that any false declaration or omission even if made in good faith, which in the opinion of experts would not have led to a contract or would have led to modified terms, makes the contract (not just the claim as in Brazil) null and void. There are also a number of provisions dealing with different types of ‘omission’.

In Chile, the matter is dealt with in Arts. 556 & 1176 of the Commercial Code, which set out the duty on the insured. The duty continues throughout the contract and, again, even during the presentation of claims. The consequence of a breach in Chile, as in Argentina, but unlike in Brazil, is the rescission of the contract. The insurer is entitled to retain or call for the premium.

In Mexico, there is a legal presumption of good faith. Articles 8 and 47 of the Law of Insurance Contract provide for the actual duty of disclosure upon the insured and enable the insurer to avoid the contract in the case of breach proven by him, even if the material facts did not have an influence in relation to the occurrence of the casualty. Articles 52 and 53 deal with the duties upon the insured to advise of change of circumstances in relation to the risk. Note that the insurer has the right to avoid the contract in cases of so-called essential of aggravation of risk if the assured does not notify these within 24hours. In both cases the insurers has 15 days to avoid the contract i.e. 15 days following the date he became aware of the omission or misrepresentation or 15 days after the 24 hour period has elapsed in the case of aggravation of risk. This can give rise to considerable difficulties in practice.

In Venezuela, there is a presumption of good faith. Breach gives rise to the claim being denied, not the rescission of the policy.

In Colombia, the matter is dealt with in Arts.1058 and 1060 of the Commercial Code. The sanction is nullity of the policy.
Other Latin countries just provide a remedy based on an adjustment of the premium. This is the case I believe in Peru.

I now turn to:

**Currency of loss and treatment of interest, monetary correction, costs and legal fees**

Under Brazilian law all contracts made in Brazil must be denominated in R$ unless one of the contracting parties is domiciled abroad. Likewise claims in the Brazilian courts must be made in R$, unless the contract is validly stated to be in another currency.

Apart from interest being applied to claims, Brazil also applies monetary correction. This is largely designed to deal with the effects of devaluation and the rate is usually set by the judicial authorities but is usually more akin to the inflation rate. The net effect is that if devaluation is greater than inflation as we saw earlier this year, claims in local currency quickly lose their value in hard currency terms.

Costs and legal fees in Brazil. Court fees are usually paid in the first instance by the Plaintiff, but are recoverable. Legal fees are interesting. The losing party has to pay a so-called ‘sucumbencia’ to the winning party. Strictly speaking, this goes to the winning party’s lawyer. The amount may be between 5-20% of the amount of the claim. Who wouldn’t be a lawyer in Brazil!

In Argentina, watch out in liability claims for Art.110 of the Law of Insurance which obliges the insurer to bear the costs and expenses, both judicial and non-judicial of the insured in defending the claim, even if the claim is properly rejected. There is a similar rule in Mexico and other Countries. On the other hand note that in Argentina the insurer can pay into Court the amount corresponding to him including costs and fees, leaving the insured to defend the case and excepting himself from further liability.

In Mexico, as in Chile, claims can be in local or hard currency. There is an inflationary correction when the claim is in local currency, based on UDI’s (in Mexico) or UDF’s (in Chile).

In Colombia and Venezuela, policies can be contracted in local or foreign currency, but payment has to be in local currency. Insofar as interest is concerned, the very recent law No. 510 of 1999 in Colombia has modified Art. 1080 of the Commercial Code, as I have said, such that the insurer has to pay 1½ times the current bank interest rate if he delays beyond the 30 day period he has to respond to and pay the claim.
In Venezuela, as elsewhere, costs follow the event, but here they can be fixed as high as 30% of the amount of the claim.

As to whether reinsurers bear all the local costs of defending, even where successful, this depends partly on what the policy says, and whether there is control or co-operation, but there has also been recent UK case law on this.

These then are just some of the highlights that I have chosen to mention here. There are a number of other rules I have not mentioned in all the relevant countries.

My next topic is:

Subrogation and Time Limits

Subrogation is of course possible in Brazil as elsewhere, although claims have not been commonly pursued. When they are it will be the insurer in whose name proceedings have to be brought.

Time bar generally for contractual claims in Brazil is 10 years although a contractual provision can of course provide for a lesser period.

There are some exceptions to these rules. Remember for example that I said insurance and reinsurance claims are subject to a 1 year time bar and two years if the event occurred outside Brazil. Time runs from the moment of knowledge of the loss.

In Argentina, subrogation is governed by Art. 80 of the Law of Insurance and provides effectively that subrogated recovery claims will be brought in the name of the insurer. In one case I have been dealing with we had seriously to consider an assignment to Reinsurers, because of the insolvency of the insurer and notwithstanding that this meant the provision of counter-security in view of there then being a foreign plaintiff. Where there is an insured and uninsured element to recover, subject to anything in the policy, in Argentina any funds recovered will be applied proportionally, not top down. Time bar is generally 10 years for contractual claims and 2 years for extra-contractual.

In Chile, subrogation is governed by Art. 553 of the Commercial Code and once again recovery actions will be brought in the name of the insurer.
In Mexico, time bar is 2 years for extra-contractual claims and 10 years for contractual claims in the absence of any other specific provision. Again, subrogated recovery actions are brought in the name of the insurer and unlike elsewhere Powers of Attorney are not required.

In Colombia, time bar is 20 years for extra-contractual claims and also 20 years for contractual claims in the absence of anything in the contract. Recovery actions are in the name of the insurer. Entitlement to funds is proportional in the absence of any contracted stipulation where there is an uninsured element.

Finally, in Venezuela the contractual time bar period is 10 years for personal actions and 20 years for property actions and the extra-contractual time bar period is 10 years.

My final topic is

Y2K

I wish to mention briefly the position relating to Y2K in the key countries, since it is so topical.

There has been sufficient airing of the ‘millennium bug’ (Y2K issue) such that it is not necessary for me to deal with the technical background of the problem. What I want to do however is to highlight a few points relating to the insurance and legal position in a few Latin countries, insofar as they affect local insurance companies, particularly in view of the concern amongst reinsurers as to what the local law is and whether exclusion clauses will be enforced locally.

BRAZIL

The Brazilian insurance authority, SUSEP (the Superintendence of Private Insurance) together with the National Federation of Insurers (FENASEG) has issued a model exclusion clause for Year 2000 risks which must now be included in all insurance policies initiated or renewed as of September 1st, 1998. This model clause was authorised through Circular No.55 published on 5th August, 1998, and implemented by the IRB.
The intention behind the clause is to exclude loss resulting directly or indirectly from date recognition failure, including any resulting damages whether relating to hardware or software, and relating to acts of the insured or any third party. The intention in other words is to provide an absolute exclusion.

Although the clause in principle will apply generally, it will be possible for insureds to obtain restricted Y2K coverage from Brazilian insurers on a case-by-case basis, subject to separate, individually tailored clauses. However, of concern to local insurers is the fact that, pursuant to the same SUSEP directive, the clause may not be included in policies relating to life insurance, personal accident insurance and health insurance.

The confidence of the market in the effectiveness of the clause cannot at this stage be said to be total. Apart from anything else, there are as yet no legal (or factual) precedents, and predicting how local individual judges will decide the issues is particularly difficult.

One problem that I can identify relates to the burden of proof. Under Brazilian law, it is the insurer not the insured who has the obligation to prove that the loss comes within the terms of the exclusion clause. It will of course not always be straightforward to prove that a loss was caused by computer date recognition failure, given the potential remoteness of its effects. I believe that the Brazilian Courts are likely to sympathise with the insured, against insurers, in some cases.

Although this is more a general point, Brazilian insurers are anxious as to the likely high costs which may be faced in Y2K claims, which may require sophisticated expert evidence, and where expert examination in itself may entail the destruction (or the temporary removal from service) of expensive machinery etc.

MEXICO

The Mexican National Commission for Insurance has established that insurers will not be allowed to argue their own Y2K failure as an excuse for not complying with their obligations towards their assureds. Separately, and more significantly, the Commission has issued a document in which it has stated that (in its view) insurance companies will not be liable to indemnify for losses, damages or expenses derived from the inability of equipment to recognise dates of the Gregorian calendar. On the other hand this ‘stance’ is not compulsory and Mexican insurers may cover Year 2000 related risks if they wish to, but they must comply with some rules established by the Commission and present their Year 2000 model clauses to the Commission.
As elsewhere the policies may give rise to disputes, notwithstanding the stance of the Commission. What about their interpretation? For that, we need to turn to the general law. Firstly the Law of the Insurance Contract expressly establishes that exclusions, if used, must be clearly expressed. Further the Mexican Courts have established that risk exclusion clauses must be interpreted in a restrictive manner.

Another way in which an insured may dispute any exclusion clause which may be used in Mexico is by arguing that the clause is abusive. In the context of the Mexican legal system, the concept of abuse in contracts is a very well developed one: to abuse of the counterparty of a contract, one must take advantage of his ignorance, misery or lack of experience and there must be a notorious lack of proportion in the obligations and rights of the parties. Some feel that this may give rise to disputes where exclusion clauses exist, and despite the Commissioner’s ‘stance’.

The Mexican law of insurance does recognise the concept of fortuity, and so this may also give rise to arguments in any Y2K related disputes.

Another argument open to an insurer (or reinsurer) were it necessary, would be to argue hidden defect of the object of the insurance. In this case, the insurer would not be liable to indemnify under art. 98 of the Law on Insurance Contract. The problem would be to demonstrate whether a piece of equipment which was checked and updated according to the current Y2K official standards can be considered to have a hidden fault.

ARGENTINA

There has been much controversial debate in Argentina over whether to exclude Y2K risks or not, because for some, the fact itself of excluding a risk could be interpreted as the recognition of its existence. In the end the stated position of Argentinean insurers in general is that they will not regard the Year 2000 Problem as a fortuitous event at all, but in any event risks are being expressly excluded in their local policies. There is no standard or recognised ‘model’ clause for all insurers. The clauses being used are in fact similar to that used in Brazil mentioned earlier.

Probably the only way for the insured to argue the invalidity of such a clause (as opposed to its lack of application) would be to argue that consent was not freely given, or alternatively the bad faith of the other party. On the other hand, to argue an exclusion clause as being abusive will be very hard due to the general market attitude and because the test to prove abuse in a private contract is very high.

The same question of fortuity will also arise in Argentina as in Mexico and elsewhere; it will be difficult for a company to argue that it as not aware of the Year 2000 problem.
Failing enforcement of an exclusion clause for whatever reason, an insurer as in Mexico may still be able to argue hidden defect of the object insured. Further, if the damage is aggravated by the defect, the sum paid to the insured will not include the cost of this aggravation.

Note in this context that as in certain other Latin jurisdictions, the insurer in Argentina is freed from its obligations if the casualty was caused by gross fault of the assured, but an agreement to the contrary is also possible. (Art. 70 of the Law of Insurance).

**CHILE**

Chilean insurers have announced that they are not prepared to grant cover for risks related to Y2K. Further, in September, 1998, the Chilean Superintendent of Insurance registered the Year 2000 General Use Clause under code CUG 98 031. This clause excludes all coverage of risks, damage and claims caused directly or indirectly by the Y2K problem. The clause mentions that unless otherwise agreed, the policy will not cover any kind of loss, damages or liabilities which, directly or indirectly are caused or arise by the inability of any electronic equipment, which may be or may not be property of the assured occurring before, during or after the year 2000. This clause too intends to be a total exclusion clause.

This clause is not compulsory. However most Chilean insurers have included it in their policies, following agreement with the local Association of Insurance Companies. This clause is not applicable in the case of life insurance.

As long as the contract is legal and in force, the clause is enforceable. The only exceptions for this principle, as in other jurisdictions, are the lack of free consent, bad faith, that the clause is not part of the contract or that the contract is not in force.

If indemnity is refused, the only real solution for the insured would be to prove that the casualty was directly or indirectly caused by something different from the Year 2000 problem. Note the onus of proof is on him, not the insurer, unlike in Brazil.

In Chile the concepts of “fortuitous case’ and “force majeure” are widely recognised and often used. They have the same fundamental element of being an event which cannot be resisted and which overcomes all efforts to prevent it or fight it and their definition is set forth in art. 45 of the Civil Code. By definition they also have to be an event which cannot be predicted. Lack of fortuity will give rise to a defence; whether force majeure gives rise to an additional defence will depend upon whether it is in the policy as an exclusion.
COLOMBIA

Colombian insurers have stated they are not willing to cover Y2K related claims. There is no model exclusion clause in Colombia, but they have included exclusion clauses in their policies, save in life policies (where they do not consider to be unduly exposed in this front). The Superintendent of Insurance did not play a part in the drafting of these clauses.

As regards interpretation, under Colombian law, ambiguous clauses are to be interpreted in favour of the insured. This is a common principle of insurance law in Latin American legal systems responding to the idea that the insured is the weaker party to the contract.

A further possible way for an insured to challenge the enforceability of an exclusion clause under the Colombian law regime would be to argue ‘abuse’, as in Mexico, although here the test is stricter.

A weapon for the Colombian insurer, were it needed, as elsewhere is the concept of fortuity. The definition of a ‘fortuitous case’ is set out in the Civil Code. It must be an event which it is not possible to resist and the occurrence of which is uncertain. In this sense, it is generally stated in Colombia as elsewhere that a Y2K related event should not be covered, for it has been known for a long time and measures have taken place to prepare for it. There is also a rule under Colombian law which establishes that a foreseeable event cannot be insured. The question of course in Colombia as elsewhere will be whether the particular event in question was possible to foresee.

Finally,

VENEZUELA

On the 17th December, 1998 the Superintendent of Insurance through the Ministry of Finance published a Resolution No. 2920 in the Official Gazette providing a model exclusion clause to be used for Y2K related risks, called “Exclusion Clause for Date Recognition”.

The Superintendent ordered the general and uniform use of this exclusion clause by insurers authorised to carry out business in Venezuela. This clause must thus be included in all policies which are signed and renewed from 17th December, 1998 onwards.

Insurance companies can, however, grant cover for these risks if they are willing to do so but they must seek authorisation from the Superintendency for the particular policy.
The model exclusion clause is very broad. It states that the policy will not cover a claim for damages of any nature, caused directly or indirectly, totally or partially by the Year 2000 Problem, as well as by any attempt, change, substitution or modification of equipment.

The enforcement and interpretation of this clause is subject to the general rules of contract law. Under art. 1159 of the Civil Code, contracts have the same force as the law between the parties and can only be revoked by mutual consent or by causes authorised by the law. The invalidation of the contract or of one of its clauses can only be alleged i.e it is illegal, impossible to comply with or when consent was not freely given.

Under the Venezuelan legal system the test for fortuity is the same as in other jurisdictions, namely that the event has to be unforeseeable.

In Venezuela, as in most other Latin jurisdictions, there has been relatively little legal debate and analysis over the enforceability of these exclusion clauses, but I hope to have given you some of the arguments and concepts that may be invoked by insureds and insurers alike.

Well, with these comments, I'm now finished. Does anyone have any questions?

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