

Insurance and reinsurance in Brazil: overview

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Law stated as at 01 Jan 2021 • Brazil

A Q&A guide to insurance and reinsurance law in Brazil.

The Q&A gives a high-level overview of the market trends and regulatory framework in the insurance and reinsurance market; the definitions for a contract of insurance and a contract of reinsurance; the regulation of insurance and reinsurance contracts; the forms of corporate organisation an insurer can take; and the regulation of insurers and reinsurers, including regulation of the transfer of risk. It also covers: operating restrictions for insurance and reinsurance entities; reinsurance monitoring and disclosure requirements; content requirements for policies and implied terms; insurance and reinsurance claims; remedies; insolvency of insurance and reinsurance providers; taxation; dispute resolution; and proposals for reform.

Market trends and regulatory framework

Regulation of insurance and reinsurance contracts

Corporate structure

Regulation of insurers and reinsurers

Operating restrictions

Authorisation or licensing

Restrictions on ownership or control

Ongoing requirements for the authorised or licensed entity

Penalties for non-compliance with legal and regulatory requirements

Restrictions on persons to whom services can be marketed or sold

Reinsurance monitoring and disclosure requirements

Insurance and reinsurance policies

Content requirements and commonly found clauses

Implied terms

Customer protections

Standard policies or terms

Insurance and reinsurance policy claims

Establishing an insurance claim

Third party insurance claims

Time limits

Enforcement

Remedies

Punitive damage claims

Insolvency of insurance and reinsurance providers

Taxation of insurance and reinsurance providers

Insurance and reinsurance dispute resolution

Reform

Contributor profiles

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Market trends and regulatory framework

1. What were the main trends in the insurance and reinsurance markets over the last 12 months?

In March 2019, Solange Vieira took office as Superintendent of the Superintendence of Private Insurance (*Superintendência de Seguros Privados*) (SUSEP), the body responsible for the control and supervision of the insurance market, open private pension plans, capitalisation and reinsurance in Brazil. Ms Vieira, the first woman to hold this position, supports a liberal agenda (aligned with that of the current government) and has been adopting measures to modernise the Brazilian insurance industry. Her actions have been guided by the need to introduce flexibility in the regulatory framework and to promote competition among insurers, in order to:

- Reduce insurance prices.
- Increase the number of consumers in the Brazilian market.

Two examples that illustrate this effort are:

- SUSEP Circular No. 592 of 26 July 2019 relating to insurance policies with reduced contract term and/or intermittent periods. This Circular allows insurance policies to be based on months, days, minutes, workdays, trips or trip legs or even based on other criteria agreed on by contract, as well as pay-as-you-go insurance. There has been an

increase in the number of contracts that are priced based on the effective risk profile of the insured, especially in the field of automobile insurance.

- SUSEP Circular No. 598 of 19 March 2020, which creates a 36-month experimental regulatory environment (regulatory sandbox) for insurers meeting certain criteria that develop innovative projects (for example, using new technologies and InsurTech). Only a few small-scale property risks, such as insurance policies for cars, bicycles and mobile phones, will initially be able to benefit from this regulatory sandbox.

The approval of Brazil's Economic Freedom Law (Law 13,874/2019) will also have an impact on the development of the insurance market over the next few years. In addition to the repeal of the principle of reciprocity (which allows foreign insurance companies to operate in Brazil if Brazilian entities benefit from the same conditions in the relevant country), this Law is expected to offer more freedom to insurers in defining their insurance policies, which currently require prior approval of the SUSEP before being sold.

Until the start of the 2019 novel coronavirus disease (COVID-19) pandemic, the Brazilian insurance market had been enjoying continuous and solid expansion (with a 12.1% growth in 2019). The pandemic will have a considerable impact on the Brazilian insurance market, although it is too early to predict its exact effects.

2. What is the regulatory framework for insurance/reinsurance activities?

Regulatory framework

The primary source of insurance law is the Civil Code (Federal Law 10,402/2002). Chapter XV of the Code is dedicated to insurance and comprises of the following provisions:

- General provisions (Section I, Articles 757 to 777).
- Property insurance (Section II, articles 778 to 788).
- Personal insurance (Section III, articles 789 to 802).

In addition to the Civil Code, Decree-Law 73/1966 regulates the system of private insurance. Complementary Law 126, enacted in 2007, governs reinsurance, and opened the market to international reinsurers, ending IRB's monopoly.

Marine insurance is regulated by Articles 666 to 730 of the Commercial Code (Federal Law 556/1850). The Commercial Code was partially revoked when the Civil Code was enacted, but the provisions on maritime trade remain in force.

Depending on the insured party, the Consumer Act (Federal Law 8,078/1990) may apply. The Act grants broader rights to consumers (such as reversal of the burden of proof and a longer limitation period to bring claims) in an attempt to rebalance the power relationship between consumers and service providers.

Brazil has a civil law system. Under the Civil Procedural Code, precedents of the Supreme Court and superior courts can be binding in some circumstances. However, as a rule, court precedents are not binding, but are considered an important source of interpretation of the law and an argument of authority.

Regulatory bodies

Insurance and reinsurance in Brazil are regulated by the National Council for Private Insurance (CNSP), which is responsible for:

- Establishing the guidelines and rules of the private insurance policy.
- Regulating the establishment, organisation, operation and supervision of persons that carry out insurance and reinsurance activities.
- Establishing the general guidelines applicable to insurance contracts, reinsurance and coinsurance transactions, among others.

The SUSEP, a quasi-governmental entity controlled by the Ministry of Industry and Commerce, with public legal personality as well as administrative and financial autonomy, is responsible for implementing the policies issued by the CNSP. The SUSEP supervises the creation, organisation, operation and transactions of insurance companies. SUSEP can also impose administrative sanctions.

The CNSP and SUSEP regulate the insurance and reinsurance market through resolutions and circulars, respectively.

Regulation of insurance and reinsurance contracts

3. What is a contract of insurance for the purposes of the law and regulation? How does it differ from a contract of reinsurance?

Under Article 757 of the Civil Code, an insurance contract is a contract under which "the insurer undertakes, against payment of a premium, to guarantee a legitimate interest of the insured regarding a person or thing against predetermined risks". The subject matter of insurance contracts is not the thing or person, but rather the pecuniary interest of the insured over the person or thing described in the policy. The contract transfers the risk from the insured to the insurer.

The rules on reinsurance contracts are set out in Complementary Law 126/2007 and CNSP Resolutions CNSP 168, 225, 232, 241 and 363, among others. The subject matter of reinsurance contracts is the transfer of risk from the insurer to the reinsurer.

4. Are all contracts of insurance/reinsurance regulated?

All insurance and reinsurance contracts are regulated, although insurance contracts are subject to more stringent regulations. This is especially true in the business-to-consumer context, as consumers are considered to be the weaker party and therefore in need of special protection, including by the:

- Consumer Defence Code (CDC).
- SUSEP, through the issuance of rules, oversight and resolution of disputes in the administrative sphere.

The regulation of reinsurance contracts is less stringent, because the parties involved are both companies, which are assumed to be on a relatively equal footing when entering into contracts. The parties are considered to have the maturity and expertise to look after their own interests.

Corporate structure

5. What form of corporate organisation can insurers take?

Insurance companies must be organised as stock corporations (*sociedades anonimas*) (Article 24, Decree-Law 73/1966; Article 25, Law 4,595/1964).

Regulation of insurers and reinsurers

6. Are all insurers and reinsurers regulated? Are they all regulated in the same way?

Insurers and reinsurers are both subject to regulation, but to differing degrees, with insurers coming under stronger regulation.

7. Can insurers and reinsurers carry on non-insurance business? Are there any restrictions on their business activities?

Insurers cannot engage in any other area of commerce or industry (*Article 73, Decree-Law 73/1966*). They must operate within the scope of their business purpose, as defined in their bye-laws, which must be approved in advance by the SUSEP. Reinsurers that are authorised to operate in Brazil can only engage in reinsurance and retrocession activities in the fields of business authorised by SUSEP.

8. Are there any statutory limits or other restrictions on, or requirements relating to, the transfer of risk by insurance or reinsurance companies?

Reinsurers registered in Brazil must comply with the following requirements:

- The cedant company must contract with local reinsurance companies for least 15% of each reinsurance cession, in treaty and facultative reinsurance agreements. The remainder (85%) can be subscribed by foreign-admitted or occasional reinsurers (*CNSP Resolution No. 325 of 2015*).
- The cedant company must not cede more than 10% of the aggregate value of the premiums ceded in reinsurance to occasional reinsurers, considering all their operations in each calendar year.
- The cedant company must not cede more than 75% of the premium corresponding to each contracted coverage to related companies or companies of the same economic group headquartered abroad. Related companies are those directly or indirectly related to each other due to:
 - ownership of 10% or more of the corporate capital;
 - actual corporate control; or
 - operations under the same trade name.

An insurer or reinsurer must inform the SUSEP every time it concentrates, in one single admitted or occasional reinsurer, its (re)insurance operations above certain percentages of assigned premium in relation to shareholders' equity and recoverable losses in relation to shareholders' equity. The percentages vary depending on the risk classification of the reinsurers. There are exceptions to these rules for certain lines of insurance, including for surety bonds, export credit insurance, rural insurance and domestic credit insurance.

Operating restrictions

Authorisation or licensing

9. Does the entity or person have to be authorised or licensed?

Insurance/reinsurance providers

Insurers and reinsurers must obtain prior authorisation from the SUSEP to operate in Brazil. They must also obtain the same local business permits as required from all companies.

To obtain authorisation and renewal of authorisation, insurance and reinsurance companies must satisfy the following requirements:

- Sufficient capitalisation as required for the activity.
- Formulation of a business plan.
- Indication of the controlling group.
- Compliance with the requirements on intra-group transactions.
- Adoption of internal controls.
- Show that there are no issues that can affect the reputation of the controllers and holders of qualified participations.
- Show that the company's investments meet the standards of safety, profitability, solvency and liquidity.
- Send monthly reports to the SUSEP, through an online programme called FIP.
- Meet the deadlines to apply for renewal of authorisation.
- Payment of the annual oversight fee to the SUSEP.

Under Complementary Law 126/2007, reinsurance and retrocession operations can be carried out by local, admitted and eventual reinsurers. An admitted or eventual reinsurer must meet the following criteria:

- Be constituted according to the laws of its country of origin to underwrite local and international reinsurance in the classes in which it intends to operate in Brazil, and have been operating in its country of origin for more than five years.
- Have an economic and financial capacity above the minimum established by the SUSEP.
- Have a solvency evaluation by a rating agency recognised by the SUSEP equal to or higher than the minimum established by the SUSEP.
- Appoint an attorney-in-fact, domiciled in Brazil, with special powers to receive summons, subpoenas, notifications and other communications.

The following additional requirements apply to admitted reinsurers:

- Maintenance of a foreign currency account linked to the SUSEP, with an amount set by the SUSEP to guarantee its operations in Brazil.
- Periodic submission of financial statements.

Insurance and reinsurance intermediaries

An insurance broker is defined as a natural or legal person legally authorised to attract new clients and promote insurance contracts between insurance companies and individuals or legal entities (*Article 122, Decree-Law 73/66*).

To operate in Brazil, an insurance intermediary must obtain:

- Authorisation from SUSEP.
- The appropriate licence or permit.

(*SUSEP Circular No. 127 of 13 April 2000.*)

An authorised reinsurance intermediary is a legal entity that has a professional civil liability insurance contract, in the form defined by the SUSEP, and that is managed by a specialised and duly qualified insurance intermediary (*Complementary Law 126/2007*).

To operate, reinsurance brokers must obtain authorisation from the SUSEP and comply with the following requirements:

- The reinsurance brokerage must be undersigned by the representative's claim.
- There must be a checklist of all forwarded documents.
- Articles of association or amendments to articles of association must be included.

- There must be a charter and minutes of the meeting.
- There must be a constitution or amendments to the constitution.
- A business plan must be in place.
- There must be an organisational chart complete with economic groups, with a list of all companies and their company registration numbers (CNPJ), or, in the case of a foreign company, the country where the head office is located and the respective share capital and the total working capital, or declaration that the entity does not belong to any particular economic group.
- There must be indication of how the controlling partners of the group will perform.
- There must be proof of origin and evidence of the transactions used in the operation.
- There must be a spreadsheet of the newspapers in which the declaration of intent to operate have been published.
- Members of the controlling group and those with legal participation must be identified, along with the share capital of each member.
- Annual tax returns must be provided for the following:
 - private individuals with a controlling stake; and
 - persons who had, in the last year, shares in the company.

There must also be evidence that the tax returns had been submitted to the Brazilian Federal tax authorities, or equivalent documents, and for those resident abroad, proof of annual income and a list of all assets, rights and private liabilities, and their respective amounts.

- There must be a declaration of any other investments in Brazil or with other Brazilian companies by the direct and indirect directors of the company, or a declaration that no such investments exist.
- The registration form must be completed.
- Under Resolution 330/2015:
 - there must be a declaration of a full list of the members of the controlling group and those with legal participation and their respective holdings; this must be accompanied by a declaration that the group conforms to the requirements under Article 2 of Annex II to Resolution 330/2015 (*subsection VII, Article 23, attachment I*);
 - there must be authorisation from the federal Brazilian tax authorities to submit to the SUSEP (for the sole purpose of gaining authorisation) all tax returns, assets and rights, and debts and liabilities for the previous two financial years (*subparagraph "a" of subsection IX, Article 23, attachment I*); and

- there must be authorisation for the SUSEP to access all information related to any public or private registrations, including judicial or administrative cases or proceedings (for the sole purpose of gaining authorisation) (*subparagraph "b" of subsection IX, Article 23, attachment I*).

(Articles 32 and 37, CNSP Resolution 330/2015; Article 3, SUSEP Circular 528/2016.)

Other providers of insurance/reinsurance-related activities

Claims adjusters, along with lawyers and technical experts, that provide services to insurers and reinsurers, are not regulated and do not need any special authorisation to render services.

10. What are the main exemptions or exclusions from authorisation or licensing?

Insurance and reinsurance providers

In cases of duly justified public interest and in exceptional circumstances, the SUSEP can waive compliance with the conditions relating to the entry into a group controlling an insurance company of the entities referred to in Article 1, item I of CNSP Resolution 330/2015 (that is, insurance companies, capitalisation companies, public entities of complementary pension plans, local reinsurers, admitted reinsurers, eventual reinsurers and reinsurance brokers).

In exceptional circumstances, the SUSEP can authorise the transfer of risks to reinsurance companies that are not registered in Brazil, if there is evidence of insufficient capacity of admitted, eventual and local reinsurers, regardless of the prices and conditions offered by these reinsurers (*CNSP Resolution 241/2011*).

Insurance and reinsurance intermediaries

There are no express exemptions or exclusions for insurance intermediaries.

Other providers of insurance/reinsurance-related activities

CNSP Resolution 241/2011 allows the SUSEP, in exceptional situations, to authorise the transfer of risks to companies not registered in Brazil, provided a justifiable technical reason is provided to the SUSEP.

Restrictions on ownership or control

11. Are there any restrictions on the ownership or control of insurance-related entities?

Insurance/reinsurance providers

Direct equity stakes that provide control of insurers can only be held by:

- Individuals approved by the SUSEP.
- Entities authorised to operate by the SUSEP.
- Legal entities whose stated purpose is exclusively to hold equity stakes in companies authorised to function by the SUSEP and that comply with the applicable corporate governance standards.

(Articles 33 et seq, CNSP Resolution 330/2015.)

A new member of the controlling group of an insurer must satisfy these conditions. The individual beneficial owners of legal entities holding controlling stakes or qualified participations (defined as an equity holding of 5% or more), or that are members of the controlling block, must be identified.

Local reinsurers are subject to the provisions of Decree-Law 73/1966 and the other legal and regulatory rules applicable to insurance companies, including those on:

- Incorporation.
- Authorisation to operate.
- Transfer of control.
- Corporate restructuring.
- Cancellation of authorisation.
- Election or appointment of directors and officers.

There are no restrictions on admitted and occasional reinsurers, as their decisions are taken by the parent companies located abroad.

Insurance/reinsurance intermediaries

See [Question 9, Insurance and reinsurance intermediaries](#).

12. Must owners or controllers notify the relevant authorities, or obtain approval, before taking, increasing or reducing their control or ownership of the entity?

Any transfer of control, either direct or indirect, by insurance/reinsurance providers or intermediaries, requires previous authorisation from the SUSEP (*CNSP Resolution 330/2015 and Decree-Law 73/1966*). The same applies to any transaction or series of related transactions that lead to the acquisition of a qualified participation.

Ongoing requirements for the authorised or licensed entity

13. What are the key ongoing requirements with which the authorised or licensed entity must comply?

Insurance/reinsurance providers

See [Question 9, Insurance/reinsurance providers](#).

Insurance/reinsurance intermediaries

See [Question 9, Insurance and reinsurance intermediaries](#).

Penalties for non-compliance with legal and regulatory requirements

14. What are the possible consequences of an entity failing to comply with applicable legal and regulatory requirements? What recourse do policyholders have if they have done business with an unauthorised or unlicensed entity?

Companies supervised by the SUSEP can be subject to the following penalties for failing to comply with applicable legal and regulatory requirements:

- Warnings.
- A fine of BRL5,000 to BRL1 million, depending on the infraction committed.
- A fine equal to the amount insured or reinsured, in the case of insurance, coinsurance or reinsurance transactions carried out without authorisation.
- Suspension of the exercise of the activity for 30 to 180 days (or of the profession for executives).
- For executives, disqualification from exercising a position or function in the public service, government-controlled or owned company, private pension plan operator, capitalisation company, financial institution, insurer or reinsurer, for two to ten years. This penalty is applied to any person that has been punished with suspension in the past five years for an infraction of the same nature, or found guilty by a final judgment of any act classified as a crime in the exercise of their profession.
- Cancellation of authorisation to operate for companies found guilty of involvement in money laundering more than once in any five-year period.

(CNSP Resolution 243/2011.)

The penalties can be applied cumulatively. The accused person or company can present an administrative defence to the SUSEP. An unfavourable decision can be appealed to the Appeals Council of the National Private Insurance System, which is the highest administrative instance. A party found guilty at this level can take the case to court.

The SUSEP and the accused can enter into an agreement of adjustment of conduct/commitment agreement, setting:

- Fines.
- Time limits for compliance.
- The penalties for failure to remedy the infraction.

Signing such an agreement does not imply any admission of guilt.

Prospective policyholders should ensure the company they intend to do business with has authorisation from the SUSEP to avoid future problems, because their only recourse would be to sue the company, which is a risky proposition.

Restrictions on persons to whom services can be marketed or sold

15. Are there any restrictions on the persons to whom insurance/reinsurance services and contracts can be marketed or sold?

Insurance and reinsurance services and contracts can be marketed to legally constituted companies and persons aged 18 years or older and of sound mind (that is, not legally interdicted or declared incapable of managing their own affairs).

Reinsurance monitoring and disclosure requirements

16. To what extent can/must a reinsurance company monitor the claims, settlements and underwriting of the cedant company?

A reinsurer can participate in the adjustment of the claim, without prejudice to the responsibility of the insurer to the insured (*Article 319, CNSP Resolution 168/2007*). Since there are distinct contractual relationships between the insured and insurer (cedant) and the insurer (cedant) and reinsurer, the insurer remains liable to the insured regardless of the participation of the reinsurer in the claim adjustment process.

Reinsurance contracts, either automatic or facultative, can contain a clause of control of the claims process in favour of a local reinsurer when it retains the largest proportional participation in the risk (*CNSP Resolution 225/2010*). Despite this provision, the key position remains the same, that is, the final liability to the insured for the outcome of the claims process rests with the reinsurer.

17. What disclosure/notification obligations does the cedant company have to the reinsurance company?

There are specific legal provisions on disclosure or notification obligations. Generally, disclosure obligations as well as time limits are listed in the reinsurance agreement in the section on notices.

Insurance and reinsurance policies

Content requirements and commonly found clauses

18. What are the main general form and content requirements for insurance policies? What are the most commonly found clauses?

Form and content requirements

The issuance of an insurance policy must be preceded by a written proposal indicating the essential elements of the risk and interest to be guaranteed (*Articles 758 to 760, Civil Code*). The insurance policy evidences the contract of insurance and can be nominative, in order or in bearer form. The insurance contract must contain the following information:

- Risks covered.
- Start and end dates of the policy.
- Guarantee.
- Premiums.
- Names of the insured and beneficiary.

A personal insurance policy cannot be issued in bearer form.

However, in practice, it is possible to take out insurance without a previous formal proposal.

The formal requirements applicable to reinsurance contracts are less strict. While reinsurance transactions must be formalised in a written contract (within 270 days of the start of cover), the reinsurer's or cedant's acceptance of the reinsurance proposal is deemed proof of the agreed coverage (*Article 37, CNSP Resolution 168/2007*).

Reinsurance contracts are freely negotiated by the parties, and do not require prior approval of the SUSEP. However, the following terms must be included in the reinsurance agreement:

- The date on which the rights and obligations of each party take effect and expire, including details of how and when these obligations will cease in the event of cancellation.
- Criteria for cancellation.
- Risks covered and risks excluded.
- Cover period, identifying the start of the reinsurer's liability and the exact time when losses are covered by the contract.

(*Articles 33 to 41, Chapter VII, CNSP Resolution 168/2007.*)

Commonly found clauses

Various clauses commonly found in insurance contracts include:

- Delimitation of the risk and restrictive clauses.
- Intentional misconduct by the insured as cause for denial of coverage.
- Duty of utmost good faith and the consequences of non-compliance.
- Aggravation of risk as cause to deny or reduce coverage.
- Prompt notification of loss events.

19. Is facultative or treaty reinsurance more common? What are the most commonly found clauses in reinsurance policies?

Facultative/treaty reinsurance

Currently, since the market is soft and there is considerable capacity for retention by insurers, treaty reinsurance is more prominent than facultative contracts. This question is sensitive to the circumstances of the market.

Commonly found clauses

Reinsurance contracts (slips) are freely negotiated between the parties without any need for prior approval of the SUSEP. However, certain clauses and stipulations are compulsory:

- Insolvency clause.
- Intermediation clause if a broker is involved.
- The contractual formalisation, which must occur within 270 days of the start of the coverage, and must state the:
 - date of the proposal and acceptance;
 - start date; and
 - place for use as a time zone reference of the start and end times.

- Reinsurance of risks in Brazilian territory is subject to Brazilian legislation and judicial resolution of disputes, unless the parties expressly provide for another method, such as arbitration.
- Start and end dates of the rights and obligations of each party.
- Precise stipulation of the risks covered and excluded.
- Criteria and procedures for cancellation.
- A clause calling for direct payment of the reinsurer to the insured (cut-through clause).

(Articles 33 to 41, CNSP Resolution 168/2007.)

Implied terms

20. Are there any terms that are implied by law or regulation (even if not included in the insurance or reinsurance contract)?

Generally, the courts' interpretation of an insurance contract will be the one that is most favourable to the insured (consumer). Although insurance contracts are inherently based on the principle of good faith, caution should be taken to avoid ambiguities and imbalances, because judicial interpretation is almost always in favour of the insured.

The principle of good faith applies to all aspects of the insurance relationship, such as rules on:

- Claims adjustment.
- Limitation of risks.
- Establishment of insured capital.

Customer protections

21. How do customer protections in the general law affect insurance contracts? What customer protections are generally included in insurance policies to supplement this?

General law

Law 8,078/1990 (Consumer Defence Code) (CDC) covers the supply of goods and services to end users. Insurance services are expressly included in the list of activities that can be covered when the insured is a consumer (*Article 3, paragraph 2, CDC*). Therefore, the CDC applies to the majority of insurance contracts.

Insurance policies

While the application of the CDC is clear for insurance policies covering individuals, its application to insurance contracted by companies, although sometimes argued in lawsuits based on the idea that they are consumers (particularly in the case of small firms), is questionable.

The CDC contains a series of protections that benefit consumers, including:

- Reversal of the burden of proof.
- Interpretation of ambiguous clauses in favour of the consumer.
- Nullity of abusive clauses.
- Prohibition of tie-in sales.
- Transparent wording of contracts in clear language and without excessive fine print.

Therefore, the general and specific conditions of insurance contracts should be as clear and transparent as possible, to avoid ambiguities and situations that overly favour insurers to the detriment of consumers.

Standard policies or terms

22. What are the main standard policies or terms produced by trade associations or relevant authorities?

Standard policies are produced by the SUSEP and are available on its website (www.susep.gov.br/menu/informacoes-ao-publico/planos-e-produtos/seguros). However, each insurer can draft its own contracts, as long as they are not contrary to those specified by the regulator.

Insurance and reinsurance policy claims

Establishing an insurance claim

23. What must be established to trigger a claim under an insurance policy?

Essentially, the occurrence of the loss triggers the claim. For example:

- Under a life insurance policy, the trigger is the death of the person whose life is covered.
- In fire insurance, the trigger is moment the fire occurred.
- In insurance against theft, the trigger is moment the insured becomes aware of the crime.

In civil liability insurance, identification of the trigger can be more complex and difficult, since the knowledge of the insured depends on factors outside their control. For this reason, it is the normal practice to adopt claims-made basis policies with limitation periods.

Third party insurance claims

24. What are the circumstances in which third parties can claim under an insurance policy?

The Superior Tribunal of Justice has held that direct claims by third parties against an insurer are possible, provided the claimant (third party) also includes the insured as a co-defendant in the suit. Therefore, a direct suit against the insurer is not possible without the participation of the insured (*Precedent no. 529 of the Superior Tribunal of Justice, 2nd Section, 18 May 2015*).

Time limits

25. Is there a time limit outside of which the insured/reinsured is barred from making a claim?

A claimant's right to sue arises at the time their right is violated, which marks the starting point of the limitation period. As in most civil law countries, there are two types of time-bar mechanisms:

- Prescription (*prescrição*).
- Pre-emption (*decadência*).

The basic difference is that prescription bars the filing of lawsuits, while pre-emption extinguishes the underlying claim itself.

There are differences according to the type of insurance in question. As a rule, for insurance against damages, the limitation period starts to run when the insured learns of the damage. For insurance of persons (specifically personal accidents), the limitation period starts to run when the insured learns of the state of health causing the disability (total or partial). This is the starting date of the time limit within which the insured must notify the event to the insurer. On such notification, the time-bar is suspended until the question is resolved of whether or not the event is covered by the policy.

The general time limit to file an insurance claim is one year (*Article 206, Civil Code*). It is very important to exercise care regarding the starting date of the limitation period, which is not detailed in law, leaving it to the courts to decide. Recognition of prescription is equivalent to a judgment on the merits (with prejudice), preventing any new discussion of the case in other suits.

In relation to reinsurance, the Superior Tribunal of Justice, in a controversial decision (*Special Appeal 1.170.057/MG, Reporting Judge Ricardo Villas Boas Cueva, 3rd Panel, published on 13 February 2014*) held that the limitation period is one year, under the interpretation that a reinsurance contract is a type of insurance contract and, therefore, subject to the same limitation period.

Enforcement

26. Can the original policyholder or other third party enforce the reinsurance contract against a reinsurer?

In principle, the insured or other third party cannot directly sue the reinsurer, as insurance and reinsurance contracts have different parties:

- Insurer and insured for insurance contracts.
- Reinsurer and insurer (cedant) for reinsurance contracts.

There are two exceptions to this general rule:

- Where the reinsurance contract contains a cut-through clause allowing direct payment.
- Where the insurer (cedant) becomes insolvent, which allows the insured to seek indemnification directly from the reinsurer.

(Articles 13 and 14, Complementary Law 126/2007.)

The second exception (insolvency of the insurer (cedant)) is fraught with complications under the law. This is because of the application of the rules on bankruptcy and reorganisation, under which creditors' claims are subject to satisfaction in the order of priority provided in bankruptcy legislation. These rules give priority to labour and tax creditors. Therefore, any payment made by the reinsurer outside the bankruptcy proceeding that do not comply with the order of priority can be challenged.

Where the reinsurer adjusts the claim and denies coverage, causing losses and damages to the insured, the insured may be able to sue the reinsurer under the rules on extra-contractual civil liability (*Article 186, Civil Code*).

Remedies

27. What remedies are available for breach of an insurance policy?

Insurer

There is a remedy of loss of the guarantee when an insured or its representative makes a false or inexact declaration, or fails to disclose a circumstance that would have influenced the acceptance of the proposal or the premium rate. This is considered to be a violation of the principle of good faith that applies to insurance contracts (*Article 766, Civil Code*). The burden of proving the omission or inaccuracy rests with the insurance company.

In addition, the insured will lose coverage if they intentionally aggravate the risk covered by the contract (*Article 768, Civil Code*).

Insured

An insurer that accepts to cover a risk while being aware that the risk no longer exists at the time of conclusion of the contract must pay double the premium to the insured (*Article 773, Civil Code*).

If an insurer refuses to indemnify the insured for a claim covered by the insurance policy, the insured can seek compensation for material and moral damages.

Additionally, a consumer contract will not be binding on the consumer if either:

- The consumer was not given the opportunity to inspect the content of the contract before its conclusion.
- The contract is written in a way that makes it difficult for the consumer to understand its meaning and scope.

(Article 46, CDC.)

Punitive damage claims

28. Are punitive damages insurable? Can punitive damages be reinsured if they are covered by an underlying policy?

The law does not contain any provision on punitive damages. Therefore, it is not possible to offer insurance policies or reinsurance contracts to cover punitive damages. However, the case law, supported by the opinion of legal scholars, allow the award of what amounts to punitive damages, under the title of moral damages. This is based on the principle of deterrence. Generally, an insurance contract can cover moral damages caused by the insured and, therefore, punitive damages can be reinsured in the guise of moral damages.

Insolvency of insurance and reinsurance providers

29. What is the legal and regulatory framework for dealing with distressed or insolvent insurance or reinsurance companies, or other persons or entities providing insurance or reinsurance related services? What regulatory and/or other protections exist for policyholders if the insurance company is insolvent?

Certain companies, due to their importance to the economy and society, are supervised by governmental bodies and can be subject to administrative (extrajudicial) liquidation. This is the case for:

- Insurers and private pension plan operators (overseen by the SUSEP).
- Banks and other financial institutions (overseen by the Central Bank).
- Health plan operators (overseen by the National Health Agency).

When such a company starts to show signs of financial distress, the regulator that monitors it can order its extrajudicial liquidation.

The insured and beneficiaries that are creditors of insurance companies have a special privilege over the technical reserves, special funds and guarantee provisions for insurance, reinsurance and retrocession transactions (*Article 86, Decree-Law 73/1966*). After the credits of the insured and beneficiaries are paid, insurers and reinsurers are next in line for calls on those reserves, funds or provisions.

Additionally, insolvency of the insurer, if it has contracted reinsurance, can lead to direct payment claims against the reinsurer (*Article 14, Complementary Law 126/2007*) (see [Question 26](#)).

30. Can excess insurance policies "drop down" to provide coverage if the primary insurer goes into insolvency?

Brazilian legislation does not cover this matter.

31. Is a right to set-off mutual debts and credits recognised in an insolvency proceeding involving an insurer or reinsurer?

This procedure is not usually permitted.

Taxation of insurance and reinsurance providers

32. What is the tax treatment for insurers, reinsurers, and other persons or entities providing insurance and reinsurance-related services?

The tax powers of the three levels of government (federal, state and municipal) are established in the Federal Constitution of 1988. In addition to taxes, the federal government can also, by enactment of a law (principle of legality of taxes), establish social contributions. The difference between these contributions and taxes is that the revenues from the former levies are reserved for specific uses while the latter go into the general fund. Since the general fund is subject to several mandatory set-asides (such as health and education) and revenue-sharing with the state and municipal governments, the creation of contributions allows the federal government to have greater discretionary spending power.

There are three income tax regimes that apply to companies:

- The real profit regime (for large firms).
- The presumed profit regime (for small- and mid-sized companies).
- The simplified taxation regime (*Simples Nacional*) (for micro and small enterprises).

For insurers, the following taxes apply:

- Tax on financial transactions relating to insurance:
 - paid by the insured or insurer;
 - calculated as an amount of the premium;
 - at a rate of 0% to 7.38%;
 - with an effective rate of 0% to 7.38%.

(Decree 6,306/07.)

- Contribution to social security on gross revenue (Cofins) (*Law 9.718/98*).
- Corporate income tax:
 - paid by the insurer;
 - calculated on the adjusted net income;
 - at a rate of 15% + 10% surcharge on profits over BRL240 million per year;
 - with an effective rate of approximately 25%.

(Decree 3,000/99.)

- Social contribution on net profit:
 - paid by the insurer;
 - based on an adjusted calculation;
 - at a rate of 15%;
 - with an effective rate of 15%.

(Law 7,689/99.)

For admitted and occasional reinsurers, the following taxes apply:

- Cofins *(Law 12,249/2010)*.
- Withholding tax:
 - paid by the cedant;
 - calculated on 8% of the amount of the premium;
 - at a rate of 25%;
 - with an effective rate of 2%.

(Decree 3,000/99, Provisional Measure 2,158 – 35/01.)

- Tax on financial transactions relating to foreign exchange:
 - paid by the purchaser of foreign currency;
 - calculated based on the amount remitted;
 - at a rate of 0.38%;
 - with an effective rate of 0.38%.

(Decree 6,306/07.)

For local reinsurers, the following taxes apply:

- Tax on financial transactions relating to insurance:
 - paid by the cedant or insurer;
 - calculated based on the amount of the premium;
 - at a rate of 0%;
 - with an effective rate of 0% to 7.38%.

(Decree 6,306/07.)

- Cofins on gross revenue (*Law 9,718/98*).
- Corporate income tax:
 - paid by the reinsurer;
 - calculated based on the adjusted net income;
 - at a rate of 15% plus a 10% surcharge on profits over BRL240 million per year;
 - with an effective rate of approximately 25%.

(*Decree 3,000/99.*)

- Social contribution on net profit:
 - paid by the reinsurer;
 - calculated based on the adjusted net income;
 - at a rate of 15%;
 - with an effective rate of 15%.

(*Law 7,689/88.*)

Insurance and reinsurance dispute resolution

33. Are there special procedures or venues for dealing with insurance or reinsurance complaints or disputes?

Disputes between private litigants are heard by the state courts. The federal courts can only rule on certain issues, such as those involving the interests of a federal public entity.

In the first instance, claims are decided by a single judge. The courts of appeal act as courts of second instance. Appeals are judged by a panel of three judges (which can be extended to a panel of five judges in certain cases).

A judgment rendered by the court of appeal that is contrary to federal law or the Constitution can be subject to appeal to the Superior Court of Justice or the Supreme Court, respectively. The Superior and Supreme Courts cannot review facts or the interpretation of contractual clauses, and can only rule on matters of law and its interpretation.

Disputes involving insurance are normally decided in the state civil courts. The exceptions are:

- Cases that involve federal government entities (agencies, controlled companies, and so on), over which the federal courts have jurisdiction.
- Disputes involving amounts up to 40 times the minimum monthly wage (currently BRL1,045) and that are less complex, which can be filed, at the claimant's option, in the small claims courts.

It is rare for insurance cases to be decided in the federal courts.

The use of arbitration is common, particularly for large risks. Brazil has a specific law on arbitration (Law 9,307/1996) and the practice is well established in the country (see [Question 34](#)).

34. Are arbitration clauses in insurance and reinsurance agreements enforceable?

The decision to choose arbitration to resolve disputes rests with the parties, and an arbitral award has the same force as a judicial award. The courts can intervene in arbitration matters to enforce awards and to grant urgent measures. Arbitral awards can be set aside by the courts on certain formal grounds, as well as if the award is contrary to public policy or good customs, or the arbitration did not observe due legal process. However, the judiciary cannot overturn the merits of the arbitral decision itself.

If the arbitral clause specifies the institution that will manage the proceeding, the rules of that institution apply. For ad hoc arbitrations, problems can arise if the parties fail to specify the rules for appointing the arbitrators or other key aspects. In such situations, if the parties cannot agree, the claimant will need to go to court to resolve the form of the arbitration. The Arbitration Law guarantees the parties the same constitutional guarantees of due legal process (ample defence and rebuttal) that apply in judicial proceedings (Law 9,307/1996).

Foreign arbitral awards have the same status as foreign judicial awards, and must first be recognised by the Superior Tribunal of Justice before seeking enforcement in the court with jurisdiction over the recalcitrant party or the subject matter.

Under the Arbitration Law, the parties' agreement to refer their disputes to arbitration must be made in writing. Only patrimonial disposable rights can be subject to arbitration. Under the Consumer Act, any provision in a consumer contract that makes arbitration compulsory is null and void. However, the parties remain free to agree on arbitration, provided that the consumer has unequivocally and voluntarily agreed on it.

35. Are choice of forum, venue and applicable law clauses in an insurance or reinsurance contract recognised and enforced?

Insurance contracts

In insurance contracts involving individuals (consumers), the forum to resolve disputes is that of the domicile of the insured. It is also possible to specify arbitration in contracts with consumers, provided that the clause is included in a separate document, in a clear and transparent manner, so that the insured (consumer) can freely agree. In cases involving companies, the general rule in the Civil Procedure Code applies, according to which the forum is that of domicile of the defendant.

In international contracts, Brazilian law admits choice of forum, venue and applicable law clauses. However, their validity is controversial for insurance contracts, since these are usually adhesion contracts and such clauses can be perceived as abusive.

Reinsurance contracts

Brazilian law applies and Brazilian courts have jurisdiction for risks located in Brazil, unless the parties choose a foreign law or arbitration or a foreign venue (Article 38, CNSP Resolution 168/2007).

Reform

36. What proposals are there for reform of the law, regulation or rules relating to the provision of insurance or reinsurance services?

Brazil's first General Data Protection Law (Law No. 13,709/2018), which came into force in September 2020, is likely to have a significant impact on the insurance industry over the next years. The Brazilian Data Protection Authority (*Autoridade Nacional de Proteção de Dados*) is expected to provide guidelines and issue regulations on data protection and privacy in the near future.

Another current issue is the possibility to exclude risks associated with epidemics and pandemics in life insurance contracts. Insurance companies can presently exclude these risks provided that this is stated in the insurance policy and the epidemic or pandemic is declared by the competent authority. Bill No. 890/2020, proposed in the midst of the COVID-19 pandemic, aims to amend the Brazilian Civil Code so that insurers cannot refuse to pay the insured capital if the insured party's death or disability is due to an epidemic or pandemic, even if the policy contains a restriction to that effect.

Measures are also being adopted to develop the Brazilian InsurTech market (see [Question 1](#)).

The Brazilian Parliament is currently examining Insurance Law (Law No. 3555/2004). This establishes general rules for private insurance contracts and repeals provisions of the Civil Code, Commercial Code, and Law-Decree No. 73 of 1966. It is not possible to foresee whether it will be adopted.

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Publications

- *Lloyd's Brazilian chapter of a book dedicated to the regulation of the main insurance and reinsurance markets in the world (UK, USA, Japan) and of emerging countries (Brazil, China and South Africa), 2001.*
- *"The Transition of Law and Regulation from State Control to Market Freedom", the Research Handbook on International Insurance Law and Regulation, March 2012 (Edward Elgar Publishing and Lloyd's (London)).*
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- *Tratamento de dados pessoais e discriminação algorítmica.* São Paulo: Thomson Reuters, 2020.
- *Temas Atuais de Direito dos Seguros, Tomos I e II.* São Paulo: Thomson Reuters, 2020.
- *Principios contractuales en el Derecho Civil brasileño: ha llegado el momento de redimensionarlos.* In: *Congreso Internacional de Derecho Civil. VIII Centenario de la Universidad de Salamanca, 2018, Salamanca. Congreso Internacional de Derecho Civil. Octavo Centenario de la Universidad de Salamanca. Valencia: Tirant lo blanch, 2018.*
- *Contributo para a delimitação dos novos contornos da exceção de contrato não cumprido.* In: *Autonomia privada, liberdade existencial e direitos fundamentais.* Belo Horizonte: Fórum, 2018.
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