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# Insurance & Reinsurance 2022

**Brazil: Law & Practice**

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## Law and Practice

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## 1. BASIS OF INSURANCE AND REINSURANCE LAW

### 1.1 Sources of Insurance and Reinsurance Law

Brazil's legal system is based on civil law; therefore, its framework is composed of numerous laws and legal codes.

The main sources of insurance and reinsurance law in Brazil are the following:

- the Civil Code (enacted by Law No 10,406/2001), which dedicates an entire chapter to insurance contracts and the main principles that must govern the relationship between the insured and the insurer;
- Decree-Law No 73/1966, which is still in full force and effect, and which allows the regulation of this specific activity and market through regulations enacted by the National Council of Private Insurance (CNSP) and the Brazilian Superintendence of Private Insurance (*Superintendência de Seguros Privados*, or SUSEP); and
- Supplementary Law No 126/2007, which sets forth the main rules for reinsurance and retrocession transactions in Brazil after dismantling the monopoly of the Reinsurance Institute of Brazil (*Instituto de Resseguros do Brasil*, or IRB) in this area.

The interpretation of most insurance policies is also based on the Consumer Protection Code, enacted by Law No 8,078/1990. In addition, most policies are adhesion contracts (ie, there is no arm's-length negotiation of their terms and conditions). If the terms and conditions of such agreements are not clear, they are interpreted in favour of the adhering party.

## 2. REGULATION OF INSURANCE AND REINSURANCE

### 2.1 Insurance and Reinsurance Regulatory Bodies and Legislative Guidance

Authority for the oversight and regulation of the Brazilian insurance market is fragmented:

- CNSP and SUSEP regulate the National Private Insurance System (SNSP), which comprises insurance and reinsurance companies, entities operating open-end private pension funds, capitalisation companies, and insurance and reinsurance brokers;
- CNPC, together with the Brazilian Pension Funds Authority (PREVIC), regulates and oversees entities operating private closed pension funds; and
- the National Regulatory Agency for Private Health Insurance and Plans (ANS) regulates the health insurance and healthcare industries.

CNSP and SUSEP are governmental entities under the Ministry of Economy, responsible for regulating the insurance sector (life and non-life, excluding health). CNSP is the policy board for the markets mentioned above. SUSEP further details the rules enacted by CNSP. SUSEP is the supervisor of the regulated entities, conducting routine inspections and disciplinary proceedings, and is also responsible for ensuring that the entities within those markets are liquid and solvent, and protecting the rights of the insured parties.

CNPC and PREVIC operate in a similar manner, with CNPC acting as the regulatory body, while PREVIC is the supervisor of closed-end complementary pension entities and issues rules detailing CNPC's regulations. The Brazilian government has made public its intention to merge

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PREVIC and SUSEP, which would create a single supervisory entity for insurance and pension funds. No concrete actions towards such unification have been taken so far.

The ANS was established by the Brazilian government under the Ministry of Health and operates nationwide to regulate, standardise, control and inspect the private health insurance and plans sector in Brazil, including private health insurance, health management organisation, self-insured plans, medical co-operatives, non-profit health organisations and dental assistance.

## 2.2 The Writing of Insurance and Reinsurance

### Insurance

Only companies authorised by SUSEP (or ANS for health insurance) can write insurance business in Brazil. The authorisation procedure is divided into two major steps: prior approval and ratification, according to Resolution CNSP No 422/2021.

The procedure is lengthy and standards for approval are high. During the prior approval review, SUSEP analyses a series of documents presented by the organising group to review:

- the quality of the business plan, which must be very detailed and span a period of at least three years; and
- the financial and operational capacity of the controlling shareholders or the future insurer (in which case, the company will have to present at least twice the minimum required capital, pursuant to the minimum capital projections of its business plan in the first year).

This request must be made prior to the signature of any organisational corporate act. SUSEP must analyse the documents within 120 days, according to a recently issued normative act.

Once the prior approval of the project is granted by SUSEP, applicants must perform the relevant corporate acts for organising the insurance company, which are submitted to SUSEP for ratification purposes. The ratification phase is generally simpler, as it seeks only to confirm that the organisational structure described in the prior approval phase was duly implemented. Such phase also aims to confirm the legality of the funds used for forming the insurer's capital. SUSEP has another 120-day deadline for deciding on the ratification.

Although the procedure above is similar for all insurers, since 4 January 2021, insurance companies are divided into four segments (S1, S2, S3 and S4). Companies characterised as S4 are deemed to offer less risk to the market, and, therefore, are subject to reduced capital and prudential requirements. Such requirements gradually become stricter as the company grows and moves to the higher segments.

SUSEP has also created a regulatory sandbox, in which approved insurtechs may create an insurance company with a temporary licence (36 months). Sandbox participants are subject to further reduced regulatory requirements, even when compared to insurers in the S4 segment. The new regulation for the authorisation of insurance companies (Resolution CNSP No 422/2021) created a fast-track process for companies in SUSEP's sandbox to obtain a definitive licence. This process requires a new business plan and the evidence that the company or its controlling shareholders have the necessary capital requirements to be in the S4 or S3 segment.

Insurance companies issuing only micro-insurance policies, which target low-income consumers, are also subject to reduced capital requirements.

It is worth noting that the insurer will also need to file its insurance products with SUSEP and obtain a process number before it issues any policies. Although this process used to be bureaucratic and lengthy, companies are now able to file their products automatically, with no prior review from SUSEP. For insurance of big risks (eg, with a limit of liability of BRL15 million), CNSP Resolution 407/2021 now allows insurance companies to forgo the registration procedure completely, incentivising “build-to-suit” products for corporate risks. SUSEP expects market players to be responsible in drafting their products and prefers to penalise bad behaviours instead of reviewing each product available in the market beforehand.

## Reinsurance

Reinsurance and retrocession activities can be carried out in Brazil by the following types of reinsurers, all of which need to be accredited as such by SUSEP prior to engaging in any related activities.

### Local reinsurers

These must be organised as joint-stock companies headquartered in Brazil. Such entities must engage exclusively in reinsurance and retrocession activities (with exclusive corporate purpose). The proceedings to obtain a prior authorisation to operate are the same as those applicable to local insurers. Since these rules are more stringent, there are fewer local reinsurers than admitted or occasional reinsurers doing business in Brazil. Brazilian insurance companies must give preference (right of first refusal) to local reinsurers to underwrite at least 40% of the reinsured risks in each treaty or facultative agreement.

### Admitted reinsurers

These may be headquartered abroad, but need to have a representative office in Brazil (which can be owned by the reinsurer or be a third con-

tracted party). The representative office must be organised either as a joint-stock or limited liability company, but must have as its exclusive corporate purpose the representation of the offshore admitted reinsurer in reinsurance and retrocession transactions. There are some eligibility requirements that must be met by this type of reinsurer for purposes of accreditation; in particular, the requirements to open a local bank account and to keep, at all times, a balance of USD5 million in such account. The representative office’s management must communicate with SUSEP about the appointment or replacement of an officer or director, or both.

### Occasional reinsurers

These are, in many ways, very similar to admitted reinsurers, the only difference being that they do not need to have a representative office in Brazil. For this reason, eligibility requirements for purposes of accreditation by SUSEP are more restrictive than those applicable to admitted reinsurers.

## 2.3 The Taxation of Premium

Insurance premiums are subject to a tax on financial transactions (IOF), according to Articles 18 and following of Decree 6.306/2007. Currently, IOF rates range from 0% to 7.38% depending on the insurance product and its coverage, but the executive branch may increase the tax rate to 25% without the approval of the National Congress. Insurance companies and financial institutions are responsible for levying IOF on behalf of the insured party upon the payment of the premium.

Insurance companies are also subject to particular tax regimes concerning contributions on gross income (PIS/COFINS), levied at a combined 4.65% rate on financial spread, and increased rates for purposes of corporate income taxation (45% until 31 December 2021, or 40% from 1

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January 2022, instead of the regular 34% applicable to other companies).

### **3. OVERSEAS FIRMS DOING BUSINESS IN THE JURISDICTION**

#### **3.1 Overseas-Based Insurers or Reinsurers**

According to Brazilian law, mandatory insurance and non-mandatory insurance related to risks in Brazil and contracted by individuals or entities residing in Brazil should be exclusively contracted with local insurers.

There are a few exceptions to such rule. For instance, Brazilian residents may contract insurance offshore when coverage for the risk is unavailable in Brazil. The unavailability is evidenced by the refusal of at least five insurers that issue the same type of coverage locally. SUSEP Circular No 603, issued in 2020, provides the procedures to be followed by Brazilian residents when taking out insurance offshore and making use of the legal exceptions.

Also, as the restriction is applicable to Brazilian residents and legal entities headquartered in Brazil, Brazilian companies of international groups may still be beneficiaries of global insurance programmes funded by their controlling entity offshore.

Foreign companies underwriting insurance with Brazilian residents where a local insurance is required can be viewed by SUSEP as an insurance company operating in Brazil without the proper authorisation. For such practice, insurance companies are subject to fines of up to BRL3 million, determined by SUSEP. Companies' shareholders, directors and officers could also be held jointly liable for any fines and, in some situations, may be indicted to criminal

prosecution, as operating an insurance company without SUSEP's authorisation is a financial crime in Brazil.

With regard to reinsurance, as mentioned above, foreign reinsurers may operate in Brazil if accredited by SUSEP.

#### **3.2 Fronting**

Fronting is not a usual Brazilian practice and does not have a specific regulation. Although fronting is not expressly prohibited, Brazilian insurers and local reinsurers are subject to retention obligations.

### **4. TRANSACTION ACTIVITY**

#### **4.1 M&A Activities Relating to Insurance Companies**

Although the M&A market was affected in Brazil by the COVID-19 pandemic, especially in 2020, the first two quarters of 2021 showed an expressive increase in transactions, surpassing the transactions of 2020 in only one semester. Considering the success of Brazil's vaccination campaign (with over 77.5% of the population having at least one dose of the vaccine at the time of writing), the authors have a positive perspective for such field and believe that new joint ventures in bancassurance will still represent a relevant part of the M&A market in 2021–22, as banks continue to grow their importance in the sector. With the success of entities participating in SUSEP's sandbox programme, as well as the development of insurtechs operating under a managing general agent (MGA) model, insurance companies and other players are expected to acquire or invest in insurtechs to enter the market with a technological edge or modernise their operations.

Transactions (including M&A and portfolio acquisitions) and corporate reorganisations involv-

ing insurers and local reinsurers are, in most cases, subject to prior approval and ratification proceedings before SUSEP, depending on the characteristics of the parties involved and the project. International M&A transactions involving relevant multinational groups are usually also subject to pre- or post-closing filings with SUSEP.

## 5. DISTRIBUTION

### 5.1 Distribution of Insurance and Reinsurance Products

Insurance policies may be distributed by the insurance company directly, by insurance agents, by policyholders or by insurance brokers and their agents.

In the case of distribution of certain types of insurance to the public at large, insurance agents represent insurance companies. Such model is frequently used by retailers in order to distribute extended warranty insurance, as a consequence of regulatory restrictions. Recently, CNSP issued a new regulation allowing companies to use the insurance agent model to act as MGAs (CNSP Resolution 415/2021). This new resolution allows agents to act in all types of insurance and to have broad powers to manage the distributed insurance (similar to the MGA model abroad).

Policyholders, on the other hand, represent insured groups. For that reason, the policyholder structure is commonly used in bancassurance to distribute group insurance. CNSP has been evaluating a new resolution that would be applicable to policyholders, but the new regulations have not been issued thus far.

According to Brazilian law, the legal intermediaries for the distribution and promotion of insurance contracts are the insurance brokers. Insurance brokers may be individuals or companies.

Also, an insurance broker company may intermediate the distribution of policies through its own agents. In order to conduct insurance brokerage activities, insurance brokers are required to be previously accredited.

The accreditation is a procedure before SUSEP in which the insurance broker will have to provide evidence that it has duly complied with the eligibility requirements necessary for accreditation purposes, such as the following:

- it must be organised in accordance with Brazilian law;
- it must be headquartered in Brazil;
- it must include the expression “insurance brokerage” as part of its corporate name;
- it must include insurance brokerage services as part of the activities that comprise its corporate purpose; and
- it must have an officer responsible for insurance brokerage who is duly registered before SUSEP as an insurance broker.

After being accredited as a brokerage company, insurance brokers must update SUSEP regarding any changes relating to corporate documents and governance or its organisational structure.

In 2020, CNSP issued, in Resolution No 382, rules to be followed by insurers and intermediaries when distributing insurance. The Resolution aims to provide better standards for transparency and clarity to clients.

Remarkable changes to the distribution of insurance may be caused by the launching of the open insurance system by CNSP Resolution No 415/2021. The Resolution provides for the entry of a new player, the insurance service initiating company (SISS). A SISS has mandatory enrolment in the open insurance system and would provide a personalised environment for insurance consumers. The introduction of SISSs

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was controversial and, since the open insurance system is about to be implemented, no SISSs have been incorporated.

## **6. MAKING AN INSURANCE CONTRACT**

### **6.1 Obligations of the Insured and Insurer**

The insured parties must comply with the duty of utmost good faith, disclosing all material facts and acting honestly towards the insurance companies, in such a way that the insurance company has sufficient information about the circumstances involving the risk and coverage. According to the Civil Code, the insured must disclose all of the relevant information upon contracting the policy and notify the insurer if the risk is aggravated. However, the courts generally charge the insurers with the obligation to ask all of the relevant information from the insured, considering that insured parties, in many cases, do not have the specialised knowledge of what would aggravate the insurers' risks.

In addition, in consumer contracts, the insurer must provide clear and adequate information to the consumer (Article 6, Consumer Protection Code). Failure to provide adequate information (ie, omission, or false or misleading information) gives the insured the right to terminate the agreement and, in some cases, claim reimbursement of some of the payments made.

### **6.2 Failure to Comply with Obligations of an Insurance Contract**

Should the insured party fail to provide the requested information (or omit relevant data), the insurance company may (i) increase the premium or terminate the policy, if the omission was not in bad faith; or (ii) refuse to cover any claims that would otherwise be covered under the terms and conditions of the policy issued to

the insured party, which may lead to the partial or total denial of the coverage, if the omission was in bad faith. Brazilian courts require more than a showing of mere negligence to support a bad faith claim – as a general rule, the insured party must have engaged in intentional wrongdoing.

Brazilian courts also generally require a direct connection between the cause of the loss and the missing relevant information to the insurer, although such causal relation is not expressly provided in Brazilian law.

Should the insured intentionally aggravate the risk, the insurer will have the right to deny coverage to claim or cancel coverage and retain the premium(s) paid with no proportional reimbursement.

### **6.3 Intermediary Involvement in an Insurance Contract**

As indicated in **5.1 Distribution of Insurance and Reinsurance Products**, in Brazil, the broker has the legal role of approximating the interests of the parties in order to foster insurance agreements (Decree-Law No 73/66), acting as a mere intermediary. Besides that, Brazilian law provides that brokers may also handle communication between the insurer and the insured, and submit documents to the insurer should the broker receive a claim from the insured under the insurance policy.

The law does not qualify the broker as a representative of any of the parties. Notwithstanding this, insurance authorities and public prosecutors located at SUSEP understand that brokers should act on behalf of, and to the benefit of, those interested in taking out insurance coverage; ie, the potential or effective insured parties. In order to maintain the independence and autonomy of the brokerage, Law 4594/64 pro-



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hibits the employment of brokers in legal person under public law and in insurance companies.

For collective policies, such as life policies of a company's employees, Brazilian regulation provides for the figure of *Estipulante* (policyholder), which is the entity that, on behalf of other parties, takes out a collective insurance coverage to the benefit or interest of those parties.

There is also the figure of *Representante de Seguro*, which is similar to the American figure of an "agent"/MGA, which is considered as acting on behalf of the insurer as a sales force for insurance to individuals (eg, extended warranty insurance coverage).

## 6.4 Legal Requirements and Distinguishing Features of an Insurance Contract

The formation of an insurance agreement is preceded by a written proposal sent by an insured person or an insurance broker. Local regulation, however, allows the contracting of policies through digital channels, provided that certain conditions are met.

At a minimum, insurance agreements should contain the identification of the parties (insurance company, policyholder, insured parties, beneficiaries), term of effectiveness, covered risks, liability limit, applicable premium and specifics of the duty to indemnify (claim notification and regulation rules), among other data.

The insurer must give clear and specific information to the insurer regarding specific terms of the coverage being taken out, especially the events that are not included in coverage, restriction to the right of indemnification (maximum indemnification limits, deductibles, etc) and the regulation procedure of eventual claims to be carried out if a covered claim occurs.

At the time of the placement, an exchange of specific data between the insurer and insured is required by the applicable law and regulations.

## 6.5 Multiple Insured or Potential Beneficiaries

In Brazil, it is possible to establish expressly a beneficiary to the indemnification different from the insured. However, only persons with a legitimate interest in the covered risk can benefit from the coverage.

In a collective insurance policy, a policyholder contracts insurance on behalf of a group (Resolution CNSP 107/2004). In order to be included in the policy as an insured party, individual beneficiaries receive an individual certificate of the coverage. This structure is common for life insurance.

In collective insurance, the duty of utmost good faith, disclosing all material facts and acting honestly towards the insurance company remains.

There are also some types of insurance policies in which, because of their nature, the beneficiary is different from the insured; for example, rental insurance, in which the beneficiary is not the tenant, but the landlord.

## 6.6 Consumer Contracts or Reinsurance Contracts

The existence of a reinsurance policy does not interfere drastically in the duties and obligations of the parties involved.

As for consumer contracts, as mentioned above, consumers have the right to clear and adequate information on the products commercialised and the specification regarding quantity, characteristics, composition, quality, taxes and price, as well as the risks involved in contracting such products. Therefore, the insurer should take

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extra caution while indicating the conditions and clauses of the policy.

## 7. ALTERNATIVE RISK TRANSFER (ART)

### 7.1 ART Transactions

ART transactions are not common in Brazil.

Industry loss warranty contracts are not yet on the market.

SUSEP has published CNSP Resolution No 396/2020, which aims to create a special type of reinsurer that finances its operation solely with insurance-linked securities (ILSs). The resolution provides rules such as an ILS expiry date, and issue of the ILS and registration of the ILS in systems authorised by the Central Bank of Brazil (*Banco Central do Brasil*, or BCB) or the Securities Exchange Commission (*Comissão de Valores Mobiliários*, or CVM).

Nevertheless, ILSs are not yet operating in the market.

### 7.2 Foreign ART Transactions

ART transactions in Brazil are not commonly used by local reinsurers and insurers.

As the definition of insurance in Brazil is broad and applied in a general manner by SUSEP, it is likely such transactions would be viewed as reinsurance. The lack of regulation on the subject by SUSEP could be viewed as an impediment for conducting such transactions locally.

## 8. INTERPRETING AN INSURANCE CONTRACT

### 8.1 Interpretation of Insurance Contracts and Use of Extraneous Evidence

Despite the specifics and proper characteristics of insurance policies, the interpreting of insurance contracts must abide by the general rules for interpretation of private contracts under Brazilian law.

The Civil Code establishes the general rules for interpretation of private transactions. In this sense, the interpretation of any contract between private parties should seek and comply with:

- the genuine intention of the parties when entering into the transaction;
- the uses and customs or traditions of the place where it took place and of the specific market; and
- the principle of good faith of the contracting parties (which is stricter in insurance contracts).

In addition to this general rule, the interpretation of insurance contracts may also be subject to the rules of interpretation of the adhesive nature of contracts (set forth by the Civil Code and Consumer Protection Code, as the case may be), which determines that in the event that any provisions are ambiguous or contradictory, the contract must be interpreted in favour of the party who adhered to such contract.

Considering the above, extraneous evidence, related to negotiation of the agreement and the usual market practices, is also used by courts to confirm the parties acted with good faith.

According to the Declaration of Economic Freedom Rights (Law No 13.874/2019), when the insurance is a civil/corporate contract – in other

words, a contract signed between equal parties – the interpretation rules are softened. In such cases, there is a presumption of parity, resulting in:

- the observance of the risks allocation established; and
- exception and limitation of the contractual revision.

## 8.2 Warranties

In Brazil, the specific and restricted concept of warranty does not exist in the same manner as the one used in countries that have a common law system. In such sense, the duty of disclosure and good faith, and the insurance policy wording and clauses regarding the coverage and loss adjustment claim process are extremely important to comprehend its proceedings and necessary conditions to the indemnification.

## 8.3 Conditions Precedent

In Brazil, the specific and restricted concept of conditions precedent does not exist in the same manner as the one used in countries that have a common law system. As mentioned above, the duty to act in good faith, the duty of disclosure and the policy wording are therefore essential to the interpretation of the insurance contract.

# 9. INSURANCE DISPUTES

## 9.1 Insurance Disputes over Coverage

In Brazil, disputes regarding insurance coverage can be addressed in national litigation proceedings, in an ordinary lawsuit and arbitration, when there is a complex relation sub judice.

The parties may agree to submit insurance disputes to arbitration. Court decisions have solidly recognised the validity of clauses providing for mandatory arbitration for civil and commercial matters; however, courts have decided that

such clauses shall only bind consumers if they expressly agree to them.

However, under a consumer contract, it is important to comply with some requirements for the validity of an arbitration clause. The arbitration clause should be in bold type and have a specific signature on it, or be contained in a separate document to the main agreement. Accordingly with the Brazilian Arbitration Law (Federal Law No 9,307 of 23 September 1996, or BAL), in adhesive contracts the arbitration clause must be accompanied with the consumer's specific signature on the clause, which needs to be in bold type, or be contained in a separate document to the main agreement. Besides that, the arbitration clause will be effective should the consumer initiate the arbitration or expressly agree with the institution of its proceeding.

Brazil has seen a continuous increase in the popularity of arbitration as an alternative dispute resolution method for the following reasons:

- it is usually faster than procedures in Brazilian courts;
- parties have the freedom to choose arbitrators, which may have more knowledge on specific and technical questions (as is the case regarding insurance and reinsurance matters);
- parties are free to select the applicable law;
- parties can determine that the existence of the procedure and the final decision will be confidential;
- more flexibility is conferred to the procedure; and
- decisions in arbitration can be enforced by courts.

The mentioned characteristics make arbitrations more attractive in some cases than ordinary court procedures, even more so considering that insurance disputes are usually highly complex

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and specific. In fact, SUSEP has encouraged entities belonging to CNSP and that operate big risk portfolios to add arbitration clauses in their contracts.

Brazilian law has established a limitation period of one year from the loss to file a dispute regarding an insurance claim.

## 9.2 Insurance Disputes over Jurisdiction and Choice of Law

According to the Law of Introduction to the Norms of Brazilian Law, the law applicable to agreements between parties is the law of the proponent's residing country. The freedom of the parties to choose the applicable law is a debated issue in Brazil, as the Law of Introduction to the Norms of Brazilian Law only provides the above rule in relation to applicable law.

Insurance between Brazilian parties is interpreted according to Brazilian law.

As for the Brazilian jurisdiction, it is competent when the respondent is domiciled in Brazil or should the obligation be fulfilled.

Therefore, national insurance policies disputes will usually be resolved in Brazil. The territorial competence in Brazil can be negotiated by the parties in a choice of exclusive forum clause. This type of clause cannot be negotiated in an abusive manner to the detriment of the consumer, under penalty of being invalid. For consumer contracts, the jurisdiction is mandatorily the place of residence of the consumer, according to the Consumer Protection Code.

As for reinsurance policies, Resolution CNSP 168/2007, as stated in **6.2 Failure to Comply with Obligations of an Insurance Contract**, establishes the obligation of the submission of the contract to Brazilian law, although such provision in a regulatory rule is highly debated.

## 9.3 Litigation Process

The Brazilian litigation system has three instances:

- a first instance composed of state and federal lower courts;
- a second instance composed of regional federal courts or state high courts; and
- a third Superior Court instance composed of the Superior Court of Justice (with jurisdiction for non-constitutional matters) and the Supreme Federal Court (with jurisdiction for constitutional matters).

The first instance is characterised by the development of the phase of cognition, which has the evidentiary stage and different manifestations of the parties in order to convince the judge. The other instances are usually related to appeals filed against the decisions of the first instance and therefore they are not designed for the production of evidence, but for the re-examination of the main arguments of the case. The Superior Court of Justice and the Supreme Court have another particularity: they are designed to decide appeals based on federal law violations or constitutional law violations. In other words, it is not possible to reassess the evidences already discussed in the instances below.

Insurance disputes may be time consuming if the parties refuse to accept the first-instance judgment because of the appeal system.

The New Civil Procedure Code came into force on 18 March 2016 and pursued a briefer litigation by promoting and enhancing the rules of alternative dispute resolution mechanisms (especially arbitration and mediation), rendering certain decisions by the superior courts binding and creating a model decision from a single case that can be applicable to similar cases and, therefore, similar court decisions (comparable with precedents in the USA). The New

Civil Procedure Code's stimulus for conciliation and mediation is clear, considering that judges, once they have received a petition, shall provide a conciliation or mediation hearing that will be carried out by experts in the matter, who will try to resolve the situation by consensus.

## 9.4 The Enforcement of Judgments

In Brazil, the enforcement of a national judgment (which includes a national arbitration sentence) can be made in a definitive or provisional manner, depending on the existence of *res judicata*. In both cases, the enforcement is initiated by the filing of a simple motion requesting the beginning of the enforcement phase and enables the use of constrictive measures against the debtor in order to secure the debit enforced.

However, before a foreign judgment (judicial or arbitral), it is necessary to hold a recognition proceeding before the Superior Court of Justice (SCJ) prior to enforcement proceedings, which is regulated by the New Civil Procedure Code (ratification of the foreign decision – Articles 960 to 965) and the SCJ's internal regulation (Articles 216-A to 216-N). In such analysis, the SCJ will evaluate whether the decision:

- has been rendered by the authority with jurisdiction;
- has been preceded by suitable service of process, even whether there is default;
- is effective in the country of origin;
- violates Brazilian *res judicata*;
- is accompanied by an official translation, when necessary; and
- contains an express violation of public policy.

Besides such proceeding, in the case of letters of request determining an order to be enforced in Brazilian territory, the grant of *exequatur* by the SCJ is necessary to authorise the enforcement. This proceeding is regulated under the same articles of the ratification of the foreign decision.

Only after such proceedings is the decision enforceable in Brazil.

## 9.5 The Enforcement of Arbitration Clauses

The rights under commercial insurance and reinsurance contracts are generally arbitrable under Brazilian Law (ie, constitute freely disposable property rights). The Brazilian Arbitration Law, Law No 9.307/199, has incorporated the competence-competence principle, according to which, arbitrators should issue a decision on their own jurisdiction before the courts.

However, in insurance and reinsurance contracts, parties should pay attention to specific formalities in the arbitration clauses, applicable according to the BAL by virtue of insurance and reinsurance agreements' adhesive legal nature and by SUSEP regulations, as indicated in **9.1 Insurance Disputes over Coverage**. Moreover, the arbitration clause should mention that:

- the insured party has freely adhered to said clause;
- by doing so, the party is waiving its right to litigate its case before the courts, and is choosing to resolve its dispute by arbitration, which shall lead to an award with the same binding legal effects of a judicial decision; and
- the arbitration clause is governed by the BAL.

Failure to comply with said requirements may lead a court to declare an arbitration clause null *prima facie*, as evidenced by decisions, including cases related to insurance agreements.

## 9.6 The Enforcement of Awards

Arbitration awards in Brazil have the same legal effects as court judgments and are therefore enforceable. Awards granted outside the Brazilian territory must be through recognition proceedings before the SCJ, the country's highest court for non-constitutional matters, prior to

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enforcement proceedings (although provisional enforcement and precautionary measures are admissible). The recognition is granted by the Presiding Justice of the SCJ, observing the same criteria indicated in **9.4 The Enforcement of Judgments**. If the request is contested, the recognition will be judged by the 15 most senior Justices of the SCJ.

Studies show that recognition proceedings in Brazil take three years on average.

Brazil has ratified the New York Convention (Decree No 4,311 of 23 June 2002) and the grounds set out in Article V to deny recognition are mirrored in Articles 38 and 39 of the BAL. Following the recognition of the award by the SCJ, enforcement proceedings may be initiated before lower federal courts.

## **9.7 Alternative Dispute Resolution**

Alternative dispute resolution has an ever-growing relevance in Brazil, whether it be combined with litigation or arbitration. The main characteristics of mediation are informality, good faith and confidentiality. The mediation seeks to resolve conflicts in a consensual manner, without resorting to any court or arbitration proceedings (but not prejudicing the right to resort to said dispute resolution mechanisms).

The 2015 Brazilian Code of Civil Procedure and the Judiciary (CNJ Resolution No 125 of 29 November 2010) provided for relevant developments in the use of alternative dispute resolution methods, such as mediation and conciliation. Pursuant to the Civil Procedure Code, a mandatory conciliation/mediation hearing shall be scheduled prior to the presentation of the defendant's answer. Consensual extrajudicial mediation may also be agreed by the parties, and specific legislation has been enacted on the subject (Federal Law No 13,140 of 26 June 2015).

For these reasons, mediation is equally relevant for commercial and consumer insurance and reinsurance contracts, although the approach to these methods changes from case to case. The use of mediation procedures has also grown recently because of the mandatory conciliation and mediation hearing required by the New Civil Procedure Code. Judges are incentivised to try to make the parties reach an agreement, and additional mediation/conciliation hearings may be held during the proceedings, including on appeal.

If the parties agree to be subject to extrajudicial mediation, the agreement will be valid regardless of any arbitration or court procedure. When such procedures have already begun, they will be suspended until the end of the negotiations. On the other hand, if there is no ongoing procedure, the limitation period will be suspended until the end of the negotiations. It is also possible for the parties to determine the scheme of the mediation, such as its date, the place of any meetings and the mediator.

## **9.8 Penalties for Late Payment of Claims**

Brazilian regulation establishes that the settlement of a claim must finish in 30 days after the delivery of the necessary documents by the insured. However, there is no provision regarding damages for this delay.

Brazilian law does not accept the condemnation of the debtor in punitive damages as a consequence of late payment. Nonetheless, after the enforcement of judgment has been initiated and before the default, monetary correction and default interest are imposed on the amount enforced as a result of application of the law.

Damages can be included if there is a violation of SUSEP's rule and a punitive administrative proceeding.

## 9.9 Insurers' Rights of Subrogation

Insurers in Brazil have a legal right of subrogation following the payment of a claim, as established in the Civil Code. This means the transfer to the new creditor of all rights, claims, benefits and guarantees of the prior creditor regarding the debt against the main debtor and potential guarantor. The new creditor acts as if it was the prior creditor.

## 10. INSURTECH

### 10.1 Insurtech Developments

During the past three years, SUSEP has been taking an active role in implementing regulation with the purpose of promoting innovation in the insurance market. The authority has been issuing rules to foster the market, incentivising the creation of new business models.

Brazil has seen a blooming of start-ups that are trying to disrupt the market and come up with new solutions to modernise traditional products.

Bancassurance channels have also turned their attention to the insurance sector and are implementing new products through the use of technology and new models.

Specifically regarding regulations aligned with the new agenda and in a joint effort with the BCB and the CVM, SUSEP issued, on March 2020, new regulations for a regulatory sandbox. Innovative and disruptive companies wishing to underwrite risks could obtain, through the sandbox programme, a temporary limited licence from SUSEP to issue insurance products under reduced entry barriers. The first sandbox programme was initiated in 2020 by SUSEP and approved 11 participants in December 2020, of which ten were able to undergo the final authorisation process. SUSEP initiated a second sandbox programme in 2021, with 21 new

projects having been preliminarily approved on 21 October 2021. Such entities are now undergoing a final approval process. If all entities are approved, the number of total insurers in Brazil will have a 24.8% increase resulting from both the sandbox programmes.

SUSEP was the first authority to conclude a sandbox initiative and to start a second programme in 2021. The entity is working fast on promoting the modernisation of the sector.

The intention of the programme is to foster innovation and competition, with the ultimate goal of enhancing the customer experience, increasing market penetration and reducing insurance prices. Such resolution was welcomed by the burgeoning insurtech start-ups that face high costs and strict regulation challenges associated with risk underwriting activities in Brazil. The regulations subject to public consultation were inspired by the sandbox initiatives of other countries, such as the United Kingdom's Financial Conduct Authority initiative.

Other initiatives by SUSEP, such as the simplification of the registration process for new insurance products and the segmentation of insurers for a risk-based approach to regulation, are also fostering the growth of the insurtech sector in Brazil.

Segmentation is especially essential to insurtechs as it will allow smaller insurers to comply with simpler capital and reporting requirements.

SUSEP has also issued new rules for disciplinary proceedings that aim to educate the market first and focus punishment on serious and/or recurrent infractions.

### 10.2 Regulatory Response

In addition to the sandbox and segmentation initiative, SUSEP is investing in the deregulation

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of insurance products, so as to expand access to the insurance market to different economic players and consumers, and to increase the freedom to contract, in accordance with the Law of Economic Liberty and presumption of parity and equality between the contracting parties.

SUSEP aims to have a simpler registration process for products. Pursuant to public consultations issued in 2020, SUSEP also aims to create different regulations for mass insurance and the insurance of big risks. The idea is to create further contractual freedom for equal parties in a, currently, heavily regulated product.

The new regulation on insurance of big risks was enacted with the intention of further implementing the principles of the Declaration of Economic Freedom Rights, allowing insurance contracts involving qualified insurers to be freely negotiated with the insurer and with no standard wording previously registered before or approved by SUSEP. This differs from the usual treatment traditionally given to insurance contracts, which are based on standardised terms that frequently do not address big-risk-industry needs for specific clients/transactions. Big risks insurance includes specific lines (such as petrol, nuclear and banks), as well as policies of legal entities involving limits of coverage above BRL15 million, total assets above BRL27 million or gross revenues above BRL57 million.

## **11. EMERGING RISKS AND NEW PRODUCTS**

### **11.1 Emerging Risks Affecting the Insurance Market**

Financial protection is offered against civil liability arising from data privacy breaches (either by hackers or due to a company's errors and dereliction), including defence costs in investigations

and lawsuits – cyber insurance. The following items are examples of covered risks:

- public disclosure of private data or third-party corporate data that is confidential or under the insurer's responsibility or custody;
- contamination of data by malicious code or malware, undue refusal to grant access requested by authorised people, theft of access codes inside the insurer's premises or computer systems, etc;
- actions taken by outsourced companies under the insured's responsibility;
- defence costs, reasonable costs for legal consulting in investigative procedures, costs incurred to notify users about any data breach, etc; and
- control costs and expenses.

Parametric insurance is being developed and commercialised to attend to the market's need to insure losses derived from climate change, especially in the agricultural area. In such insurance, the coverage is based on the definition of parameters of the occurrence of a natural event. In other words, the coverage is related not to a natural catastrophe, such as a hurricane, but to regular events performed in extreme/specific conditions; for example, the claim depends on an excessive amount or absence of rain.

Intermittent insurance is also gaining force in the insurance market. Although such type of insurance covers risks already covered by other policies, it is innovative since it accommodates the need to respond to constant and rapid changes in everyday life and mitigates the risks underwritten for specific times. Also, it promotes the introduction of consumers from lower economic income layers in the insurance market, making the products more accessible and cheaper.

Finally, new regulation for complex risks was also published in 2021. Such regulation allows



parties to freely negotiate policies without requiring previous approval by SUSEP, which seems more adequate for the reality of complex risks insurance compared with standard consumer relationships.

## 11.2 New Products or Alternative Solutions

Brazil still has a developmental insurance market. Although there are initiatives for implementing innovative products such as intermittent and parametric insurance, the market still heavily relies on “importing” new products and ideas from foreign, developed markets.

However, SUSEP has been active in its promotion of innovation through several initiatives. The authors expect a new wave of redesigned insurance products to reach Brazil in the next couple of years, generated by SUSEP’s deregulation of products.

## 12. RECENT AND FORTHCOMING LEGAL DEVELOPMENTS

### 12.1 Developments Impacting on Insurers or Insurance Products

The Brazilian insurance market is underdeveloped in comparison to insurance markets such as the United Kingdom.

The COVID-19 pandemic may not have a great impact in the analysis of insurance coverage under business interruption claims, because the Brazilian damages insurance products are designed to cover events based on material/physical damages verified in the insured properties/sites. In the context of losses related to COVID-19, the prior material/physical damage to the property is not the cause of the closure of commercial facilities.

It is worth noting that most life insurance in Brazil considers pandemics an excluded risk. However, many insurance companies proactively announced they would not deny coverage for COVID-19 deaths.

The COVID-19 pandemic has also caused a hard market for certain segments that were indirectly affected by the crisis, such as directors and officers insurance, credit insurance and renters insurance. Premium prices are up and negotiation of different coverages and conditions has been difficult.

## 13. OTHER DEVELOPMENTS IN INSURANCE LAW

### 13.1 Additional Market Developments

As mentioned above, SUSEP is conducting several initiatives for promoting growth, competitiveness and innovation in the insurance market.

SUSEP’s regulatory agenda for 2021 was focused on:

- setting forth new principles for the implementation of the open insurance system;
- consolidating rules for the second edition of the regulatory sandbox programme;
- innovating the rules on insurance for big risks;
- consolidating rules on different insurance products (life, rural, auto, civil liability);
- restructuring the rules for the authorisation processes conducted by SUSEP;
- reviewing the rules on internal control, risk management and internal audit; and
- reviewing the regulation on insurance agents (*Representantes de Seguro*), allowing such entities to act as true MGAs.

In 2021, SUSEP and CNSP issued rules about the electronic registration of insurance policies,

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the segmentation of regulated entities, the second edition of the regulatory sandbox, the implementation of the open insurance system, and the disciplinary proceedings and principles related to the intermediation of insurance policies.

As of 9 December 2021, SUSEP had already issued 44 public consultations on various themes. One of the main agendas is to deregulate the insurance market in general and deregulate the registration of insurance products, promoting simplified regulations for different types of insurance coverages.

The presidency of SUSEP changed in November 2021. The new president is Alexandre Camillo. It is still unclear to market players how this change will affect SUSEP's regulation priorities.

With the 2022 elections, SUSEP's management is likely to change again in the coming year (depending on the success of President Jair Bolsonaro's re-election campaign).

# BRAZIL LAW AND PRACTICE

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**Pinheiro Neto Advogados** is an independent full-service firm specialising in multidisciplinary deals, and was the first Brazilian law firm to specialise in corporate clients. Over more than 75 years, the firm has translated the Brazilian legal environment for the benefit of local and foreign clients. With clients in almost 80 countries, the firm has grown organically, and developed a distinctive, tight-knit culture, with a low associate-to-partner ratio. Its unique, democratic

governance structure promotes transparency and consensus-building among the partners. With a focus on innovation, the firm has kept its competitive edge throughout the years, and is widely hailed as a beacon of the Brazilian legal market.

The firm would like to thank Nicholas Camargo Giovanelli and Hellen Cristina Leite for their contribution to the guide.

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