5 What are the limitation periods for issuing proceedings?

5.1 The Civil Procedure Code contains general rules about limitation periods: declaratory actions have a limitation period of 20 years, other actions a limitation period of 10 years.

5.2 The limitation period for insurance contracts is governed by article 1081 of the Commercial Code. Two types of limitation period apply: the ordinary limitation period and the extraordinary limitation period.

5.3 The ordinary limitation period is two years from the time the interested party was or should have been aware of the facts giving rise to the claim. The Supreme Court of Justice has defined an "interested party" as anyone who is entitled to a right arising from an insurance contract.

5.4 Article 1081 states that as a long stop there is an extraordinary limitation period of five years from the time the right to bring an action accrued. This limitation period runs against everybody, regardless of the time of the knowledge.

5.5 Limitation of time for action is a public policy issue and thus terms cannot be modified by agreement between the parties. Under Colombian law a limitation period can only be suspended by acknowledgment of debt or by filing a claim.

6 Are there any alternatives to litigation?

6.1 The Colombian Political Constitution of 1991 and the Statutory Law on the Administration of Justice of 1996 establish alternative mechanisms for resolving disputes. Law 446 of 1998 provides for conciliation and arbitration schemes. These are regulated by decree 1818/1998.

6.1.1 Mediation

Mediation can occur as part of the judicial process or alternatively, can be extra-judicial. Extra-judicial mediation can take place before a body which specialises in mediation (institutional conciliation) or before public authorities (administrative mediation)

6.1.2 Arbitration

Arbitration may be invoked either through an "arbitration agreement" or through a "compromising clause". In the former, the parties agree to refer disputes that may arise between them in the future to arbitration. In the latter the parties agree to refer an existing dispute to arbitration.

Arbitration is commonly used to resolve commercial disputes and issues arising from administrative contracts.

6.1.3 Friendly mediation

Parties may agree to grant a third party known as a "friendly mediator", the power to decide, with binding effect, the extent of obligations arising from a contract.

7 **What opportunities are there to settle a claim?**

For ordinary proceedings, the Colombian Civil Procedural Code provides for an obligatory conciliation hearing after close of pleadings, to provide an opportunity for parties to settle their disputes completely, or at least narrow the issues.

8 **Do Courts allow "without prejudice" negotiations to take place?**

Without prejudice negotiations are not recognised.

9 **What type of damages may be awarded by the Courts?**

Damages are awarded on legal rates/criteria according to the concept of proportionality. Exemplary damages can be awarded in limited circumstances.

10 Claims Made Policies

Claims made policies were recognised in Colombia relatively recently, by Act 389 of 1997.

11 What is the Insured's duty of disclosure?

11.1 Art. 1058 of the Commercial Code states that the Policyholder has a duty to disclose to the Insurer any fact or circumstance that is relevant to the risk covered.

11.2 Usually, the Insurer provides a questionnaire for the Insured to complete, in which case it is presumed that the Insurer has examined any aspect of the risk which he considers to be relevant. If the Insurer does not provide a questionnaire, any inaccuracy in the information provided by the Insured may lead to an adverse finding against the Insured.

11.3 If the information provided by the Insured is inaccurate, the law allows the Insurer to avoid the Policy, but only if the non-disclosure or misrepresentation would have caused the Insurer not to enter into the contract or to impose more onerous conditions.

11.4 If the non-disclosure/misrepresentation is innocent, the Insurer will not be entitled to avoid the contract, but only to reduce the indemnity provided proportionately to any prejudice caused.

12 What is the consequence of a breach of a policy condition?

A breach of Policy Condition may jeopardise cover as may any compromise of subrogation rights.

13 What is the consequence of a breach of warranty?

Under Art. 1061 of the Colombian Commercial Code, a warranty is a promise whereby the Insured is obliged to do something particular, to comply with a specific requirement or to affirm or deny the existence of a given fact. A warranty must be incorporated in the Policy. Breach of warranty by the Insured will entitle the Insurer to treat the Policy as void.

14 Are exclusion clauses in policies effective?

Exclusion clauses are effective, provided they are highlighted and shown on the front of the Policy.

15 **The requirement of the Insured to notify Insurers of claims/circumstances.**

Art. 1075 of the Commercial Code states that Insurers should be notified of a loss within 3 days of the date the Insured has knowledge or should have had knowledge of the loss. Late notification does not deprive the Insured of his entitlement to any compensation; rather it entitles the Insurer to set off the amount of any damage suffered as a result of late notification, against the indemnity claimed.

16 **What is the effect of a reservation of Insurer's rights?**

There is no analogous concept in Colombian law. Art. 1077 of the Commercial Code provides that an Insurer has 30 days from the date of notice of a claim to confirm or deny cover (with grounds) or lose the opportunity to do so.

17 **Are third parties entitled to bring direct claims against Insurers under the Policy?**

Pursuant to Art. 1133 of the Commercial Code, amended by Art. 87 Act No. 45/1990, third parties can bring a claim direct against Insurers.

18 **What are the requirements of a foreign insurer to be authorised to carry on business in the jurisdiction?**

Only insurance companies that are registered in Colombia can offer direct insurance to Colombian companies. Foreign Insurers wishing to conduct insurance business in Colombia must therefore establish a public limited company in Colombia and obtain the appropriate authorisation from the Superintendent of Insurance.

19 **Are the laws for insurance applicable for reinsurance?**

19.1 The laws of insurance are generally applicable to reinsurance, unless specific exceptions are recorded in the reinsurance contract.

19.2 The Commercial Code includes specific articles which govern the Reinsurer's liability. The Code does not permit an Insured to claim directly against a Reinsurer.

Mexico

GENERAL LAW

1 What is the source of law in the jurisdiction?

1.1 Mexico is a Federal Republic with the result that some laws apply to the whole jurisdiction and others only in their local States. Laws approved by local congress can not derogate Federal law.

1.1.1 Statute

This is the principal source of law in Mexico. Federal Statutes are enacted by Congress Union and approved by the President of the Republic of Mexico. Local law is enacted by local Congress and approved by the Governor of the State.

International treaties enacted by the President of the Mexican Republic and ratified by Congress have Federal status.

1.1.2 Custom

This is a secondary source of law and has legal effect only when it is not contrary to written law.

1.1.3 Case law

This is another subordinate source of law and can only be derived from the federal courts. For case law to constitute a binding precedent:

1.1.3.1 There must be at least five judgments of the respective court, without any intervening contrary decision.

1.1.3.2 The only relevant judgments are those of the Supreme Court of the Nation (Suprema Corte de Justicia de la Nación), the College Circuit Courts (Tribunales Colegiados de Circuito), the Tax Court (Tribunal de Justicia en material Fiscal) and the Administrative Law Court (Tribunal de Justicia Administrativa).

1.2 General principles of law

There are in addition general principles of law. Some of these are directly recognised by federal law.

2 How do Courts determine jurisdictional issues?

2.1 A Mexican court will have jurisdiction:

a) If the defendant is domiciled in Mexico;

b) if it is agreed by the parties in the contract;

c) in other specific cases (c.f. art 12-28 Civil Procedure Code)

2.2 A Mexican Court will have jurisdiction in an insurance dispute if two conditions are satisfied:

2.2.1 The Insurer is domiciled in Mexico and has been established in accordance with Mexican legislation with the consent of the Secretary of the Hacienda and Crédito Publico (this organ is equivalent to the treasury in the USA and the Exchequer in England) and National Commission of Insurance and Security, equivalent of the FSA in the UK;

2.2.2 the insurance contract is made in Mexico.

3 Who has the right to issue proceedings?

3.1 In Mexico a party can instigate civil proceedings only if he has a cause of action .

3.2 Third parties have no right to commence proceedings against an Insurer, but may seek a declaration on a repudiated contract.

4 What is the typical litigation procedure?

4.1 In Mexico, civil litigation proceedings are governed by the Civil Procedure Code 1943, as amended in 1994.

4.2 The key procedural stages are as follows:

4.2.1 The Claimant files a claim, which in Mexico is called "Demanda". The "Demanda" must incorporate all the facts, the legal arguments upon which the claimant relies and the remedy sought.

4.2.2 Once the "Demanda" has been served, the defendant must file a defence within the time ordered by the judge. If the defendant fails to lodge a defence, the Claimant can apply for a default judgment.

4.2.3 If the defendant enters a defence, the parties are given 15-21 days (depending on the case) in which to submit further allegations; they can reply to any allegations made in the defence and can ask for further particulars of any allegations.

4.2.4 Once this process is complete, the judge summons the parties to an "Audiencia de Conciliación". The purpose of this hearing is to encourage the parties to reach a settlement. If an agreement is not reached, the Judge will commence the "evidence" stage.

4.2.5 The evidence stage normally lasts 10 days. Under the Mexican law, the Judge can admit as evidence the following:

- confession;
- documents;
- expert and third party evidence;
- or any other evidence submitted by the parties to the judge and accepted by him.

4.2.6 After the "evidence" stage is complete, the next step in the proceedings is the "allegation" stage. During this stage the parties have 10 days to make written submissions to the judge. Once this process is complete, the judge considers the evidence and submissions and makes his judgment.

4.2.7 Following judgment, the parties have five days to lodge an appeal before the "Tribunal de Alzada". Once an appeal has been lodged, the appeal court has a period of three days to reject or admit the appeal.

4.2.8 In insurance disputes, parties are obliged to initiate an arbitration process **before** the instigation of any civil proceedings. This mediation must take place before la Comision Nacional para la Protección y Defensa de los Usuarios de Servicios Financieros. (CONDUSEF), otherwise the "Demanda" won't be admissible. It should be noted that it is not compulsory for Insurance Companies to take part in the arbitration.

5 **What are the limitation periods for issuing Proceedings?**

5.1 Under Mexican law there are specific limitation periods for different types of action.

5.2 There is no common limitation period for contractual actions. Each type of contract has its own limitation period, for example actions founded on insurance contracts have a 2 year limitation period

5.3 The limitation period for claims in tort is 2 years.

5.4 The limitation period will be suspended:

5.4.1 By the appointment of an expert following the occurrence of the loss;

5.4.2 in the case of an action claiming payment of policy premiums, by the Insurers demanding payment;

5.4.3 by the submission of a claim to CONDUSEF for mediation.

6 Are there any alternatives to litigation?

6.1 In insurance disputes, mediation is compulsory prior to issuing of proceedings.

6.2 Conciliation and arbitration are obligatory in matters of insurance and The Commercial Code regulates the general rules applicable to arbitration.

6.3 Generally, the "corredores publicos" (notary public specialised in commercial transactions) will act as mediators in any mediation of a commercial nature.

6.4 Conciliation is classified as "judicial or extra judicial" depending on the type of organisation or institution involved.

7 What opportunities are there to settle a claim?

7.1 Parties can agree a settlement at any time during the proceeding before judgment is handed down.

7.2 Any agreement reached by the parties during the proceeding must be in writing.

8 Do Courts allow "without prejudice" negotiations to take place?

Under Mexican law the concept of "without prejudice negotiations" does not exist. The negotiations tend to be oral.

9 What type of damages may be awarded by the Courts?

In Mexico the object of an award is to compensate the party for the loss suffered. Punitive damages are allowed, such as loss suffer and damage (moral damage).

10 **Claims Made Policies**

Since 2002, Claims Made Policies are recognised in Mexico. However it is a new subject and there is not enough case law about this. In Mexico it is established that in order to insure Claims Made Policies it is necessary that the insurance company takes responsibility for indemnification owned to third parties because of events occurred during the valid period of the policy and two years before it, only if the claim is presented during the valid period of the policy and two years after it.

11 **What is the Insured's duty of disclosure?**

11.1 A material non-disclosure or misrepresentation by an Insured will entitle Insurers to avoid the contract. However, if the insurance covers a number of risks and the non-disclosure/misrepresentation relates only to a specified risk, then the Insurer can only avoid that element of the insurance covering that risk. In addition, the Insurer will not be entitled to avoid the contract if:

11.1.1 He knew or should have known about the non-disclosure/misrepresentation; or

11.1.2 having knowledge of the non-disclosed fact, the Insurer fails to notify the Insured within 15 days that he intends to avoid the policy.

12 **What is the consequence of a breach of a policy condition?**

A breach of condition may release the Insurers from any liability in relation to that claim, but only if the condition is one permitted by the Insurance Contract Act.

13 **What is the consequence of a breach of warranty?**

In Mexico there is no distinction between the conditions and warranties.

14 **Are exclusion clauses in policies effective?**

Exclusion clauses are effective provided they are clear and easy to read and are not contrary to the law.

15 **The requirement of the Insured to notify Insurers of claims/ circumstances**

15.1 The Insurance Contract Act states that a loss must be notified to the Insurer within a maximum period of 5 days from the date the Insured became aware of the loss. A longer period can, however, be agreed by

the parties; normally insurance contracts will provide for longer notification periods.

15.2 The Insured must notify any aggravation of the risk within 24 hours of him being aware of it. Otherwise the responsibility of the insurance company will cease.

16 **What is the effect of a reservation of Insurer's rights?**

16.1 There is no equivalent concept of "reservation of rights" in Mexico. An Insurer must confirm or deny cover within 30 days of the date he receives all relevant information and documentation from the Insured.

16.2 Insurers are entitled to request from the Insured any information relating to the loss that may be relevant to the loss.

17 **Are third parties entitled to bring direct claims against Insurers under the policy?**

Third parties have no right to bring an action against Insurers unless the Insured assigns the benefit of the policy, which entitles a third party assignee to claim in his own right.

18 **What are the requirements of a foreign Insurer to be authorised to carry on business in the jurisdiction?**

18.1 Under Mexican law, foreign companies can carry on business in Mexico, provided that they comply with legal requirements. Insurers must be authorised by the Secretary of the Hacienda and Crédito Publico and by the Commission of Insurance and Finance. These authorisations are discretionary.

18.2 The Insurer will also be subject to solvency and security requirements. It will also have to provide proof of authority in its own jurisdiction.

18.3 In the case of a foreign Finance Company that wishes to establish a branch in Mexican territory, there must exist an international treaty with the country where this foreign company was constituted, and there must be authorisation given by the Federal Government, through Secretarias de Hacienda y Crédito Publico.

19 **Are the laws for insurance applicable for reinsurance?**

Yes, but though the "Ley General de Instituciones y Sociedades Mutualistas de Seguros," in it's chapter IV regulates this, the law governing Reinsurance disputes is not well developed. Usually, disputes are resolved by reference to the Insurance and Bonds Mutual Companies Act. As more cases are heard by the Courts, a body of case law is developing. In addition, the administration and regulation of Reinsurance companies/contracts is governed by directives issued by the secretary of the Hacienda and Crédito Publico and by the Commission of Insurance and Finance.

Spain

GENERAL LAW

1 What is the source of law in the jurisdiction?

1.1 The Spanish legal system is a codified system descended from Roman law. The foundation upon which Spanish law rests falls into four main categories:

1.1.1 Principal sources

- *Ley* –"act", enacted by Parliament and embodying the basic principles on the subject.

- *Reglamento*- "regulations"- enacted by governmental bodies (rather than parliament) to develop further the basic principles enshrined in *ley*, and analogous in some ways to statutory instruments and amending or supplementing provisions. In general usage, ley embraces both concepts.

1.1.2 Subsidiary sources

- "Custom"; under circumstances where there is no directly applicable legislation, evidence may be accepted to show custom, convention or usage.

- "General principles of law". This is a bundle of concepts embodying principles such as good faith, estoppel, public policy and so on, which appear in specific situations in legislation and therefore can be argued to be of general application.

1.1.3 International convention and particularly European Community Directives

EC regulation has the same weight in Spanish law as the constitution, which takes priority over all other law including *ley*.

1.1.4 Complimentary sources: "case law"

This is analogous to precedent, so far as it goes, but one should treat with extreme caution any temptation to regard it as equivalent. One of the biggest differences between Spanish and English law is that Judges are bound only by legislation. They

are never bound by a prior decision of a Court of equal or even superior status.

The only relevant judgments are those of the Supreme Court and there must be at least two decisions to the same effect in closely analogous cases. Even then, however, the Judges are not bound by such decisions; however, they stand as a form of notice to the Lower Courts that the Supreme Court has adopted a certain stance and that if the Lower Court acts contrary to that stance, there is some prospect on appeal of the judgment being overturned by the Supreme Court.

2 How do Courts determine jurisdictional issues?

2.1 The rules governing the jurisdiction of Spanish Courts are contained in domestic legislation and in the international conventions ratified by Spain.

2.2 As a general principle, Spanish Courts will have jurisdiction if the Defendant is domiciled in Spain.

2.3 In relation to any dispute between Insurers and Insureds arising from an insurance contract subject to the Spanish Insurance Contracts Act, the competent Court will be that where the Insured is domiciled. Therefore, if the Insured is domiciled in Spain, Spanish Courts will have jurisdiction.

2.4 In the case of liability insurance subject to Spanish Law, Insurers may be sued by third parties where the Insured is sued, since Spanish Law recognises so called direct action against Insurers.

2.5 If the contract is not subject to Spanish Law and the Insurer is not domiciled in Spain, Spanish Courts will have jurisdiction, under the provisions of the EU Regulation 44/2001 which mirrors the Brussels Convention, if:

- The Policyholder resides in Spain.
- The Insurer is a co-insurer, and proceedings against the leading Insurer are brought in Spain.
- The Insurer has a branch or office in Spain.
- In case of liability insurance, if the harmful event occurred in Spain.
- In case of immovable property, if the harmful event occurred in Spain.

3 Who has the right to issue proceedings?

3.1 Under Spanish Law, any natural person, an estate, legal and certain forms of entities and, under certain circumstances, groups of consumers

who were affected by the same harmful event, having a corresponding right, are entitled to issue proceedings.

In addition, consumers' and users' associations are entitled to issue proceedings for the defence of the interests of the members of the association and in general for consumers and users.

The State Prosecutor is also entitled to issue proceedings in certain matters.

3.2 In criminal proceedings, save in limited cases, any individual or organisation is entitled to instigate criminal actions ("*querella*"), whether or not they have been affected by the alleged criminal acts, on the basis that they represent the public interest.

Likewise, there is a general duty to report ("*denuncia*") to the relevant authorities or court the potential commission of criminal offence.

It is important to note that under the Spanish Criminal system, prosecuting parties are permitted to bring a civil action within the criminal proceedings.

4 What is the typical litigation procedure?

4.1 Civil litigation in Spain is governed by the Civil Procedures Act, which came into force in January 2001 ("Ley de Enjuiciamiento Civil 1/2000", "LEC").

4.2 This Law distinguishes two main proceedings:

4.2.1 *Juicio ordinario*: when the value of the claim is:

- Pesetas 5 million (Euros 30,050) or more;
- falls under Art. 249 of the LEC;
- it is impossible for the Judge to make an estimation of the amount involved.

4.2.2 *Juicio Verbal*: when the amount claimed is:

- Less than Pesetas 5 million (Euros 30,050);
- the claim is made under Art. 250 (of the LEC) not under 249.1

4.3 Juicio Ordinario

4.3.1 Demanda

This is the document issued by the Claimant in order to commence the proceedings. It contains in detail all the facts relied upon, the

allegations that he wishes to make and the legal arguments supporting them. The Demanda will also contain the personal details of the Defendant and Claimant and all documents supporting the Claimant's claim which he intends to use as evidence. The opportunity to amend or supplement one's case in Spain is generally limited to facts and documents of which the parties become aware after the submission of their pleading. The Demanda must therefore be as comprehensive as possible on the presentation of the case. Due to the principle of "preclusion" any document not filed in support of the Demanda will be rejected by the Court if an attempt is made to adduce it at a later stage, unless it is:

- dated after the Demanda;
- dated before the Demanda but unknown by the Claimant to have existed at the date of the commencement of the proceedings, in which case this lack of knowledge must be proven;
- not available to the Claimant at the date of the Demanda's issue. Again in this event, a precise description of the previous location of the document and how it became available must be given.

The Demanda interrupts the limitation period, crystallises the parties position so they cannot change their version of the facts and triggers "*lis pens*"- litispendencia - preventing additional actions in respect of the same subject matter in a civil court.

4.3.2 Contestacion a la Demanda

Once the Demanda has been filed at Court, a copy of it, together with a copy of all the supporting documents, is served on each Defendant, who in turn must serve a reply (i.e. a defence) within a period of 20 days.

The Contestacion must answer each point raised in the Demanda, both as to facts and as to legal arguments and, as with the Demanda, any supporting documentation on which the Defendant seeks to rely must be attached.

4.3.3 Audiencia Previa al Juicio

After the Contestacion has been filed, the Judge will summon the parties to a preliminary hearing.

In that hearing, the most important steps are as follows:

- The parties are encouraged to reach a settlement. If the parties reach a settlement, the Judge will approve it, so its contents can be enforced.
- If the parties do not reach a settlement, the Judge will consider the procedural objections raised by the Defendant in the Contestacion.

- Once the procedural questions have been examined by the Judge, the parties and the Judge will fix the issues in dispute. The Judge will continue to encourage the parties to reach a settlement.

- If an agreement is not reached, the parties will notify the Court of the documents they intend to use at trial.

- The Judge will consider the evidence each party intends to use and accept or reject it in each case. The Judge will not admit evidence on facts which are not subject of an allegation by the parties, or which are admitted by the parties, as they are deemed otiose.

4.3.4 Trial

- The witnesses are heard;

- Closing arguments on evidence are submitted.

- Closing arguments on law are submitted.

4.3.5 Diligencias finales

After the trial has taken place and before the Sentencia is handed down, the Judge has the power to order additional evidence to clarify his view on any points which require it. Such evidence is known as "Diligencias Finales" and can only be ordered by the Judge following a request from one of the parties and provided that the Judge considers it relevant.

4.3.6 Judgment

Following the trial, the Judge will in due course render his verdict, the Sentencia, which is served on the parties.

4.4 Juicio Verbal

The most important steps in the Juicio Verbal are:

4.4.1 Demanda, defining briefly the facts and the legal grounds on which the claim is based.

4.4.2 Once the Demanda has been lodged and approved by the Judge, a copy of it, together with the supporting documents is served on the Defendant and the Judge will summon the parties to Trial.

4.4.3 At the trial the most important steps are as follows:

- The Claimant will submit his statement of facts and the legal arguments in support of his claim.

- The Defendant will in turn submit his statements and the facts, the procedural questions and the legal grounds on which he bases his defence.

- The parties will fix the issues in dispute.

- The parties will indicate the evidence they intend to use and once approved by the Judge trial will take place.

- Closing arguments on evidence are submitted.

4.4.4 Judgment

Following the trial the Judge will give his decision.

5 What are the limitation periods for issuing Proceedings?

5.1 Actions founded in contract must be commenced within 15 years.

5.2 Tortious claims expire one year after the injured party becomes aware of the damage suffered.

5.3 However, limitation periods may be interrupted by the Claimant making a claim in writing for example by a notarised letter before action. Thus, the Claimant may gain a fresh limitation period.

6 Are there any alternatives to litigation?

6.1 Arbitration

6.1.1 Under Spanish Law, the parties may decide to arbitrate a dispute. The principles of the arbitration are regulated by the Arbitration Act ("Ley de Arbitraje") of 1988.

6.1.2 According to the Act, the arbitration may be in "equity", which means that arbitrators do not need to follow the law strictly (similar to "honourable engagement") to reach their decision, or in "law" which means that the arbitrators must strictly apply the law. In the latter case the arbitrators must be practising lawyers.

6.1.3 An agreement to arbitrate will bind the parties provided that it meets all the requirements set out by the Arbitration Act. The parties are allowed to agree rules for the arbitration proceedings.

6.1.4 Under Spanish Law arbitration awards have the same legal effect as court judgments.

6.2 A.D.R./mediation is not regulated under Spanish Law (save in employment disputes) nor is it used much in Spain to resolve disputes.

7 **What opportunities are there to settle a claim?**

Throughout the litigation process, parties are encouraged under the Ley de Enjuiciamiento Civil to explore negotiated settlements instead of going to trial. If an agreement is reached by the parties and approved by the Judge, its contents can be enforced in the same manner as a judgment.

8 **Do Courts allow "without prejudice" negotiation to take place?**

Negotiations between the parties can take place either before or during the handling of the proceedings. However, Spanish law does not recognise the concept and effect of "without prejudice" correspondence. Therefore, negotiations tend to be oral.

9 **What type of damages may be awarded by the Courts?**

9.1 The object of an award in damages in Spanish Law is to give the Claimant compensation for the damage, loss or injury he has suffered.

9.2 In particular, the Spanish Civil Code refers to indemnity for damage and prejudice ("indemnización de daños y perjuicios") which includes the compensation of bodily, moral or financial injury suffered, including loss of profit.

9.3 Other damages, such as punitive and exemplary damages, are not recognised under Spanish Law.

10 Claims Made Policies

The Spanish Insurance Contracts Act allows claims made clauses providing cover in respect of claims made against the Insured within the Policy period, subject to the clause providing at least either a one year retroactive period or a one year discovery period. In addition, a claims made provision is deemed to be a restrictive clause and therefore, it must be highlighted and specifically accepted in writing by the Insured.

11 What is the Insured's duty of disclosure?

11.1 The Insurance Contracts Act establishes upon the Policyholder the obligation to disclose to the Insurer all circumstances which may influence the evaluation of the risk. The duty of disclosure is not absolute, but limited to the terms of the Proposal Form/questionnaire forwarded by the Insurer to the Insured. If the Insurer fails to ask about a particular issue, then it cannot at a later stage allege non-disclosure.

11.2 If the Insured has failed to disclose all circumstances as per the Proposal Form, the Insurer is entitled to rescind the Policy or, if the claim has already taken place, to reduce the indemnity in the same proportion as it would have increased the premium had the Insurer been aware of the non-disclosed circumstance – save in cases of fraud by the Policyholder, in which case Insurers will be exempt from liability. For the Insurer to avail itself of this right, the undisclosed circumstance must be material to the loss or claim concerned.

11.3 If the disclosure obligation is breached, the Insurer, is entitled to "rescind" the policy, i.e. to avoid the Policy only from the date on which the breach of this duty is discovered, and not from inception.

12 What is the consequence of a breach of a policy condition?

12.1 Except in the limited cases where the parties have a choice of law, the Policy must fully comply with the provisions of the Insurance Contracts Act, which is very protective of the Insured. As a consequence the Insurer can only incorporate conditions permitted by the Act.

Thus

12.1.1 a clause where it is a condition precedent to liability that the Insured must notify a claim within a particular period of time will not be effective; breach merely entitles the Insurer to recover from the Insured any damage it may have suffered directly as a result of the late notification.

12.1.2 failure to pay a premium instalment allows the Insurer to suspend the cover 30 days after the due date but not to rescind or avoid the policy

12.1.3 breach of a condition precedent to liability that, for example a fire should not have been caused by negligence on the part of the Insured will not stand under the Act.

13 What is the consequence of a breach of warranty?

The concept of warranty does not exist as such under Spanish Law. In practice a breach of "warranty" would be treated in the same way as a breach of a condition or a case of misrepresentation.

14 Are exclusions in policies effective?

14.1 Under the Spanish Insurance Contracts Act, clauses which limit the rights of the Insured, such as exclusions and restrictive definitions, have no effect unless properly highlighted and specifically accepted in writing by the Insured or the Policyholder. A general form of acceptance by signature at the end of the contract will not suffice.

These rules are not formalities: they are an absolute requirement in Spanish Law. Failure to follow them can have devastating consequences as the Policy is effectively turned into an insurance without exclusions.

14.2 If a term is ambiguous, then its meaning will be construed against the party who drafted the Policy.

15 The requirement of the Insured to notify Insurers of claims/circumstances

15.1 Loss must be notified to the Insurer within a maximum period of seven days from the date on which the Insured becomes aware of it, unless a longer period of time has been stated in the Policy. However, the Insurer shall only have the right to recover damages for prejudice caused by late notice. No damages are recoverable if it is proven that the Insurer has gained knowledge of the loss by some other means.

15.2 Liability policies issued on a claims made basis often require the Insured to notify to the Insurer of any circumstance which could give rise to a claim. If the Insured, being aware of it, fails to notify a circumstance within the Policy period and a claim is made after the expiry of the Policy the Insurer will only be entitled to turn down the claim if the claims made clause is drafted in accordance with the Insurance Contracts Act.

16 What is the effect of a reservation of Insurers' rights?

16.1 Reservation of rights as such is an unknown concept in Spain. The closest concept is the "*doctrina de los actos propios*" which means that a party is bound by its own conduct. For instance, if the Insurer has made payments on account in respect of a claim, it cannot, at a later stage, reject cover except in the event of fraud. The fact that the Insurer corresponds with the Insured and requests information without establishing a reservation of rights, does not mean in Spain that the Insurer has affirmed coverage or is unable to reach the conclusion that the claim is excluded under the Policy.

16.2 The Insurer is obliged to pay the indemnity on completion of the investigations and adjustments necessary to establish the existence of the loss. However, in the event it is not possible to complete the adjustment quickly the Insurer is still obliged to make, within forty days from receipt of notification, an interim payment of the minimum sum which is likely to be due, according to the information available at the time.

16.3 If the Insurer fails to pay the indemnity within 3 months from the date of the loss or fails to make an interim payment within 40 days, the Court will impose penalty interest equal to one and a half times the legal interest rate. When two years have elapsed from the date of the loss without payment having been made, the annual penalty interest rate is at least 20%.

17 **Are third parties entitled to bring direct claims against Insurers under the policy?**

Under Spanish Contract Law, any prejudiced party is entitled to bring a direct action against the Insurer of the person or company who caused him a loss covered under the Policy. (See paragraph 3 above).

18 **What are the requirements of a foreign Insurer to be authorised to carry on business in the jurisdiction?**

18.1 Any EU company can carry out insurance business either by setting up a branch or subsidiary in Spain or doing business directly from the EU country on a "freedom to provide services" basis.

18.2 The establishment of a subsidiary is subject to the same formalities as any Spanish insurance company.

18.3 A branch does not have independent legal personality; rather, it shares the personality of its parent company.

In order to set up a branch, an application should be made, not to the Spanish authorities but to the domestic regulator. In case of an English company the application should be made to the Financial Services Authority (FSA) in London. Then it is for the FSA to notify the Spanish Directorate of Insurance (DGS) that a UK Insurer wishes to open a branch in Spain. The DGS has two months to indicate to the FSA any conditions under which, for public policy reasons, the applicant would be entitled to carry out the Insurance in Spain. If within two months no such indication has been received from the DGS, the applicant would be entitled to carry out insurance without any further requirement.

18.4 The "freedom to provide services" principle allows the Insurer to provide insurance directly from its home country. For this purpose, Insurers must submit an application to their home authorities. UK Insurers must submit the application to the FSA. The FSA must then report to the Spanish DGS indicating:

- that the applicant complies with the minimum solvency margins;
- the classes of insurance in which the applicant is authorised to trade in the UK; and

- the classes of the risks which the applicant intends to cover in Spain.

The FSA must then write back to the applicant indicating that notification to the DGS has been made. The applicant will be entitled to write business in Spain, on a freedom to provide services basis from the date of this notification.

19 **Are the laws for insurance applicable for reinsurance?**

Reinsurance is defined (very briefly) under the Insurance Contracts Act within the section devoted to non-life insurance. Section 79 of the Act provides that its provisions are not mandatory in respect of reinsurance contracts. Therefore, whilst the parties are not bound to follow the provisions of the Act but rather are free to agree otherwise, the principles of insurance will apply by analogy.

England & Wales

GENERAL LAW

1 **What is the source of law in the jurisdiction?**

In England and Wales, law is derived either from common law (i.e. precedent established case law) or by statute enacted by Parliament. In addition, English law is subject to European law under the various EU Treaties.

2 **How do Courts determine jurisdictional issues?**

2.1 The principles governing jurisdiction in English Courts are fairly complex and reference must be made not only to English statutes but to the conventions entered into by the contracting states within the European Union. In the case of contracting member states, the main principle governing jurisdiction is that, unless an alternative basis of jurisdiction applies, a Defendant who is domiciled in a contracting state must be sued in the courts of that state. There are, however, several alternative bases for jurisdiction and for the purposes of claims against insurers the following will apply:

2.2 English Courts will have jurisdiction if:

- the insurer is domiciled in England (or deemed to be domiciled in England)
- the Policyholder is domiciled in England
- the Insurer is a co-insurer, and proceedings against the leading Insurer are brought in England
- in the case of liability insurance, if the harmful event occurred in England
- in the case of real property, i.e. land and buildings, the harmful event occurred in England
- in the case of liability insurance, in third party claims by the Insured, where the injured party has brought proceedings against the Insured in England; and
- in the case of a counter claim, if the insurer has commenced proceedings in England based on the same contract or facts.

2.3 If an action is brought against an Insurer who is not domiciled in a contracting state, jurisdiction is governed by the Civil Procedure Rules. In Insurance cases, an Insured wishing to sue an Insurer, or an Insurer wishing to sue an Insured, will normally have to establish one of the following:

- The insurance contract was made in England;
- the insurance contract was made through an agent of the Defendant trading or residing in England (a broker is for most purposes the agent of the Insured, not the Insurer, so that the use of English brokers will not usually suffice to allow an insurer to be sued in England);
- the insurance contract was breached in England;
- the insurance contract was governed by English law.

3 Who has the right to issue Proceedings?

3.1 Under English law, in order for a party to obtain a remedy in the Courts, that party must have a corresponding right and a cause of action. This is known as the doctrine of locus standi. For example in the case of a breach of contract until recently only the parties to the contract could sue. Now the Contracts (Third Party Rights) Act 1999 establishes the right of a third party to enforce any benefit or right conferred on it by the contract. In the case of tort, a right of action against a party exists if breach of a duty of care owed by that party can be shown.

3.2 Criminal proceedings are normally brought by the Crown although in limited circumstances a private prosecution may be allowed. All criminal proceedings are conducted in the criminal courts which have separate procedural rules from the Civil Courts.

4 What is the typical litigation procedure?

4.1 Civil litigation proceedings are governed by the Civil Procedure Rules. These are a relatively new set of rules introduced in April 1999 and designed to make the legal system more accessible to the general public. One important feature of the new rules is the emphasis on pro-active case management by the Courts. In theory, Court monitoring of timetables and deadlines results in the expeditious development of proceedings.

4.2 Legal proceedings are commenced by the service of the Claim Form. Details of the claim are set out in the Particulars of Claim which are usually served at the same time as the Claim Form. The Defendant has 14 days from service of the Claim Form in which to acknowledge service. A Defence must then be served 14 days after the acknowledgement of service.

4.3 If the Defendant fails to acknowledge service or file a defence, the Claimant can apply for expedited judgment (known as "default judgment") and a full trial of the issues will not occur.

4.4 If the Defendant acknowledges service and enters a defence, the case proceeds and the parties are given the opportunity to serve further written submissions such as a Reply to Defence and/or Requests for Further Information. These written submissions are collectively known as "Statements of Case."

4.5 After close of written submissions, which takes place 14 days after service of the last Statement of Case, the parties file an allocation questionnaire and the claim is allocated to either the High Court or the County Court (depending on its value and complexity). The Court will also allocate the action to a procedural track (small claims track, fast track or multi-track) depending on the value, nature and complexity of the case. It is usual for a claim at this stage to be transferred to the Defendant's "home court" if the claim was not initially commenced in that court.

4.6 Once allocated to a court, the Court imposes a timetable of directions determining when documents are to be disclosed and witness statements and experts reports (if relevant) are to be exchanged. The parties are also asked to provide details about the probable length of trial and availability for trial dates. In complex, high value claims the court will usually hold a case management conference to decide the directions but in other cases directions are often agreed between the parties in correspondence and approved by the Judge, thereby making attendance at Court unnecessary.

4.7 One particular feature of English proceedings which differs from Spain and some Latin American jurisdictions relates to disclosure of documents.

4.8 In English Courts, parties are obliged to disclose all relevant documents within their possession or control, regardless of whether they help or hinder the disclosing party's arguments. The duty to disclose documents continues throughout the proceedings, but the standard directions usually require disclosure of documents shortly after close of pleadings and before exchange of witness statements. Parties are also encouraged to disclose documents at an earlier stage if it is felt that this is likely to result in a speedier resolution of the dispute. When disclosing documents, the disclosing party must sign a disclosure statement setting out what documents or class of documents have been disclosed and explaining, if necessary, why documents have not been disclosed. The only limit on a party's obligation to disclose all relevant documents is the concept of proportionality – i.e, that the time and cost of collating documents of limited relevance must not be disproportionate to the sums being claimed.

4.9 There are a number of pre-action protocols which have been adopted by the Courts which govern pre-action procedure in certain types of case, for example, professional negligence claims, personal injury claims and construction claims.

4.10 These protocols provide for pre-action disclosure of documents to allow each party to determine the merits of their respective cases, before proceedings are issued.

4.11 After documents have been disclosed and witness statements exchanged, the parties set the action down for trial by filing the Listing Questionnaire with the court. The date for filing the questionnaire is usually determined at the directions stage but in any event it should not be more than 8 weeks before the trial date. Trial bundles i.e. files of relevant documents are prepared and lodged with the court not less than 3 days before the start of the trial.

4.12 In all civil cases except defamation actions, trials are heard without a jury. The Judge, having heard the evidence of the parties, makes a decision on liability and quantum and determines which party is to meet the costs of the action.

4.13 Appeal from a decision at first instance is to the Court of Appeal. A further appeal may be made in certain circumstances to the House of Lords. It is also possible to appeal to the European Court of Justice.

5 What are the limitation periods for issuing Proceedings?

In English law, the basic rule for actions founded on contract is that the proceedings must be commenced within a period of 6 years from the date of breach. In respect of actions founded in tort the limitation period is 6 years from the date the damage occurs or 3 years in personal injury cases. In libel cases the relevant period is 1 year. There are a number of exceptions to these rules which may lengthen the limitation periods, principally under the Latent Damage Act 1986.

6 Are there any alternatives to litigation?

6.1 The CPR encourages parties to consider using an alternative procedure to litigation as a means of saving costs and time.

6.1.1 Arbitration

The parties may decide to arbitrate their dispute (to avoid the delay and expense of litigation) or a contract to which they are subject may require that the dispute is referred to an Arbitrator.

Arbitration avoids a public hearing in court and allows the parties to decide the procedure the arbitrator will follow. The arbitrator often has relevant expertise and is usually chosen by the parties. He has the power to impose solutions which legally bind the parties.

6.1.2 Alternative Dispute Resolution (ADR)

Mediation is the most commonly used method of ADR. It uses an independent third party (the Mediator) to help the parties reach their own solution. The parties provide written statements and then come together at a chosen venue to voice their concerns and put forward their arguments. The Mediator, having heard the parties, identifies the real areas of disagreement and moves the parties towards constructive solutions to the problem. If a solution is agreed the parties record this in a formal agreement which, whilst contractually binding on the parties, will not prevent the parties using the courts afterwards.

7 What opportunities are there to settle a claim?

7.1 Throughout the litigation process, parties are encouraged under the Civil Procedure Rules to consider whether it is possible to negotiate a settlement with the opponent instead of incurring the full costs of a trial.

7.2 Parties may make further attempts to settle (either before or after the commencement of proceedings) by making Part 36 Offers and/or payments into court. Adopting the Part 36 procedure not only provides a mechanism for achieving settlement, but can increase the pressure to settle by raising the threat of costs and interest penalties, since if a Part 36 offer/payment into Court is not accepted, then in the event the offer/payment in to Court is not beaten by the award made by the Court, the offeree is on risk for all costs incurred from the last date the offer/payment in to court could have been accepted.

8 Do Courts allow "without prejudice" negotiations to take place?

Communications between the parties for the purposes of negotiation, marked "without prejudice" will be privileged from admissibility as evidence in court. Offers of settlement marked "without prejudice save as to costs" are also privileged and will only be seen by the judge when exercising his discretion to award costs after all issues of liability and quantum have been decided.

9 What type of damages may be awarded by the Courts?

The object of an award in damages in English law is primarily to give the Claimant compensation for the damage, loss or injury he has suffered. Aggravated damages are possible in cases of:

- Defamation with a view to profit;
- abuse of public office;
- statutory exception

10 Claims Made Policies

Claims made policies are valid under English law. Claims made rather than Occurrence policies are the norm in the London insurance market for most classes of business.

11 What is the Insured's duty of disclosure?

11.1 The duty of utmost good faith is a fundamental principle of English insurance law which places on both the Insured and Insurer the obligation to:

- Avoid material misrepresentations;
- disclose all material facts.

11.2 A definition of material fact is set out in the Marine Insurance Act 1906 (Section18(2)) (and which is of general application), which requires the Insured to disclose any fact which would influence the judgment of a prudent Insurer in calculating the premium or in his decision to accept or reject the risk. The same wording applies to misrepresentation (Section 20(2)).

11.3 Failure to disclose all material facts or material misrepresentation will entitle the Insurer to elect to avoid the Policy ab initio.

12 What is the consequence of a breach of a policy condition?

In modern policies those terms the due observance of which is intended to be a condition precedent to the Insurer's liability or a pre-condition of recovery are usually described expressly as conditions precedent. Conditions precedent are likely to address matters such as type of risk, conduct of the Insured during the cover period and the notification of claims. Alternatively, there may be a general condition precedent clause which states that compliance by the Insured with obligations imposed on him by the Policy is a condition precedent to the Insurer's liability to pay claims. Failure to comply with a condition precedent will not automatically entitle the Insurer to avoid the policy but the Insured may be precluded from recovery in respect of that loss. Breach of an ordinary condition will only normally entitle an Insurer to damages or set-off against liability to the extent that it has suffered prejudice. Breach of a condition precedent entitles the Insurer to refuse the claim, regardless of whether or not prejudice has been caused.

13 What is the consequence of a breach of warranty?

13.1 In insurance, a warranty is a pre-contractual promise by the Insured. For example, the Insured may warrant that a particular fact is true. In non-marine policies, all warranties must be express. In marine policies, there are implied warranties set out in the Marine Insurance Act 1906.

13.2 A warranty must be strictly complied with and it is irrelevant whether or not it is material to the risk or to the loss. If there is a breach of warranty, Insurers are automatically discharged from liability for claims arising after the breach.

14 Are exclusion clauses in policies effective?

14.1 It is common for Insurers to include in the Policy exclusion clauses to exclude or limit their liability in circumstances in which they would otherwise find themselves liable. In order for such clauses to be effective, they must be clear and unambiguous.

14.2 If a term is ambiguous, then its meaning will be construed against the party who drafted it.

14.3 There is a raft of legislation in English law controlling the use of contractual terms which seek to limit or exclude liability but the majority of it does not apply to Insurance contracts. However, recent European regulations, introduced in the UK under the Unfair Terms in Consumer Contract Regulations 1994, does apply so that a term which is "unfair" shall not be binding on the Insured who is a "consumer".

15 The requirement of the Insured to notify Insurers of claims/circumstances

Typically, policies require that the Insured notify a claim within a specified period of time. It is also usually necessary to notify circumstances which may give rise to a claim even though no specific demand or allegation may have been made against the Insured at the time.

16 What is the effect of a reservation of Insurers' rights?

Whilst Insurers are considering whether or not a claim is covered, they may reserve their rights. The reason for doing this is that it enables an Insurer to continue to investigate the claim and request further details of loss without unwittingly affirming cover or effectively waiving any future right to dispute cover.

17 Are third parties entitled to bring claims against Insurers under the policy?

17.1 Under English law, pursuant to the common law doctrine of privity of contract, a third party is usually unable to make a claim directly against Defendant's Insurer.

17.2 The Third Parties (Rights Against Insurers) Act 1930, however, provides an exception to this rule in the event the Insured is insolvent. The basic principle is that if the third party establishes liability against the Insured who is insolvent, then the third party can step into his shoes and make a claim under the Policy. The third party obtains the Insured's rights under the policy.

17.3 The Contracts (Third Party Rights) Act 1999 also in principle entitles a third party to make a claim against Insurers to enforce any right or benefit conferred on that third party by the Policy. It is, however, unlikely that such benefits and rights will be conferred in the Policy.

18 What are the requirements of a foreign Insurer to be authorised to carry on business in the jurisdiction?

18.1 Authorisation is required if a company effects or carries out contracs of insurance within the UK by way of business. Authorisation may be obtained by:

18.1.1 Grant of permission by the Financial Services Authority "FSA" under The Financial Services and Markets Act 2000. The applicant's resources must be adequate and the applicant must be a fit and proper person. In particular its affairs must be conducted soundly and prudently.

18.1.2 Insurance companies authorised to carry on insurance business in another country within the European Economic Area are given automatic exemption from authorisation in the UK in accordance with the Single European Market for insurance. The FSA must be notified of the intention to establish a branch in the UK.

18.1.3 The Society of Lloyd's is automatically authorised under The Financial Services and Markets Act. Managing Agencies, but not Lloyd's Names, require permission to underwrite.

18.2 An applicant whose head office is located outside the European Economic Area must possess assets of a prescribed value in the UK and must also provide a deposit of a prescribed amount.

19 Are the laws for insurance applicable for reinsurance?

The laws applicable to insurance are generally applicable to reinsurance, although there is a body of case law specific to reinsurance.

Acknowledgements

We are grateful to our friends and colleagues without whose invaluable contribution this guide could not have been written.

Martin Manzano
Marval, O'Farrell & Mairal
Av. Leandro N. Alem 928
1001 Buenos Aires
Argentina

Telephone: 00 54 11 4310 0100
Fax: 00 54 11 4310 0200

Ricardo Sateler
Faraggi Sateler & Cia
Barros Errazuriz No 1954
Of 204 Providencia
Santiago
Chile

Telephone: 0056 2 269 0299
Fax No: 0056 2 269 0298

Jorge Hilário Gouvêa Vieira
Escritorio de Advocacia Gouvea Vieira
Avenido Rio Branco, 85 –13° and.
20.040-004 Rio de Janeiro
Brazil

Telephone: 0055 21 3849 4443
Fax: 0055 21 3849 4444

Alejandro Venegas
Venegas Franco Asociados
Calle 100#20-76, oficina 702
Bogota
Colombia

Telephone: 00 57 1 623 03 30
Fax No: 00 57 1 600 76 24

Francisco Fernandez Guerra-Fletes
Tanús Arce Fernández Cadena & Asociados
Av. Insurgentes Sur No. 950 Piso 9-2
Col. Del Valle, México, D.F. C.P. 03100

Telephone: 00 52 55 5687 3437

www.dac.co.uk