

Ecuador

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1. Introduction and basic principles

Insurance and reinsurance contracts are governed by the Ecuadorian Commercial Code, together with the Ecuadorian Insurance Act 1998 (Ley General de Seguros 1998) and the Supreme Decree 1147. Ecuador is a civil law jurisdiction, which derives most of its law from statute. But as in most civil law jurisdictions prior decisions of the courts can be persuasive when interpreting the applicable law.

Under Ecuadorian law, the Ecuadorian Companies, Stocks and Insurance Supervisor (Superintendencia de Compañías, Valores y Seguros - SCVS) is an autonomous corporate body responsible for the supervision of all activities and entities involved in Ecuadorian securities and the insurance market.

2. Broker relationships and role

Brokers are considered to be individuals or companies who assist the insurer to negotiate and complete insurance contracts. Individual agents can only work for one insurance company; company agents can represent one or more insurers.

3. Governing law of policies

The general rule is that Ecuadorian law is mandatory in all policies involving Ecuadorian parties or risks located in Ecuadorian territory (Art. 25 Insurance Act). Also the SCVS can impose mandatory clauses and prohibit ones that it considers abusive.

Under Ecuadorian law a policy must contain an ADR clause which gives the parties the option to establish an arbitration or mediation for future disputes.

4. Jurisdiction and claim resolution

Ecuador recognises arbitration and mediation as valid means of dispute resolution. As explained above it is mandatory for policies to contain an ADR clause. The parties can decide freely on the arbitral jurisdiction.

If the parties do not agree to resolve their dispute by means of an ADR procedure the insurance is subject to Ecuadorian jurisdiction.

a) Arbitration framework

Ecuador is a signatory and has ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The most important arbitral institution in Ecuador is the Chamber of Commerce of Guayaquil. According to Art. 42 of the Arbitration and Mediation Law 2006 the awards issued in an international arbitral proceeding, will have the same effects and will be enforced in the same manner, than the awards issued in a national arbitral proceeding.

b) Regulatory/superintendent/ombudsman

Insurers and reinsurers in Ecuador need the authorization of the SCVS if they want to constitute as an insurance company. All Ecuadorian risks may only be insured if authorised by the SCVS. The SCVS also has the power to settle claims between the insured and insurer. Also all the regulations dictated by the SCVS are mandatory.

5. Disclosure obligations and remedies for breach

In Ecuador insurance contracts must be performed in good faith. Art. 14 of Supreme Decree 1147 states that the insured has a duty to declare fully and accurately the insurer's questions. But the insured does not have the obligation to voluntarily declare risks that were not enquired about by the insurer.

Any omission or misrepresentation will allow the insurer to rescind the insurance contract. Thus, it is necessary that the omission or misrepresentation would have an effect on the judgement of an insurer, either in fixing the premium or determining whether it will take the risk.

6. Warranties and conditions precedent

Warranties and conditions precedent are not clearly recognised under Ecuadorian law. But there is a similar concept called a "suspensive condition". The Ecuadorian civil code does not give an exact definition of a "suspensive condition" but it can be inferred as a condition that has to be fulfilled in order to give rise to an enforceable obligation.

Art. 75 of the Insurance Act states that the conditions of the insurance policy can be negotiated freely by the parties. Therefore a clearly drafted condition clause should be upheld.

7. Claim management issues

a) Notifications of claims

Art. 20 of Supreme Decree 1147 establishes that the insured must notify the insurer or his legal representative of any loss within 3 days of becoming aware of the loss. This period can be extended by the parties, but never reduced.

A delay in the notification will only affect an insured's rights to claim under the policy if the policy stipulates so expressly. However, bad faith from the insured allows an insurer to deny the claim, even in the absence of a contractual provision.

b) Reservation of rights

Reservation of rights is not a recognised concept under Ecuadorian law.

c) Without prejudice, privilege and confidentiality

Ecuadorian law does not recognise the concept of "without prejudice".

Communications between lawyer and client are considered confidential and are generally respected by the parties.

Further information

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d) Limitation

Art. 42 of the Insurance Act establishes that insurers and reinsurers have 30 days from the notice of a claim to pay the insured. In those 30 days insurers or reinsurers can submit a statement denying the claim or raising questions which will suspend the period.

If the insured does not accept the insurer's response, it can submit a claim before the SCVS in order to demand that the insurer justify its denial. The SCVS will then determine whether the insurer should pay totally, partially or not at all. The decision of the SCVS can be challenged before the judicial courts.

The limitation period for the insured to make a claim under an insurance policy is 2 years from the occurrence of the loss (art. 26 of Supreme Decree 1147). This period cannot be amended by the parties.

Limitation will be interrupted by the notification of a claim and a new term will start counting after the insurer's response.

e) Penalties for late payment of claims

Art. 42 of the Insurance Act establishes that if the SCVS require the insurer to pay the claim, and the insurer does not, the insurance company can be liquidated at the discretion of the SCVS.

f) Right of third parties

Third parties cannot claim directly against insurers for their loss.

8. Reinsurance considerations

There are two types of reinsurance companies that can operate in Ecuador. Companies formed in accordance with Ecuadorian law and foreign companies authorized by the SCVS to work with insurers and reinsurers established in Ecuador.

The legal treatment of reinsurance policies is not clear. But it is likely that the insurance and general contractual provisions will be applied to reinsurance policies.

With respect to cut through clauses Supreme Decree 1147 provides that an insured cannot claim directly against the reinsurer.

Concepts such as claims control/ claims cooperation /follow the fortunes and the incorporation of terms have no settled meaning under Ecuadorian law. Nevertheless a clearly drafted clause should be upheld in court.

9. Subrogation

As in most of civil law jurisdictions, subrogation rights are recognised in Ecuador. Once a payment has been made the insurer will have the right to step into the rights of the insured against third parties responsible for the damage.

The subrogation action will not be possible if the party responsible for the damage is a spouse, or relative until the fourth degree of consanguinity or second of kinship by election (in law) of the insured. This exception will not apply if the damage has been caused wilfully or in bad faith.

The rights are exercised in the name of the insurer and require proof that the claim has been paid. The recovery shall be limited to the amount paid by the insurer.

10. Earthquake

Art. 49 of Supreme Decree 1147 establishes that under a fire policy the insurer does not respond for loss or damage caused by or that occurs as a result of earthquake, volcanic eruption or other convulsion of nature, unless otherwise agreed.