Chapter 1

Argentina

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I. INTRODUCTION

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I. INTRODUCTION

§ 1:1 Regulatory bodies; sources

In Argentina, the insurance industry is regulated by and is subject to State control. State regulation and control is based on the need to safeguard confidence, an inherent element in the insurance relationship, to afford protection against incompetence and dishonesty, and to restore the balance between parties bound by agreements containing uniform and pre-determined conditions, having provisions whose scope is usually unknown.

Insurance business and insurance for risk situated within Argentina can only be contracted through a licensed insurance carrier through approved policies.[1] The Insurance Department, within the Ministry of Economy, supervises the insurance industry. State control is applicable to:

1. Insurance carriers: including, but not limited to, their

[Section 1:1]

[1]Law Number 12,988; Law Number 20,091.

ownership structure, management and supervisory bodies, financial condition, reserves and permitted investment assets, and insurance plans;
2. Brokerage, with a specific register and qualification procedure applying to those wishing to act as a broker in the placement of insurance policies; and
3. Policy provisions, with their contents approved by the Insurance Department (special coverage policies made for substantial amounts require special authorization).

In Argentina, the insurance sector is mainly governed by the following laws:

1. Law Number 20,091 provides for the requirements that individuals and entities engaged in the insurance business must meet, including requirements for formation and registration, composition of management and supervisory bodies, general requirements for insurance plans, minimum capital requirements and capital allocation, management control and financial statements auditing, general regulations for corporate conversion and portfolio transfer, and winding-up procedures. This Law also provides that the Insurance Department is the agency responsible for state-based control of the insurance industry. Finally, it outlines applicable sanctions in the event of violations and procedural guidelines for both administrative and court proceedings.
2. Law Number 17,418 regulates the terms in insurance contracts, including, but not limited to, execution, insurable risks, specific characteristics of risks and those based on the types of insurance, term of validity, premiums, main obligations of the parties and their involvement in the agreement, and reinsurance provisions.
3. Law Number 22400 regulates the brokerage industry regarding the placement of insurance contracts. It contains requirements for brokers' licensing and control, as well as applicable sanctions.

There also are rules governing the on-going development of this industry that are focused on usual requirements and resolutions issued by the Insurance Department, such as Resolution Number 21523/92, as amended, that regulates Law Number 20091; Resolution Number 35615/11 that regulates the reinsurance business, and Resolution 24828/96 that regulates Law Number 22400 of brokerage.

§ 1:2 Market structure

The structure of the Argentine insurance market includes prop-

erty, life, public liability, worker's compensation, and surety insurance. Under Argentine law, health insurance is subject to control by the Ministry of Health, outside the scope of the Ministry of Economy and the Insurance Department.

Finally, reinsurance contracts can be included within the insurance framework. Under such contracts, insurance carriers transfer the primary liability assumed under insurance contracts whereby their business is carried out.

II. PRINCIPLES OF INSURANCE LAW

§ 1:3 Meaning of insurance

Although there is no unanimous agreement among legal writers on how to define the insurance contract, under section 1 of Law Number 17,418 (the "Insurance Law"), "Insurance is a contract whereby the insurer agrees, upon a premium or consideration, to compensate damage or comply with an agreed obligation if the anticipated event occurs".

§ 1:4 Elements of contract

Parties

There are generally two parties to an insurance contract, the insurer and the insured. Occasionally, there may also be a policyholder and a beneficiary. The insurer is the party who assumes the risk and, upon the occurrence thereof, is under a duty to pay the agreed consideration for that event under specific conditions. Therefore, the main obligation thereof is to indemnify the insured. Under domestic rules, the status of insurance carriers can only be awarded to stock companies, cooperative or mutual companies, branches or representatives of foreign companies, and official or semi-public bodies. Furthermore, they must be expressly approved by the Insurance Department.

The insured is the party on whom the risk lies and who is the owner of the insurable interest. The obligations are to pay for the premium, keep the status of the risk, report the occurrence of a loss, report any damage sustained, prevent the loss, avoid and minimize damage, and refrain from making any changes in any damaged items. The policyholder is the party who contracts the insurance and who is under a duty to pay for the premium. On certain occasions, such as in case of an insurance taken in the name of a third party, a policyholder may be a person other than the insured but, in most cases, it is the same person.

Finally, the beneficiary is the person that has the status of creditor of the insurer's liability. Usually, the beneficiary is the

insured but, on certain occasions, such as in the case of life insurance, the beneficiary is a third party who is not a party to the insurance contract.

Insurable Interest

Under section 2 of the Insurance Law, the subject matter of an insurance contract may be any kind of risk, provided that there is *an insurable interest*, unless otherwise expressly forbidden by law. Furthermore, under section 60, which is related to property insurance, a risk may be insured provided that there is a lawful economic interest in the non-occurrence of the loss.

Hence, the insurable interest is a pecuniary relationship between a person and a thing or to a right of such a nature that there is a concern in the non-occurrence of the risk that would lead to a reduction of its value or to a pecuniary loss for the holder of such interest. Thus, the insurable interest scope is threefold. i.e., property, lawful juridical relationship thereto, and exposure thereof to a certain risk.

The insurable interest is of material importance to the insurance contract because it is the subject-matter thereof. It should exist as from the start date of coverage (although it may be future, if the existence thereof is anticipated) and, most importantly, when the loss occurs. Furthermore, it should be accurately ascertained and mentioned in the policy pursuant to section 11 of the Insurance Law. Under the Insurance Law, such interest should be lawful, i.e., not contrary to law or good customs. Furthermore, the value of the insurable interest determines the maximum amount of the indemnity that the insurer may pay for.

Formation

An insurance contract arises by mutual consent, i.e., for the existence thereof a simple concurrence of wills is sufficient. Under section 4 of the Insurance Law, the mutual rights and obligations of the insurer and the insured come into effect as from the date of execution of the agreement, even before the policy has been issued. Furthermore, payment of premium is not a condition for existence of the contract.

The insurance proposal, which is technically presented by the insured, must be in writing, as required by the Insurance Department, and it is not binding on the parties until it has been accepted by the other party. Acceptance of the agreement requires a positive representation of the insurer's will, i.e., its silence does not purport to be an acceptance but a refusal to the insurance proposal.

Section 1152 of the Civil Code should also be noted. An amend-

ment to the offer made upon acceptance must purport to be a proposal for a new contract. Furthermore, if the insurer issues an amended policy instead of presenting a counter-offer, the insured may contest it within one month. If it does not do so within such term, the amendment will be deemed to have been accepted by the insured (provided that the insurer has advised the insured of this right through a prominent clause inserted on the reverse side of the policy, as provided by section 12 of the Insurance Law). If the insured contests the amendment, the validity of the remaining clauses of the contract is not affected, although the insured also may rescind the contract at that time.

§ 1:5 Void and voidable contracts

Under Argentine law, the nullity of legal acts is governed by the Civil Code. Hence, the insurance contract, being a legal act, is included in the provisions thereof, aside from the special characteristics provided in its specific rules.

Under the Civil Code, a legal act executed by persons who are absolutely incapable (section 1041) or relatively incapable as to the act (section 1042), or by a person who is forbidden to exercise the act (section 1043) is null and void. Furthermore, a legal act is null and void when a party has proceeded with false pretenses or fraud as presumed by law or where the act's principal purpose is prohibited or it does not meet the formalities prescribed by law (section 1044).

Furthermore, a legal act is voidable when the parties thereto have acted while under an accidental incapacity or while deprived of their reason due to any cause, when their incapacity under law was not known at the time of execution of the act, when the prohibition of the act's purpose was not known owing to the need for an investigation of fact, or when any vices of error, violence, fraud, or pretense are present (section 1045).

Under the Insurance Law, an insurance contract may be void under certain circumstances; one of these situations arises when, at the date of execution of the contract, the loss has already occurred or the likelihood of its occurrence has disappeared, i.e., upon the inexistence of the risk, the insurance contract is void.

Another case is non-disclosure (see below), i.e., under section 5 of the Insurance Law, a contract is void when the insured entered into the contract upon a misrepresentation or concealment of known circumstances even if it was made in good faith and, in the judgment of an expert witness, had the insurer known the status of the actual risk, it would have not entered into the agreement or would have amended its conditions. If non-disclosure is

not fraudulent and it is claimed before it becomes time-barred, the insurer may void the contract by returning the collected premium less costs.

The Insurance Law also provides for voidance of any contract that is executed with an aim at unfair enrichment. Section 62 provides that this solution is applicable when the insured amount is substantially higher than the actual market value of the insured interest, and the insured or policyholder knowingly fails to ask for a reduction thereof, and thus seeks to enrich unjustly out of the insured surplus. One other scenario is provided in section 68, whereby group insurance contracts are void when the insured enters into them for the purpose mentioned above, as the insured should not seek to secure aggregate indemnity that exceeds the sustained damage.

§ 1:6 Premiums

A premium is the insurance price and the insurer's compensation for the assumed liabilities. In technical terms, a premium should be the cost of the risk's guarantee, whose economic consequences are assumed by insurer. Determination is generally based on three factors:

(1) Assumed risk;
(2) Period of time that such risk is assumed; and
(3) Amount of the insured value.

All of these elements make up the so-called net, pure or technical premium, which also varies on the basis of the interest rate, as accrued from the investment of the funds collected by the insurer, and the administrative expenses and the profit, as calculated by the insurer. All of these elements lead to the gross or written premium, which is the one paid by the insured.[1] Fixed rates must be approved by the Insurance Department.

Premiums can be distinguished according to their payment terms and frequency, such as a one-off or a periodic payment or a yearly, multi-year, or installment basis. A premium is characterized by its entirety and invariability. The former characteristic implies that it is due as from the inception of the contract and is earned for the whole period, no matter what the payment terms are. The latter characteristic arises from its continuity over time. Nevertheless, a premium can vary upon inflation-adjustment clauses, changes in the risk or the insured interest, or a provision issued by the controlling authority.

[Section 1:6]

[1]Halperín, *Insurance Lessons* (1987), p. 5.

§ 1:7 Disclosure and misrepresentation

An essential obligation of the insured is to state and disclose the risk that will become the subject matter of the insurance contract. Hence, this pre-contractual obligation (as should be performed before the mutual agreement) allows the insurer to accurately define and ascertain the insured risk.

The obligation is closely related to a specific concept of insurance that is called non-disclosure, regulated in article II, chapter I (sections 5-10) of the Insurance Law. Pursuant to section 158 of the Insurance Law, sections 5, 8, and 9 may not be amended by the parties, while sections 6 and 7 may be amended only to the benefit of the insured.

As mentioned above, the concept of non-disclosure is provided in section 5 of the Insurance Law, and it is defined as any misrepresentation or concealment of known circumstances even if made in good faith which, in the judgment of an expert witness, if the insurer had been warned of the status of the actual risk, it would have not entered into the agreement or would have amended its conditions. This situation is punished with voidance of the contract, and the insurer must contest it no later than three months after learning about the misrepresentation or falsehood. If the loss occurs within such term, the insurer is under no duty to make any payment (section 9).

When non-disclosure is not fraudulent and it is claimed within the term of one year, the insurer may void the contract by returning the collected premium, less costs, or, if the insured accepts, readjust it to the actual status of the risk. In life insurance contracts, readjustment may be imposed on the insurer when nullity would be detrimental to the insured if, in the judgment of an expert witness, the contract may be adjusted (section 6).

When non-disclosure is fraudulent or willful, the insurer is entitled to the premiums earned for the elapsed periods and for the period during which non-disclosure or misrepresentation has been claimed (section 8). If the agreement is executed by an insurer's representative, non-disclosure will be judged upon an analysis of the knowledge and the conduct of both the principal and the agent, unless the latter acts simultaneously for the insured and insurer. The same criterion will be applied to insurance taken in the name of third parties regarding the policyholder and the insured third party (section 10).

§ 1:8 Conditions and warranties

In insurance contract law, it is usual to refer to broad-form

conditions, as they are typically adhesion contracts. Due to the fact that the parties are not in equal conditions, several rules and court judgments have been issued to avoid abuses.

Under section 158 of the Insurance Law, a policy provision that is in violation of revocable legal rules may not be part of the broad-form conditions, except for those cases where the law establishes that it may be revoked by an "otherwise" clause. Furthermore, policies must be filed with and approved by the Insurance Department pursuant to sections 23-25 of Law Number 20,091. In Argentina, these issues have resulted in high standardization of each type of insurance contract; the broad-form conditions of some policies contain a verbatim transcription of some sections of the Insurance Law.

There also are specific conditions, i.e., provisions applied to each case in particular. Section 11 of the Insurance Law provides that each policy should contain the names and addresses of the parties, the interest of the insured person, the assumed risks, the moment at which such risks are assumed, the term of validity, the premium or consideration, and the insured amount. Other specific conditions may be included.

§ 1:9 Cancellation

Under section 18 of the Insurance Law, without prejudice to the term of validity provided in the insurance contract, except for life insurance, it may be stipulated that the parties are entitled to terminate the contract without the need to express a cause. If the insurer exercises the right to rescind the contract, a prior notice of not less than fifteen days should be given and the premium should be reimbursed pro-rata the non-elapsed period of time. If the insured decides to rescind the contract, the insurer is entitled to the accrued premium for the time elapsed on the basis of short-term rates.

When the contract has an undefined term of validity, pursuant to section 19, the parties may terminate it under the same conditions. Such section also provides that a waiver of the right to terminate the contract for a certain period is lawful, provided it is not longer than five years. Voluntary winding-up of an insurance company and a portfolio assignment approved by the controlling authority does not provide grounds for termination of the contract.

The Insurance Law establishes other situations that may lead to contract rescission or cancellation. For example, under section 31, when a policy is delivered before collection of the premium, the insurer may repudiate the contract no later than one month

after the date of report thereof, although the contract may not be terminated if the premium is paid before the expiration of the reporting period. The insurer may not be responsible for a loss occurring within the reporting period once two days have elapsed after service of notice to exercise termination.

Another situation is provided in section 37; thereunder, an increase in the assumed risk leads to a special event for termination of the contract if such situation had existed at the time of execution of the contract and, in the judgment of an expert witness, it would have prevented the contract or amended its conditions.

Finally, termination for partial loss is possible. When a loss results in only partial damage, either party may terminate the contract before the payment date of indemnity. If the insurer decides to terminate the contract, its liability expires 15 days after notice has been given to the insured, and the premium should be reimbursed for the remainder of the current period proportionally to the difference of the insured sum. If the insured decides to terminate the contract, the insurer will be entitled to the premium for the current period and shall reimburse all premiums collected for future periods.

§ 1:10 Subrogation

Under section 80 of the Insurance Law, the rights of the insured against a third party arising from a loss are transferred to the insurer up to the amount of paid indemnity, i.e., the insurer is not entitled to assert a right against a third party that is responsible for a loss but it succeeds to the insured's right because its obligation to pay the insurer arises from the contract, not from the event caused by a third party.

A third party may enforce against the insurer the same claims that it is entitled to enforce against the insured. Furthermore, the insurer may not waive subrogation if, as a result thereof, the insurer would collect double indemnity because it would lead to unfair enrichment. Under the same section, the insured is responsible for any action that may be detrimental to the insurer; for example, consenting that the third party may be discharged from liability in whole or in part.

Subrogation does not operate when it is detrimental to the insured; for example, the insured is, under civil law, responsible for the third party who has caused the damage, such as a relative or dependent person. Subrogation does not operate either in (life and casualty) personal insurance because the insured or benefici-

ary's right does not come to an end upon collection of insurance, which is not of a remedial nature.[1]

The requirements for subrogation to take place are the existence of a valid contract and of a valid payment thereunder. In a case against a third party, the insurer is only required to give evidence thereof to show a valid instrument for collection. Finally, subrogation expenses are always borne by the insurer because they arise out of its own interest.

§ 1:11 Interpretation of insurance contracts

In insurance law, apart from the general rules applied to interpretation of contracts, there are some specific rules. To understand these special characteristics of an insurance contract, it should be noted that this is a contract that is executed using a standardized format, i.e., it contains broad-form conditions that are not discussed with the insured. Even though such conditions should be approved by the Insurance Department, which intends that they be as equitable as possible, the exercise of this obligation is not satisfactory. The insured is many times unaware of such conditions, and is not capable of understanding their actual scope.[1]

One of these characteristics is the principle of good faith of the parties, which is influenced by the unpredictable nature of the contract. Thereunder, the insurer, in general, relies on the insured's information regarding the status of risk; and conversely, regarding protection of the insured, the insured is at the mercy of the monopolized action of the insurer.

The extent of risk and granted benefits should be literally construed. Nevertheless, any ambiguous or obscure clause should be interpreted in favor of the insured, because it was drafted by the insurer and, section 11 of the Insurance Law provides that the insurer should deliver a clearly written policy to the policyholder. Any restriction to the free activity of the insured should be expressly provided and the same guideline applies to a restriction to generally assumed liabilities, which should be included in the special conditions of the contract.

Furthermore, a clause that establishes a cancellation of an insured's right should be restrictively interpreted as to its scope

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[Section 1:10]

[1]Halperín, Insurance Lessons (1987), at p. 72.

[Section 1:11]

[1]Halperín, Insurance Lessons (1987), at p. 40.

and the facts that may give rise to its legal basis; the wording thereof should be clear. Any charge imposed on the insured should be reasonable. Finally, handwritten clauses prevail over printed clauses because they are regarded as particular or special conditions of the contract.

§ 1:12 Punitive damages

Punitive damages are not a typical legal concept in Argentine law, but it is in common law. Nevertheless, some years ago, it was somehow incorporated to the Consumer Protection Law (Law Number 24,240). Section 52 *bis* of the Consumer Protection Law provides as follows:

"Punitive Damages. When a supplier does not comply with its legal or contractual obligations to the consumer, at the request of the aggrieved party, the judge may impose a civil penalty in favor of the consumer, to be graded on the basis of the seriousness of the fact and other circumstances of the case, regardless of whether there is another applicable compensation. When more than one supplier is responsible for non-compliance, they will be held severally liable to the consumer, regardless of any other recovery action that they may be entitled to. The civil penalty to be imposed may not exceed the maximum amount of the penalty provided in section 47b) hereof."[1]

The application of the above-mentioned section requires the existence of a consumer relationship, as that is the field of application of the Consumer Protection Law. It is usual for companies engaged in the provision of goods or services to consumers to take coverage against punitive damages under a public liability insurance contract. Punitive damages are not provided in the Insurance Law, the Commercial Code or the Civil Code.

III. SPECIAL TYPES OF INSURANCE

§ 1:13 Fire insurance

Fire insurance is regulated by the Insurance Law. Section 85 defines the damage that may be subject to indemnity and provides that the insurer must indemnify for damage caused by the direct or indirect action of fire. It also provides that indemnity should cover any insured property that was lost during the fire.

Damage caused by explosion or lightning is equal to that caused

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[Section 1:12]

[1]Currently, the maximum amount of the penalty established in section 47b) is Ps. 5,000,000.

by fire, but the insurer is not under a duty to cover damage if the fire or explosion was caused by an earthquake. Section 87 prescribes the manner in which indemnity amounts should be determined:

1. For buildings, based on the value thereof at the time of loss, except when reconstruction is agreed upon;
2. For goods manufactured by the insured himself, based on the manufacturing cost and, for other goods, based on the purchase price;
3. For animals, based on the value they had at the time of the loss;
4. For raw materials, harvested fruits and other nature products, based on the average prices thereof on the day of occurrence of loss; and
5. For furniture and household goods and other utensils, tools and machinery, based on their value at the time of the loss.

The parties may agree that the indemnity be based on their replacement value. When a fire insurance contract includes compensation for loss of profits, the value thereof may not be agreed upon. When it has been agreed that the damaged property should be rebuilt or replaced, the insurer is entitled to demand that compensation be actually used for that purpose and request a guarantee. In these circumstances, a mortgagee or pledgee may not object to payment except in the case of arrears in payment of the debt by the debtor.

§ 1:14 Debt insurance

In general, in the insurance system, debts may be generically and globally insured through credit insurance (also known as "insolvency" insurance), whereby a creditor is covered regarding his insurable interest upon the insurer assuming the risk of default in all business credits granted. In specific terms, coverage takes the form of a bond insurance, whose purpose is to cover damages deriving from the simple failure to comply with an obligation undertaken by the debtor, under the insurance purchased.

Apart from the above-mentioned difference regarding the insured peril, these two types of insurance contracts differ as, under a credit insurance contract, the policyholder and the insured are the same person while, under a bond insurance contract, they are different persons, as the policyholder is the obligation's debtor. Another difference lies in the manner of contracting because, under credit insurance, the creditor seeks to cover all of its business volume while, under bond insurance,

certain transactions are insured, i.e., separate individual policies are purchased.

Credit insurance is customarily used to insure business and financial transactions. In the case of business transactions, the insurer agrees to indemnify the insured for a loss sustained upon default in the financing granted to purchasers of his manufactured or sold products. In the case of financial transactions, insurance is customarily used to insure loan agreements that are entered into between bank entities and their clients to assist such clients in the acquisition of goods.

Furthermore, bond insurance has been designed to guarantee that a creditor of a non-pecuniary liability will be indemnified for a damage arisen by default therein. Therefore, it is of the utmost importance to provide a detailed definition of default at the inception of the contract.

Argentine case law tends to make the insurer responsible for the consequences of a deficient definition of the assumed risk under a contract because it not only should have the required technical know-how but also it is the party who is usually in charge of drafting all contractual conditions. In this regard, it is understood that, under a bond insurance contract, loss arises simply upon the non-compliance with the contract by the debtor of the underlying obligation, regardless of the extent of such failure or the debtor's fault or innocence, except for the excluded perils.

§ 1:15 Liability of motor vehicles

Motor vehicle insurance is sold through combined coverage, which varies according to the case: public liability insurance to third parties (passengers and non-occupants of the vehicle), insurance against robbery (and theft) and insurance for damage to vehicle and fire.

Regarding coverage for material damage, the insurer should pay an indemnity when loss arises out of damage caused by other vehicles, third parties, animals, or any other external agent that is beyond the vehicle, either while it is moving, being towed away, or parked. Damage arising out of fire, lightning, explosion, overturning, tumbling, and sinking is also covered.

Typically, apart from willful misconduct and gross negligence, coverage specifically excludes acts of war, civil commotion, and elements such as tornadoes, meteorites, or hurricane (hail is usually insured), seizure by public authorities, terrorism, strikes, and speed tests. Another specific exclusion is failure to have a driving license.

Vehicle load is also important and it can become an exclusion factor if it has had an influence in the accident; for example, in the case of bad stowage, excessive, explosive or inflammable cargo. The insurer will neither pay indemnity if a vehicle is towing another away, unless otherwise provided for, or if the towing service is occasional or being provided out of an emergency.

Purchase of coverage for total loss or robbery is usual and, on some occasions, partial coverage is added. Total damage takes place when the repair cost is equal to or higher than 80 per cent of the value assigned to the vehicle under the insurance. The insured may opt to collect such percentage and retain the vehicle or collect 100 per cent and transfer title to the insured vehicle to the insurer. Purchase of public liability insurance for damage to third parties is compulsory (under section 68 of the Traffic and Road Safety Law Number 24,449).

§ 1:16 Private liability insurance

The Insurance Law provides for private liability insurance, whereby the insurer agrees to hold the insured harmless for a debt owed to a third party that arises from liability provided in the contract as a result of an event occurring within the agreed term.

The insurer's guarantee includes payment of expenses as well as court and out-of-court costs to answer a third-party's relief in a civil case and payment of the costs arising out of a defense in a criminal procedure when it accepts such defense. The insurer may deposit and pay for the insured amount and the expenses and costs that may have accrued up to that date and thus, the insured has exclusive management of the case; in such a case the insurer is no longer liable for any further subsequent expenses or costs that may accrue thereafter.

Any such expenses and costs are payable insofar as they were necessary and are payable even when the third party's relief has been denied. The Insurance Law establishes a proportional rule whereby, if the insured must bear part of the damages, the insurer must reimburse expenses and costs in the same proportion, unless such expenses have accrued out of an overtly unfair decision taken by the insurer who, in such case, must pay them in full. The insured is not entitled to indemnity if the event has arisen out of the insured's willful misconduct or gross negligence.

Furthermore, the insured is obliged to report the event giving rise to the insured's potential liability no later than three days after occurrence thereof, if the insured is aware or should have been aware of such event, or as from the date of the claim filed

by the third party if the insured was unaware thereof. Once judgment has been rendered, the insurer should comply with its obligation within the specified term therefor. The insured may not acknowledge its liability or enter into a transaction, unless it has been consented by the insurer. The Insurance Law establishes that the insurer may review the proceedings by examining the administrative or judicial files arising from or related to the investigation of the loss and by appearing as a civil party in a criminal proceeding.

Section 118 of the Insurance Law provides that the aggrieved party has a lien on the insured amount and its accessories, with a priority over the insured and any of its creditors, even in the case of bankruptcy or civil restructuring. The aggrieved party may summon the insurer as a guarantor until the case is set for discovery (in such an event, the complaint should be filed before the judge sitting in the place where the event occurred or at the insurer's domicile). The insured also may so summon the insurer within the same term and with the same effects. Finally, judgment rendered will become *res judicata* in respect of the insurer and will be enforceable against it to the extent of the insurance. In that proceeding or upon the enforcement of judgment, the insurer may not file a defense that has arisen after the loss.

§ 1:17 Professional liability insurance

In practice, professional liability insurance is similar to public liability insurance, but the former seeks to address a personal, material and consequential damage that professionals may involuntarily, out of their errors or omissions, have caused to their clients in the course of their practice as well as any damages that could derive therefrom.

The insurer assumes the economic consequences of the events that have occurred and are covered by the contract by curing the damage caused by the insured to a third party up to the limit provided in the insurance policy. This type of insurance is not only a guarantee and coverage for professionals but also for third parties who hire their services because, otherwise, their own assets could be taken to satisfy that liability only when final judgment for professional negligence has been rendered by a judge.

§ 1:18 Pollution liability insurance

Under section 22 of the General Environmental Law (Law Number 25,675), a person, whether natural or artificial, public or private, who carries out an activity that is hazardous to the environment, eco-systems and their constituent elements must

take sufficient insurance to ensure that remediation of a damage caused is properly covered.

The "environmentally hazardous activities" are listed in Resolution Number 177/2007 of the Secretariat of Environment and Sustainable Development. The list includes extraction of oil, gas, coal and minerals, exploitation of mines, food and beverage manufacturing, and manufacturing of chemical products and plastics.

The "Minimum Sufficient Insurable Amount" should be noted, as calculation thereof is used to determine whether the guarantee established under section 22 of Law Number 25,675 is sufficient to afford remediation of the environmental damage. The purpose of this rule is to quantify the costs of a potential restoration of environmental damage in case of occurrence of a loss. Calculation is made upon certain criteria, such as basic amount, vulnerability factors, factors arising from handling hazardous elements and elements subject to scheduled disposal, and probable impact on restorable resources, such as water, soil, subsoil and coastal areas.

The insured amount may not be lower than the Minimum Sufficient Insurable Amount. Hence, as it is a minimum amount, the owner of the activity may purchase a policy in excess of such coverage based on special characteristics inherent to the activity or for specific contractual reasons as agreed upon with the insurer; and it also may increase such coverage by purchasing insurance against third parties, property, labor, or special guarantees, provided that the required minimum is not affected.

§ 1:19 Life insurance

Life insurance is governed by the Insurance Law, sections 128-148, which provide that life insurance may be purchased to cover the life of the purchaser himself or herself or that of a third party. If it covers death, written consent of the third party (or his legal representative in case of an incapable person) is required. Life insurance may not be taken to cover the death of an incapacitated person or a minor less than 14 years old.

Regarding information to be submitted by the insured, after three years from the date of inception of the contract, the insurer may not rely on non-disclosure, unless it involves willful misconduct. Nevertheless, when age has been misstated, the insurer may terminate the contract when the true age is in excess of the limitations established in its commercial practice to assume the risk. If such limitation is not exceeded and the age is higher than the reported one, the insured capital will be reduced;

if it is lower, the insurer must return the surplus of the paid premium and readjust all subsequent premiums.

An increase in risk should be reported only if it arises out of reasons that are specifically provided in the contract. Changes in the insured's profession or activity give rise to termination if the risk is increased in such a way that, had it existed at the time of inception of the contract, the insurer would not have entered into it. The insured may repudiate the contract without any limitation once the first term of the insurance has ended.

Three years after the inception date of the contract and provided that he is not in arrears in the payment of premiums, he may at any time opt to convert the insurance into a paid-up one for a reduced amount or a shorter term, or surrender, i.e. terminate, it, and thus he becomes entitled to receive a share of the cash reserves accumulated by the insurer (guaranteed surrender value).

On the other hand, when the insurer is discharged for any cause after three years, it is no longer liable to the insured for any payment, except for the above mentioned guaranteed surrender value. The insurer may be discharged when the person whose life is insured commits suicide, unless the contract has been continuously effective for three years. It also is discharged if the person whose life is insured dies during a criminal activity.

In insurance to cover the life of a third party, the insurer is discharged if the death has been intentionally caused by an illegal action of the purchaser. Furthermore, a beneficiary who intentionally causes the death of the insured through an illegal action is deprived of any right.

Under a life insurance contract, it can be agreed that the capital or annuity payable in case of death be paid to a surviving third party who is determined or to be determined at the moment of the event. Appointment thereof should be made in writing, and the purchaser can freely revoke the appointment, unless it is made for consideration. The appointed third party acquires a right of his own at the time of occurrence of the event and, when his appointment is made for consideration, it can be earlier fixed.

If the purchaser does not appoint a beneficiary or, for any reason, such appointment is ineffective or nugatory, it is understood that his heirs have been appointed. Under Executive Order Number 1567/74, whereby a compulsory collective life insurance was established to cover the death of employees on the payroll, the cost of such insurance is borne by the employer, who will be directly liable to pay for the above mentioned benefit in case it failed to take the pertaining insurance.

§ 1:20 Social insurance

Social insurance is not customary in Argentina because the so-called unemployment insurance or retirement and surviving spouse benefits, as well as health insurance are, as noted below, payments granted under the welfare programs established by the Government.

Until 2008, the Managing Companies of Pension and Surviving Spouse Benefits Funds (AFJP, by its Spanish acronym) had been in existence. They were private for-profit companies engaged in the management of funds deriving from the pension contributions paid by workers who opted to be included in such regime. They did not operate as insurance carriers (although some AFJPs were owned by insurance carriers) and, in 2008, the system was repealed upon the enactment of a law and a fully state-run regime was established.

§ 1:21 Medical insurance

Medical coverage in Argentina is provided by health insurance companies and prepaid health care companies, and it is governed by Law Number 23,661 (National System of Health Insurance) and Law Number 23,660 (Health Care Companies). Therefore, it is not customary to take medical insurance except in the case of a trip, as noted below.

§ 1:22 Travelers' insurance

In Argentina, there is not a specific rule for travelers' insurance and no specific insurance contract exists; however, there is a set of combined insurance contracts. Traveler's insurance may consist of only a casualty insurance contract or it may include a variety of options, such as public liability, life or health, and even loss of baggage, all of them purchased out of a range of coverage.

§ 1:23 Marine insurance

Marine insurance contracts are governed by the Maritime Law (Law Number 20,094), sections 408-467, and, in case of silence, by the Insurance Law. The Maritime Law establishes that the general provisions are applicable to all regulated marine insurance contracts, including the provision that, if a trip involves combined routes by sea and land or air and it is not otherwise agreed upon, the rules governing marine insurance are applicable.

It contains a list of insurable interests (which extend to "vessels under construction") against perils of navigation; it excludes risks arising from an intentional act of the owner or holder of the

insured interest; it establishes that the contract is void when the insured had prior awareness of the occurrence or inexistence of the risk; it provides comparative negligence, with a fair liability apportionment system, when there is more than one insurer for the same interest or risk and annulment of the insurance for voluntary changes in the course of the voyage.

After these broad provisions, the Law regulates the insurance of interests especially related to the vessel itself and the insurance of interests related to the carried goods. It contains regulations for "other insurances", such as insurance for the earning of freight, gross and net freight, ticket pricing and loss of profits, and public liability for damage to third parties. Sections 583 and 584 of the Law regulate the action for provisional and prompt payment of the indemnity arising from an insurance contract. When an insured exercises an action for general average or of abandonment, the insurer may contest the right of the insured. However, the insured is entitled to demand prompt provisional payment of indemnity by means of ancillary proceedings within the same lawsuit by submitting evidence of his right and offering a satisfactory guarantee.

§ 1:24 Aviation insurance

Aviation insurance is regulated by the Aviation Code, sections 191-196. Airspace operators are under a duty to insure their permanent and temporary personnel that perform tasks on board against any accident that may occur in the course of their service in accordance with all labor rules applicable to the business.

Furthermore, they are under a duty to take insurance for eventual damage to passengers, baggage or goods, against third parties on the grounds and for out-of-charge carriage. It may be replaced by a cash deposit or a bank guarantee. A foreign aircraft that does not provide evidence of coverage against possible damage to carried persons or goods or to third parties on the ground is banned from Argentine airspace.

IV. INSURANCE MARKET

§ 1:25 Establishment of insurance company, branch, or subsidiary

Licenses to carry out insurance activities are granted to stock companies, cooperatives and mutual insurance carriers, branches

or representatives of foreign companies, and official or semi-public agencies and bodies, federal, provincial or municipal[1].

In all cases, such entities must be exclusively engaged in insurance activities. To operate as an insurance carrier, authorization is required from the Insurance Department.[2]

Additional requirements exist for various types of insurance, such as retirement insurance[3] and reinsurance.[4] A foreign insurance carrier may seek establishment in Argentina and carry out insurance activities on condition that it complies with the requirements mentioned below and secures authorization from the Insurance Department, provided that evidence of reciprocal treatment in the country of origin is submitted.[5] A foreign company may set up a subsidiary in which it will own a majority interest[6] and, in such a case, it will be granted the status of a domestic company. Alternatively, a foreign company may set up a branch. In both cases, the entity must be registered with the Inspection Board of Legal Entities and be granted a specific license by the Insurance Department.

§ 1:26 Foreign insurance carrier establishing a head office

Requirements

A foreign company may set up a subsidiary, i.e., a local company where it is the majority shareholder. The foreign company must have been registered with the Public Registry of Commerce to secure its capacity to participate as a shareholder in the domestic company.[1] Once it has been given the status of a domestic company, the same requirements that are applicable to a domestic company composed of domestic shareholders are applied.[2] The main requirements include:

[Section 1:25]

[1]Law Number 20,091, section 2.

[2]Law Number 20,091, section 2.

[3]Resolution Number 19106.

[4]Resolution Number 24805.

[5]Law Number 20,091, section 5.

[6]Law Number 19550 governs corporations, and there must be at least two shareholders.

[Section 1:26]

[1]Law Number 19950, section 123.

[2]Resolution Number 21523, section 2.3.1.

1. Filing of corporate articles or by-laws with the Inspection Board of Legal Entities for registration;
2. Having fully paid-up minimum capital stock;[3]
3. Having the necessary term of existence, according to the nature of the type or types of insurance to be engaged in; and
4. Providing and receiving approval of insurance plans by the Insurance Department.

An insurance plan includes a statement of the scale of premiums to be applied and the technical grounds therefor, according to the type or types of insurance in which the company intends to be engaged, the text of the policies to be issued, the text of the list of questions and the insurance proposal, and the calculation bases for technical reserves when no applicable general rules are in force.

The entity must be appropriate for the insurance market ("market convenience"). The convenience decision lies exclusively with the Insurance Department. Resolution Number 21,523/92, which regulates Law Number 20091, and provides other requirements that should be observed, such as those relating to the qualification of directors and management.

Procedure

The procedure requires involvement of both the Inspection Board of Legal Entities and the Insurance Department. The Inspection Board of Legal Entities has original jurisdiction for registration of a foreign company that is exclusively seeking to participate as a shareholder of the subsidiary that will be engaged in the insurance business. Once the parent company has been set up, the subsidiary may be created upon the drafting of the by-laws and an application to the Inspection Board of Legal Entities for registration.

The Inspection Board of Legal Entities will, based on the regulations in the insurance industry and the exclusive jurisdiction of control vested in the Insurance Department, refer the records to the Insurance Department so that it may issue its opinion on the requirements inherent in the establishment and the license for the entity.

§ 1:27 Foreign insurance carrier seeking to directly establish a branch

Requirements

Agencies and branches of foreign-based insurance entities,

[3]Law Number 20,091, section 7C.

regardless of the type of company or the original incorporation nature, are subject to the following specific requirements:

1. Comply with the conditions as provided for corporations incorporated within Argentina;[1]
2. Come from a country that offers reciprocity for insurance bodies incorporated within Argentina;[2]
3. Have representation in Argentina, with sufficient powers to carry out a and all juridical acts inherent to the purpose of the entity before controlling authorities and third parties and appear before a court of law;[3] and
4. Have fully paid-up minimum capital stock.[4]

To set up an agency or branch, a foreign-based body should submit the balance sheets of its parent company for the last five fiscal years.[5] The indirect consequence of this requirement is to ensure that the entity has been in the insurance industry for not less than five years. According to the type or types of insurance to be engaged in, the minimum term of existence is variable. Insurance plans must be approved by the Insurance Department.[6]

The insurance plan must include a statement of the scale of premiums to be applied and the technical grounds therefor, according to the type or types of insurance that the company intends to be engaged in, the text of the policies to be issued, the text of the list of questions and the insurance proposal, and the calculation bases for technical reserves when no applicable general rules are in force. The entity must be appropriate for the insurance market. Notice of the following events must be given to the Insurance Department, no later than 30 consecutive days after occurrence thereof:

1. A change of the appointed agent or an amendment to the power of attorney;
2. A change the entity may sustain regarding the background information attached to the registration file;
3. As of the date of approval, an amendment to the corporate bylaws, together with a true notarized copy of the documents giving evidence of such amendment; and

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[Section 1:27]

[1]Law Number 20,091, section 5.

[2]Law Number 20,091, section 5.

[3]Law Number 20,091, section 5.

[4]Law Number 20,091, section 7C.

[5]Law Number 20,091, section 7D.

[6]Law Number 20,091, section 24.

4. As of the date of application, a penalty that may have been imposed in the country of origin by the competent authority.

Resolution Number 21,523/92, which regulates Law Number 20091, provides other requirements that should be observed by branches.

Procedure

All the explanations noted above regarding the incorporation of a subsidiary company apply to the establishment of a branch. The difference lies in the fact that, in this case, the company that will apply for registration with the Inspection Board of Legal Entities will be the parent company whose branch is seeking to fully operate in Argentina.[7]

Supervision of actions that may occur overseas, which must be evidenced by means of true and original documents authenticated by the Hague Apostille, if applicable, will be more materially important. In the case of a person subject to anti-money-laundering and counter-terrorist financing prevention and supervision measures in its country of origin, a certification issued by the pertaining authority stating that such entity has not been imposed a penalty regarding non-compliance with anti-laundering and anti-terrorism principles, standards, and rules as disseminated by the Financial Action Task Force (FATF) should be submitted.

§ 1:28 Crossborder market

Foreign Insurance Carriers Supplying Crossborder Services

Crossborder insurance is not possible in Argentina because, as noted above, as per Law Number 20,091, section 2b), only branches or agencies of foreign companies may carry out insurance activities, i.e., a foreign insurance carrier that does not have a local branch or agency cannot operate in Argentina.

Under section 6 of the Law, insurance carriers approved by the Insurance Department may set up or close branches in Argentina as well as branches or agencies overseas; however, they may not carry out their business or own a branch if they are not incorporated in the country. Furthermore, crossborder activity is not possible because the Law requires that branches or agencies of foreign companies hold and manage funds in Argentina, and such funds should be equal to the minimum capital requirements as demanded from insurance carriers incorporated in Argentina.

Domestic Insurance Carriers Supplying Services Abroad

The possibility of domestic insurance carriers rendering ser-

[7]Law Number 19550, section 118.

vices overseas will depend on the domestic rules of the foreign country, except for the provisions in section 2 of Law Number 12,988 whereby insurance carriers are forbidden from insuring an overseas person, property or any other interest that is not within the national jurisdiction.

V. COMPETITION LAW

§ 1:29 Concerted practices among insurance, co-insurance, or reinsurance, vertical and horizontal structures

Regulation

As noted above, the insurance business is subject to specific supervision by the Argentine Insurance Department.[1] Intense supervisory activities are in place to avoid abusive practices caused by agreements among insurance carriers, reinsurance companies, or brokers in the course of their marketing activities.

This control by the Insurance Department complements the generic control that seeks to preserve the normal competition in the market, as regulated by Law Number 25156 (the "Defense of Competition Law"). Under the Defense of Competition Law, sanctions are imposed on any action or practice that seeks to limit, curtail, deceive, or distort competition or access to markets or that purports to be an abuse of a dominant market position and that may be detrimental for the general economic interest. This rule provides a description of punishable practices as well as practices and agreements that, due to economic size or market importance, require prior approval. Jurisdiction for the application of the rule lies with the National Bureau of Competition, which reports to the Ministry of Economy.

Cooperation Agreements, Operation of Insurance Pools

Cooperation among insurance carriers takes place when it is mutually agreed to distribute the same risk among them because, based on its importance, it becomes convenient to distribute such risk. Generally, insurance is taken on a unit basis, i.e., one contract for each risk. Nevertheless, due to several reasons, it is likely that the insured will seek to insure the same risk with several companies or that this situation arises because the contracts taken are not properly reviewed. Furthermore, it is likely that different stages of the risk or loss are successively insured or that it is sought to insure the insolvency of the original insurer.

[Section 1:29]

[1]Law Number 20,091.

Co-insurance refers to the anticipated orderly coverage of the same interest and the same risk with different insurers, whereby each of them assumes a portion of the total risk. It is usual that one of the different insurers (in general, the one bearing the highest risk) is in charge of collecting the aggregate premium and, if applicable, settling the loss. In the Argentine market, this insurer is called a "pilot"; however, they are not joint and severally liable unless it is specifically provided for.

With regard to the policyholder and the pilot company, only one policy is issued as insurance taken in the form of co-insurance. It provides the portion of liability to be assumed by each of the participating insurers regarding the pertaining possible loss. A copy of this contract is signed by each and every participating insurer. It is likely that, for the sake of order, each insurer may issue a policy reflecting only its portion in the contract. It may not be disclosed but it may be kept internally on file as mere evidence for its accounting system.

Any communication, notice, or demand that the insured or policyholder should serve on the insurers will be effectively served on the pilot insurer; the policy should provide that representation for these purposes lies on the pilot insurer. Regarding marine insurance, section 413 of the Navigation Law establishes the provisions for legal and judicial, representation. Law Number 17,418 does not include a provision for co-insurance. Another format of insurance pool that is aimed at the assumption of risks is reinsurance.

Claims Covered by Several Insurance Contracts

One of the formats of plural insurance arises spontaneously because the insured has not reviewed the contracts he takes. In such a case, the same interest and the same risk are insured with different insurers. This situation may not necessarily lead to the event of "double insurance", where the aggregate insured sum exceeds the insurable value because the aggregate amount of the different insurance contracts taken may be lower than the insurable interest.

In the event of plurality of insurance (which has not been taken as co-insurance), upon learning about the situation, the insured should give notice to the insurers so as to put the situation in order under penalty of forfeiture of his rights. The notice to each insurer should mention the other insurance contracts taken, the names of the insurers and the insured amount. In case of loss, each insurer will contribute *pro rata* the amount of its contract to comply with the payable indemnity.

If an insurer pays an amount higher than that for which it is

liable, it can bring an action against the insured and all the other insurers. Plurality of insurance generally arises over time. If the repeated insurance contracts properly cover the insured's interest, he will seek to recover the surplus of the paid premium because, in case of loss, he will never collect more than one indemnity. In such an event, he is entitled to ask for a reduction of the most recent insurance contract or a reduction of the insured amount to the amount that is not covered by the first insurance, together with a proportional reduction of the premium, under section 69 of the Insurance Law.

Under the Insurance Law, double insurance is void when the aggregate insured amounts in the cumulative plural insurance is higher than the insurable value and such insurance was taken with an aim at unfair enrichment. In such cases, the Insurance Law provides that all insurance contracts taken for that purpose are void, without prejudice to the insurers' right to collect the accrued premium for the period during with they were unaware of such intention, if they had not learnt about it at the inception of the contract.

§ 1:30 Insurance mergers

The Company Law (Law Number 19550), sections 82-87, provides the procedure to be followed by a corporate subject to effect a merger. The procedure requires several prior commitments between the parties, publication of notices, and participation of third-party creditors to challenge the agreement. The Defense of Competition Law provides that prior approval is required according to guidelines regarding the economic importance of the transaction.

Under section 46)1 of the Insurance Law, specific approval by the Insurance Department is required, after an analysis of the economic consequences of the transfer of contractual rights and obligations arising from the merger. Obviously, the merger should give rise to an entity qualifying as an approved insurance carrier. Notice of the procedure must be published so that creditors or the insured may issue a statement in that regard. Argentine legislation also allows for partial or total assignment of an insurance portfolio. A portfolio assignment requires the creation or maintenance of legal reserves by the purchaser.

§ 1:31 Consumer protection

An insurance contract may be regarded as a consumer relationship whereby the insurer agrees, upon the payment of a premium or consideration, to provide a service consisting of the assump-

tion of risks by means of insurance coverage. Furthermore, it can be stated that the protection and defense of insurance consumers is provided in the Consumer Protection Law Number and such rule applies to both the policyholder and the insured and is extended to the beneficiary third-party and the aggrieved party.

In the Argentine insurance regime, an insured is regarded as a consumer, i.e., fully protected by the Consumer Protection Law. Hence, the insured is entitled to several rights, such as the right to choose the insurance carrier and broker, to be aware of the regulations and contractual documents, to have the possibility to secure more beneficial clauses, to be aware of the broad conditions of public order, and to have a transparent proceeding and a clear procedure for collection. Consumers can rely on the protection of the public offices created to that effect as well as the protection of the administrative controlling authority, the Insurance Department, which offers guidance to users and covers all the issues that an insurance consumer should know.

Consumer protection has constitutional rank. The set of rules protecting users and consumers is not just a group of rules applicable to certain special situations but a comprehensive system that effectuates the Protecting Principle contained in article 42 of the Constitution, which states:

> Consumers and users of goods and services have the right, regarding consumption, to protection of their health, safety and economic interests, to suitable and true information, to freedom of choice, and to conditions of equitable and dignified treatment. The authorities shall provide protection of those rights, for education about consumption, for the defense of competition against all forms of distortion of the markets, for the control of natural and statutory monopolies, for the quality and efficiency of utilities, and for the formation of consumer and user associations. Such set of rules shall provide efficient procedures for conflict prevention and solving and the regulatory framework for domestic-based utilities by providing for the necessary participation of consumer and users' associations and the interested provinces in the controlling bodies.

VI. CONCLUSION

§ 1:32 Factors affecting insurance business

In Argentina, the insurance business is regulated by and subject to direct control of a federal body, the Insurance Department. The risk that may be expressed in Argentina can only be covered by an approved insurance carrier through approved policies.

The insurance business is governed by Law Number 20091, Law Number 17418, and Law Number 22400. These rules are

further regulated by resolutions issued by the Insurance Department, which maintains an active controlling position. The insurance market is solvent and it is not usual that insurance carriers apply for winding-up. Control and supervision of financial conditions leads to prevention of financial difficulties that might have serious outcomes.

Horizontal cooperation among insurance carriers takes place through co-insurance, whereby insurance carriers agree to distribute the risk arising from a policy; reinsurance treaties also are allowed and of customary usage. Provided that it has not been previously agreed and it does not imply unfair enrichment, plural insurance is possible.

As well as the inherent specific control exercised by the Insurance Department, there are other protected interests in the insurance business, such as the Consumer Protection Law and the Defense of Competition Law. Foreign companies, in the form of branches or through the establishment of subsidiaries, may, upon prior registration with the Inspection Board of Legal Entities and approval granted by the Insurance Department, operate in Argentina as insurance or reinsurance carriers and brokers. To that effect, they should conform to some specifically regulated requirements.

Under Resolution Number 21,523/92, which regulates Law Number 20,091, there is a range of assets in which insurance carriers should invest capital stock allocated to insurance. The rules seek that such investments be made in assets relating to national production and that foreign currency holdings of the Central Bank of Argentina may not run low.