

# International **Comparative** Legal Guides



## Insurance & Reinsurance **2021**

A practical cross-border insight into insurance and reinsurance law

**10<sup>th</sup> Edition**

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# Peru



Francisco Arca Patiño



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## 1 Regulatory

### 1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

The *Superintendencia de Banca, Seguros y AFP* – SBS – regulates insurance and reinsurance companies in Peru.

### 1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

The requirements to set up a new insurance or reinsurance company are as follows:

1. To incorporate an SAA (*Sociedad Anónima Abierta* – a publicly held corporation), whose main object is to perform (re)insurance business.
2. To obtain a licence from SBS.

### 1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Foreign insurers are only able to write business directly in certain cases not forbidden by law (see question 1.6). Further, they cannot act through a broker. Otherwise, they have to write reinsurance of a domestic insurance.

### 1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

There are no implied extraneous terms for contracts of insurance except for the general rules contained in Law No. 29946 – the Law of Insurance.

### 1.5 Are companies permitted to indemnify directors and officers under local company law?

Yes, companies are permitted to indemnify directors and officers, but this must be in accordance with the Law of Insurance.

### 1.6 Are there any forms of compulsory insurance?

Yes, there are three forms of compulsory insurance, which can only be offered and written by Peruvian insurance companies.

These forms are: the SOAT covering third-party liabilities regarding road vehicles; Payroll Life Insurance; and the SCTR for risk-involved activities.

## 2 (Re)insurance Claims

### 2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

The law in Peru is balanced in terms of insurers and insureds.

### 2.2 Can a third party bring a direct action against an insurer?

No, they cannot. Exception is made on matters related to pollution of the seas.

### 2.3 Can an insured bring a direct action against a reinsurer?

Yes. The most recent modification to the law states that direct action may be brought when there is a 100% cession of the risk and it is agreed that the reinsurer will pay the indemnity directly to the insured (in force from August 2018).

### 2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

According to insurance law, if there is misrepresentation and/or non-disclosure, the contract is null and void if it involves wilful misconduct or gross negligence by the insured. If there are none, the insurance contract may remain in force, provided the insured notifies the insurer and offers an adjustment of the premium. The insurer can reject such offer and terminate the contract.

### 2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

Yes, assureds have a duty to disclose all matters material to a risk.

**2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?**

The right of subrogation is automatic according to the law. Should the parties wish to incorporate such right, they can do so.

### 3 Litigation – Overview

**3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?**

Commercial courts hear commercial insurance disputes. A jury system does not exist in Peru.

**3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?**

Court fees depend on the quantum of the claim and the annual chart published every year. For 2020, the minimum fee was USD 14.00 and the maximum USD 171.00 for claims over USD 333,000.00.

**3.3 How long does a commercial case commonly take to bring to court once it has been initiated?**

Commercial cases usually take between three to nine months to reach the court.

**3.4 Have courts been able to operate remotely, where necessary, given COVID-19, and have there been any delays or other significant effects upon litigation as a result of COVID-19?**

Court activities were suspended from March 16<sup>th</sup> to July 17<sup>th</sup>; hence, time bars were suspended for four months. Since the suspension was lifted, courts have been operating remotely. Delays are expected as their workload has increased.

### 4 Litigation – Procedure

**4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?**

All evidence has to be offered and submitted together with the lawsuit. Courts have the power to order the disclosure/discovery and inspection of any evidence requested by any party.

Further and exceptionally, the courts may order additional probatory means for them to be satisfied, provided that the source of evidence has always been quoted by some of the parties, taking care not to replace the parties' probatory obligation.

**4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?**

- (a) Yes.
- (b) Yes.

- (c) Yes, provided it is marked as on a "without prejudice" basis.

**4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?**

No, they do not.

**4.4 Is evidence from witnesses allowed even if they are not present?**

Yes, evidence from witnesses may be given if they are not present.

**4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?**

There is no restriction on calling expert witnesses. It is uncommon for the court to nominate an expert in the described circumstances.

**4.6 What sort of interim remedies are available from the courts?**

Available interim remedies in Peru include embargo (arrest) of goods or obtaining a bank guarantee.

**4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?**

Yes, appeals may be made based on points of claims or defence, or in case of non-correct application of the law. There is only one stage of appeal available in Peru.

**4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?**

Yes; the rate is 0.83% *per annum*.

**4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?**

The losing party pays the costs of the trial and any monetary awards granted to the winning party (including attorney fees) at the discretion of the court.

No, since interests and costs applicable to a case are immaterial.

**4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?**

There is a compulsory conciliation hearing before any court action. Without it, parties cannot bring action to the Courts of Justice of Peru.

4.11 If a party refuses to a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

See the answer to question 4.10 above.

## 5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

The law is clear as to arbitral jurisdiction autonomy. Courts will intervene in arbitration only to analyse the fulfilment of the arbitration tribunal or sole arbitrator of the compulsory grounds set out by law.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

No. General wording evidencing the intention to arbitrate suffices. Nonetheless, as per the situation generated in question 2.3 above, it would be advisable to have a form of evidence by which the insured accepts arbitration in writing in respect of the reinsurance contract.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

No, there is no such possibility.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

The courts may grant an embargo on goods or a bank guarantee as forms of interim relief.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

Yes, the arbitral tribunal or single arbitrator must give reasons for its award.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

Please refer to question 4.7 above.



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